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Commentary

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Examinations under oath (EUOs) are a common condition to coverage in insurance policies that can make or break an insurance claim. In theory, EUOs are straightforward: they are an investigative tool for insurers to gather information about a claim. In practice, though, insurers may use EUOs to poke holes in the policyholder's story, identify grounds to challenge coverage, and even set up fraud claims or defenses.

This article addresses EUOs and some of the common issues that arise when an insurer requests that

a policyholder (or other witness) sit for an EUO. After describing EUOs, the article addresses how EUO testimony intersects with deposition testimony and what, precisely, the insurer may demand of the policyholder. Because EUOs are creatures of contract, policy language will control. And, as with all insurance matters, law of the relevant jurisdiction will govern the contours of the parties' obligations. Policyholders asked to sit for EUOs should consult with coverage counsel, as testimony given at an EUO will strongly impact the claim.

(1) What is an EUO?

An examination under oath is what it sounds like: an examination, meaning a deposition-style question and answer, of the insured (more below on who "insured" may include in this context). The insurer's right to examine the insured under oath is a function of duties written into the policy. Nearly every insurance policy requires the policyholder to "cooperate" with the insurer's investigation. This duty to cooperate, usually contained in a "cooperation clause," is often very broad. For example, some policy language requires the insured to cooperate "with the [insurer] in all matters pertaining to the investigation, settlement or handling of any claim." The cooperation clause may list specific kinds of expected cooperation, such as allowing the insurer to examine books and records and sitting for EUOs.

Testimony at the EUO is under oath—made on penalty of perjury—and typically recorded by a court reporter. It may be taken by the insurer's claims adjuster

or an attorney. The policyholder may bring counsel, although insurers typically take the position that counsel has no right to ask questions or object. In some states, policyholders may have additional rights, such as the right to videotape the insurer's representatives. After the EUO, the insurer should provide the policyholder with a copy of the transcript to review, sign, and return.

EUOs should usually take place before the insurer has issued a coverage position. Insurers argue that EUOs are needed to ferret out information necessary to adjust the claim but difficult to uncover, such as financial information or whereabouts during a fire that destroyed a building.

In this era of digital surveillance and recordkeeping, though, it's hard to argue that the insurer could not obtain the information it seeks in an EUO through other means. In fact, insurers often require policyholders produce documents providing the same information sought at the EUO.

Indeed, it may seem that the purpose of an EUO is to trip the policyholder up. EUOs are commonly requested if the insurer suspects a fraudulent claim, such as a fire loss caused by arson. For that reason, insurers may ask for information that goes far beyond the circumstances or scope of the claim, probing into the insured's unrelated financial circumstances and seeking examinations of spouses or other family members. As addressed below, whether the insurer is successful in doing so depends on the policy language and relevant caselaw.

Failing to sit for an EUO may have serious consequences for the policyholder. Courts often construe the requirement to sit for an EUO as a condition precedent to coverage, meaning that if the policyholder breaches it, the insurer can deny coverage on that ground alone. Other courts may require the insurer to show its investigation of the claim was prejudiced (or hindered) by the policyholder's failure to sit for an EUO (for example, because relevant information is no longer available).

Insurers may also waive their right to conduct an EUO. By denying a claim, an insurer typically forfeits the opportunity to examine the policyholder. The insurer may also waive this right by behaving un-

reasonably in scheduling or administering the EUO. Again, this is highly jurisdiction-specific.

(2) Are statements made at EUOs binding? How do EUOs intersect with deposition and trial testimony?

What happens when the policyholder's deposition or trial testimony does not match up with what the policyholder said at the EUO? If the insurer refuses to pay the claim, the policyholder may sue and, as part of the lawsuit, be required to undergo examination in a deposition or at trial.

Whether statements made in the course of investigating a claim should be treated similarly as those made in litigation is a thorny question. On one hand, EUOs, like depositions and trial testimony, are under oath: meaning that the examined party must make statements under penalty of perjury. Additionally, caselaw typically holds that testimony made in the course of litigation by a party representative—such as a policyholder—is binding, meaning that the party cannot later dispute its accuracy.

On the other hand, EUOs and litigation testimony serve different purposes and give rise to different incentives:

- EUOs are part of the insurer's **duty to cooperate** rather than legal process. In theory, EUOs are **voluntary**: the insured cannot be compelled by the law to attend an EUO. EUOs are also **not adversarial**: they are supposed to help both sides work together to resolve a claim. For that reason, policyholders are supposed to be as forthcoming and accurate as possible, even if the testimony may hurt the claim.
- As another consequence of EUOs being outside the litigation or judicial process, policyholders have fewer opportunities to ensure that EUOs are conducted fairly. EUOs are not subject to rules of civil procedure, and while policyholders may bring counsel, insurers often claim counsel has no right to ask questions or object. And there is no court or judge to adjudicate any disputes about the reasonableness or scope of an EUO.
- Litigation testimony is **adversarial** and **compelled by legal process**. By definition, litiga-

tion testimony takes place during litigation, where the policyholder and insurer are on opposite sides of the “v.” Litigation testimony is taken at a time in the claim when the parties have different incentives: to be conservative and sparing (the witness), to be exacting and meticulous (the examining party), and to provide or elicit testimony supportive of their position (both). It protects the legal rights of the examining party, who is entitled to confront the witnesses against it, and thus the policyholder may be compelled by the court to testify. By the same token, though, the adversarial process protects the policyholder, with tools such as rules of civil procedure, privilege, and counsel’s ability to object and ask questions to clarify the policyholder’s responses. Depositions are also typically limited to a single deposition per witness and seven hours of testimony.

Given these different purposes and incentives, it may be no surprise that testimony at an EUO can differ from testimony at a deposition or at trial. Some courts have taken this further by finding that testimony at an EUO and subsequent deposition are not interchangeable (though caselaw is not uniform). Thus, a policyholder who refused to sit for an EUO in breach of policy conditions could not cure the breach by sitting for a deposition. These decisions further support that testimony at EUOs and depositions should be treated differently.

Nevertheless, an insurer may seize on any discrepancies in EUO and litigation testimony to claim that the policyholder is lying and thus coverage is void. Whether the insurer is successful in doing so will depend on the circumstances and jurisdiction’s caselaw, as well as the ability of the policyholder’s lawyer to educate the court on these different purposes and incentives.

(3) What can the insurer require the policyholder to do at an EUO?

Because the requirement to sit for an EUO is contractual, the relevant policy language will define what the insurer can require of the policyholder. If an insurer requests an EUO, the first thing to do is check the policy. There may or not be an express provision addressing EUOs. If not, the policyholder has a much better chance of avoiding sitting for one or pushing back against insurer requests.

If the policy contains an EUO provision, the next question is what the provision authorizes the insurer to do. The touchstone is reasonableness. Courts often give insurers wide latitude to impose fairly demanding EUO requirements in terms of time, number, and subjects covered. Whether a request for an individual to sit for an EUO and the details of that request are “reasonable” will depend on the circumstances and may be subject to considerable dispute.

That does not mean that the insured is defenseless, though. It may be unreasonable, for example, to insist that the policyholder endure serial EUOs. Similarly, insurers are expected to act reasonably in scheduling and administering the EUO, including when (a reasonable time and date in light of policyholder availability) and where (location of policyholder or loss) the EUO is to take place. Insurers also must provide notice of the EUO not just to the witness’s counsel, but to the witness itself, or the notice may be deemed void. Nor can the insurer require the witness to execute documents not required by the policy, such as nonwaiver agreements, as a condition for taking the EUO. Policyholders should carefully examine the EUO provision in light of the relevant claim to determine the scope of their obligations.

EUO clauses often address three key subjects: (a) who may be examined, (b) how many times, and (c) on what subjects. For example, a typical EUO provision may read, “At the Company’s request, the Named Insured shall: [] permit the Company to examine any insured under oath, outside the presence of any other insured, as often as the Company reasonably requires[.]”

(a) Who may be examined: EUO provisions often specify that the insured(s), named insured(s), or some other group of persons connected with the policy may be examined. The individual to be examined usually cannot name a different representative to attend in their stead. It is important to parse the precise policy language here, because there is a material difference between, for example, “an insured” and “any insured.”

Even if not listed, the insurer may argue that additional persons may be required to sit for an EUO. It is common to demand that the policyholder’s spouse and live-in family members undergo an EUO, particularly for dwelling- and theft-related claims. In

the corporate context, current officers, directors, and employees may be required to sit.

But there are limits. Courts have pushed back against insurer requests to examine former corporate representatives, mortgagees and loss payees, and contractors hired to perform work related to a claim. Caselaw is less clear about whether adjusters and other professionals hired to help present a claim may be examined. In any case, whether an insurer's request to examine additional witnesses is reasonable will depend on the circumstances.

(b) How many times: Similarly, EUO provisions usually state that the relevant individuals may be examined "as often as the [insurer] reasonably requires." Unlike depositions, which are typically limited to one per individual for a maximum of seven hours under court rules, EUOs are not so limited. EUO provisions like these open the door for the insurer to insist on multiple EUOs if it doesn't get the answers it wants the first time. At the end of an EUO, the insurer will often reserve the right to reconvene or reopen the EUO for any reason.

But again, the insured's obligations are limited by reasonableness. Courts have admonished insurers for badgering the witness or trying to trip the witness up by requiring them to repeatedly answer the same questions. Similarly, it will be more reasonable to demand multiple EUOs for some claims (contentious, perhaps when fraud is suspected) as opposed to others (no-fault claims, for example, where courts commonly require insurers to justify requests for EUOs).

(c) On what subjects: While insurers are often given wide latitude to inquire into subjects "germane" to the claim—including circumstances that may affect coverage defenses and create potential motives for fraud—the insurer cannot undertake a fishing expe-

dition. Generally on the table are loss history, the insured's financial condition, and information about the circumstances of the claim: for example, if there was a fire, where the witness was at the time of the fire. Off the table should be information about losses that are not being claimed under the policy, settlement amounts with other insurers, and personal information beyond what is reasonably necessary to adjust the claim (police record, whereabouts of unrelated personal papers).

Whether the witness sufficiently cooperates even if they do not answer a question depends on the circumstances. The witness cannot be reasonably expected to know every answer to every question the insurer asks. Courts typically hold that witnesses acting in good faith—by providing the answers they know, suggesting who may know the answers they do not have, and offering access to documents that may have the answers—comply with EUO requirements. Conversely, and somewhat incredibly, though, insurers can often demand that witnesses testify about subjects implicating Fifth Amendment privilege and deny coverage if they refuse. For this reason, counsel should advise witnesses about the likely tradeoffs of testifying at an EUO, including refusing to answer questions the insured thinks are unreasonable or may give rise to criminal charges.

* * *

EUO-related issues will continue to arise as long as they are policy conditions. While insurers often have wide latitude to insist that policyholders undergo EUOs are part of the claims process, policyholders should carefully examine their policy language to determine what they must and must not do in connection with EUOs. As always, the insurer must act reasonably in demanding and conducting EUOs, and policyholders can and should push back against unreasonable conduct. ■

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