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Five Important Considerations for Maximizing the Examination Under Oath

When an insurance claim is made, the insurer gathers information from a variety of sources to determine the insurer's rights and obligations under the policy. The insurer may obtain information from the insured through informal conversations, recorded statements, document requests and examinations under oath. An examination under oath ("EUO") is a formal proceeding during which an insured, under oath, is questioned by an insurance company representative. This article will address five important considerations that go into taking an effective EUO.

1. Know Your Policy

Virtually all insurance policies provide an insurance company with the authority to investigate an insured's claim by means of an EUO and require that the insured submit themselves for an EUO. If the insured fails to comply with an insurer's demand for an EUO, this is generally considered a material breach

of the insurance policy which may alleviate the requirement that the insurer pay for the claim.

It is important for an insurer who intends to conduct an EUO to understand the distinction between a recorded statement and an EUO. Recorded statements are typically a recorded oral statement given by an insured to the insurer's representative. Recorded statements may be used to gather information by insurance companies at the outset of a claim. Most are taken informally, over the telephone. An EUO is a more thorough examination by a lawyer for the insurance company which is conducted under oath and is transcribed by a court reporter.

Many policies do not require an insured to submit for a recorded statement. As such, unless the policy requires both a recorded statement and an EUO, it is important to not advise insureds that they have failed in their duty to cooperate if they refuse to give a recorded statement. If the insured

gives a recorded statement, the insurer's representative should advise the insured that the insurer is not waiving its rights to require EUO testimony at a later date. It is not uncommon for the insured's attorneys to claim that if a recorded statement is taken that is not specifically mandated by the policy, the insurer has elected to proceed with that route, thereby waiving its right to an EUO. Placing a statement on the record at the outset of the EUO, like the one noted above, will aid in opposing any such argument.

2. Choose the Right Counsel

Insurers should have specific counsel identified for taking EUO testimony. Simply because an insurer has panel counsel identified to handle its litigation, does not mean that that attorney will be competent in handling an EUO. The attorney taking the EUO must have an understanding of the differences between an EUO and the general



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investigation that accompanies litigation. For example, although the witness may have an attorney present during the EUO, he or she cannot participate in the examination. Additionally, the insured cannot plead the 5th amendment in failing to answer questions – that is grounds for voiding the policy. The attorney should be able to lead the insurer through the investigation process and obtain all necessary information to properly and fairly investigate the claim. They should not be wholly focused on providing a “win” to the insurer by proving a claim is fraudulent as such an aggressive one-sided approach may ultimately subject the insurer to a bad faith claim.

3. Prepare for the EUO

A formal written notice of the EUO should be sent to the insured. The letter should cite the policy requirement for giving testimony, advise of the insured’s right to be represented by legal counsel, note the time and place of the examination, request a list of necessary documents and should reserve the company’s right to designate additional individuals to sit for an EUO. The date, time and location of the examination should be reasonable and convenient to the insured. The insurer should make every effort to cooperate in rescheduling the EUO, if the insured requests this, to avoid any potential bad faith claims if the insurer ultimately decides to deny coverage. If the insured does ultimately refuse to submit themselves for an EUO, this may form a valid basis for denying his/her claim.

An attorney cannot take an effective EUO if an insured arrives at the examination with hundreds of pages of documents that the attorney has never seen before. As such, the attorney should request documents well in advance of the examinations and thoroughly review

them prior to the EUO. If the insured refuses to comply with a document request that is material and relevant to the insurer’s investigation, this can also serve as a legitimate basis for denial of a claim.

Preparing for the examination also requires formulating effective topics and questions in advance of the EUO. This may include comparing the insured’s claim with documents and expert’s reports. Discrepancies should be noted for further explanation during the examination.

4. Properly Take the EUO

Prior to conducting the EUO, it is important to discuss the examination with the claims adjuster and the special investigation unit (“SIU”)’s investigator (if any) and obtain their complete files. The claims adjuster and SIU representative will likely have information invaluable to the attorney who is conducting the EUO. It may also be appropriate to have a claims adjuster or SIU representative present during the examination.

During an EUO, all questions considered material and relevant to the claim must be answered by the insured. Courts have given a broad interpretation to what an EUO may encompass. The only limitation placed on the EUO is that the information requested must be “material.” Thus, the EUO may include anything considered material for purposes of determining the insurer’s liability for a claim and to protect against fraudulent claims.

It is important for the attorney to set the proper tone in an EUO. Remember, the primary purpose of the EUO is to gather information so that the insurer can make an informed decision regarding coverage. While it is important to be aggressive enough to test the veracity of the insured’s claim, it is not a time to badger a witness. The attorney should

explain that the company has concerns about the claim while stating clearly that the company has made no final decision regarding coverage, but will base that decision upon the information and documents provided by the insured and the topics discussed at the EUO. Further, the EUO transcript may be discoverable in subsequent litigation. Thus, it is important for the attorney to keep in mind, during the examination, the potential ramifications of any questions asked on future litigation, including a potential bad faith claim against the insurer.

5. Let the Insured Know the Purpose of the EUO

At the outset of the EUO, it is important to advise the insured regarding the purpose of the examination. The attorney should remind the insured that the EUO is used to gather information so that the insurer can make an informed and correct decision regarding coverage – which has not yet been made. Advise the insured that you will not conclude the EUO until the insured is satisfied that he has been afforded the opportunity to provide the insurer all information necessary to substantiate his claim. If it is clear on the record that both of these issues are understood by the insured, it may be sufficient for the insurer to win a summary judgment or jury verdict on the question of whether an insurer acted in bad faith.

An EUO, effectively conducted, is a useful and expedient method for assisting the insurer in reaching its coverage decision with respect to a claim. If an EUO is properly conducted, the result should lead the insurer to a correct and proper decision to either extend or deny coverage as the evidence warrants. **P**