

# EXAMINATIONS UNDER OATH: WHAT YOU AND YOUR CLIENT SHOULD KNOW

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You are contacted by a client who recently submitted an insurance claim - say for damage to a vehicle allegedly caused by vandalism. Your clients' automobile liability insurance company (say Allstate) has been investigating the claim and has now sent a written demand for an "Examination Under Oath" of your client. Is your client required to attend? What types of questions are permissible? Can your client be required to submit documentation at the time of the examination? Once examined, can the insurance company request another examination? These and other questions (perhaps) cross your mind as you speak with your client.

This article will hopefully provide some basic information regarding examinations under oath. While the subject matters covered will be broad, this article is not intended to, nor should it be considered, an exhaustive examination of all applicable California case law and treatises on the subject. Questions may remain unanswered and you should not hesitate to supplement this article with additional research of your own.

## 1. How Long Have Examinations Under Oath Been Around?

As a preliminary matter, examinations under oath normally arise in the context of insurance claims. Many insurance policies contain provisions pertaining to first party claims which generally require the insured to cooperate with the insurer in the investigation of a claim. The language of your client's policy is what matters and it should be carefully reviewed. However, typical policy language often reads as follows:

A person claiming any coverage of this policy must also:

1. Cooperate with us and assist us in any manner concerning a claim or suit.
- \* \* \*
8. Submit to examination under oath upon our request.

3<sup>rd</sup> Edition, E-Z-Reader Car Policy, California, Farmers Insurance Group.

The history of an insurer's right to conduct examinations under oath, or an EUO, can be traced back over a century ago.

As the facts with respect to the amount and circumstances of a loss are almost entirely within the sole knowledge of the insured, and the opportunity and temptation to perpetrate a fraud upon the insurer is often great, it is necessary that it have some means of cross-examining, as it were, upon the written statement and proofs of the insured, for the purpose of getting at the exact facts before

paying the sum claimed of it. Such considerations justify the provision universally to be met with in policies, requiring the insured as often as demanded to submit to an examination under oath touching all matters material to the adjustment of the loss, and the provisions of that character are held to be reasonable and valid.

13 Am. & Eng. Ency. of Law, 358, as cited in Hickman v. London Assur. Corp. (1920) 184 Cal.524, 530-31; see also, Gross v. St. Paul Fire & Marine Ins. Co. (C.C. Minn. 1884) 22 F. 74.

It is thus fairly clear that an insurer may request an examination under oath and require the insured's compliance. Remember that the duty of good faith and fair dealing implicit in an insurance contract runs both ways - and while the insured cannot be held liable in tort for a breach of that duty (*Kerry - can you cite to my earlier article on this subject?*), a refusal to submit to an EUO can be used as a defense to payment of the claim. See, Bergeron v. Employers' Fire Ins. Co. (1931) 115 Cal.App.2d 672, 675; Robinson v. National Automobile & Casualty Ins. Co. (1955) 132 Cal.App.2d 709, 714.

## 2. How Many Times Can My Client Be Examined?

So your client has already submitted to one EUO and now the carrier wants a second. Is your client required to attend a second EUO? The answer most likely is yes. First, remember that the insured is contractually obligated to cooperate with his or her insurance company regarding a claim. The policy may require the insured to submit to examinations under oath "upon request," or similar such language. For example, the Standard Form Fire Insurance policy in California provides that:

The insured, as often as may be reasonably required, shall . . . submit to examinations under oath ....

See California Insurance Code §2071, emphasis added.

The insured's contractual obligation to cooperate with his or her insurance company and the requirement to submit to EUO's is tempered by two limits: first, the demand for an examination must be reasonable. Hickman, supra, 184 Cal. at 529. Second, the subject matter of the inquiry must relate to the loss or coverage in question. See Insurance Companies v. Wade (1872) 81 U.S. 375, 381-82. Filter the request through these parameters. Ask the carrier the reasons why they need a second examination. Agree in advance on the scope of the questioning.

## 3. Can My Client Be Required To Produce Documents At The EUO?

Many times, an insurance company's request for an EUO will include a written request that the insured provide certain documentation related to the pending claim. This is also probably proper. Under the "cooperation clause," an insurer could claim that providing documentation relevant to the claim or loss is part of the insured's duty to cooperate. Second, your client's policy may contain language imposing such an obligation. For example, a typical State Farm fire insurance policy requires the insured, after a loss, to:

(2) provide us with records and documents we request and permit us to make copies;

Finally, the insurer may rely upon your client's failure to provide requested documentation as a basis for denying the claim. Remember, however, that the requested documents must be reasonably related to the pending claim or loss.

#### 4. Now The Insurance Company Wants To Question My Client's Spouse.

Is your client required to produce their spouse, children or household members for an EUO, even though they may not be involved in the claim? Maybe and maybe not. First, check the language of your client's policy. Does it require your client to produce persons other than him or herself for an EUO? The State Farm policy referenced above did, requiring the insured to:

produce employees, members of the insured's household or others for examinations under oath to the extent it is within the insured's power to do so;...

See, e.g., West v. State Farm Fire and Casualty Co. (1988) 868 F.2d 348, 351, fn. 1.

In West, supra, the carrier requested EUOs of the insured's wife and children after the insured husband refused to answer questions at his EUO. The court held it was reasonable for State Farm to request the examine the insured's wife and children, especially given the contractual provision quoted above and the insured's refusal to answer questions. Id. at 351.

An interesting twist on this issue is that in addition to seeking the EUO of both your client and their spouse, the insurer is entitled to separately examine each outside the presence of the other. Thus, even though both spouses may be named insureds on the policy, and even though both may be claimants, they may not be entitled to "sit in" on each other's EUO.

This was the result in State Farm Fire & Casualty Co. v. Tan (S.D. Cal. 1988) 691 F.Supp. 1271, where a husband and wife submitted claims for theft loss. State Farm sought to separately question the claimants, allegedly to resolve suspicions of possible fraud. When the Tans refused to comply, the carrier filed a declaratory relief action that it be entitled to conduct separate examinations of the husband and wife. The court granted the request, finding the insurer acted reasonably in its request to conduct separate examinations. Id. at 1274. The Court reasoned that there was no prejudice to the insureds, given that they were represented by counsel and the examinations were both going to be recorded. As the Court stated, "[t]he Tans have nothing to lose unless than have something to hide." Id.

#### 5. What Do I Do If I Think Certain Questions Are Improper?

Usually, an EUO is requested long before any litigation is initiated. Thus, there is no court sitting with jurisdiction to hear "discovery" disputes. Your client is clearly entitled to have legal representation at the EUO. See, Hickman, supra, 184 Cal. at 529. And you can certainly

object to any questions you feel are improper. However, remember that if your client refuses to answer relevant questions, the insurance company may rely on this refusal as a basis for denying the claim. This could obviously eliminate any potential bad faith liability, even if it eventually turns out the claim should have been paid so long as the carrier acted reasonably in denying the claim. On the other hand, if the insurer persists in asking improper questions, this could be used as evidence of the insurer's bad faith conduct in handling the claim.

If you truly believe the questioning is improper, you could file a declaratory relief action or submit the controversy to the court as an agreed case pursuant to California Code of Civil Procedure §1138.

#### 6. What Happens If My Client Refuses To Appear Or Produce Documents?

You probably already know the answer to this question. If your client has a contractual obligation to cooperate with its insurer, and fails to do so, the insurer may rely on this failure as a basis for denying the claim and as a defense in any subsequent lawsuit by the insured. See, Robinson v. National Automobile & Casualty Ins. Co. (1955) 132 Cal.App.2d 709, 714. Cases have also held that an insurer cannot be found to have unreasonably denied a claim until it receives adequate information to process the claim. See, Globe Indemnity Company v. Superior Court (1992) 6 Cal.App.4th 725, 731; West, supra, 868 F.2d at 351 (insurer could not properly process claim until insured complied with terms of policy.)

However, in Gruenberg v. Aetna Insurance Co. (1973) 9 Cal.3d 566, the California Supreme Court held that an insured's failure to comply with the terms of the policy did not relieve the insurer from complying with the covenant of good faith and fair dealing. Id. at 577. In Gruenberg, the insured refused to submit to an EUO in connection with a fire at his cocktail lounge. The insured had been indicted for arson and refused to appear based on his Fifth Amendment rights. The insurer relied on this refusal as a basis for denying the fire claim, even though the insured later agreed to appear. The California Supreme Court held that the insurer's duty of good faith and fair dealing was unconditional and independent of the insured's compliance with the policy's obligations. Id. at 578. There were also allegations by the insured that the insurance company encouraged the filing of the arson charges by implying that the insured had a motive to commit arson, knowing the insured would refuse to appear for an EUO while he was being criminally investigated. Id. at 571, 575-76.

#### 7. Conclusion

If your client is requested to appear for an EUO, check the policy language to determine your client's contractual obligations. Remember that your client is entitled to representation by counsel and that the examination in all likelihood will be recorded by a court reporter. As long as the insurer's questions are reasonably related to the claim or loss, your client will probably be required to provide the information. A failure to do so may be a "reasonable" basis for the insurer denying the claim.