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A publication of
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EUOs FOR THE PROS

Five Considerations for Maximizing the Power of Testimony in Insurance Fraud Investigations

By Matthew J. Smith, Esq.

An examination under oath (EUO) is simply the best tool we have to investigate insurance fraud. Costing neither the time nor the expense of litigation, an EUO allows us to place insureds under oath and, where appropriate, secure a wide range of information regarding their backgrounds, finances, facts of a loss, and all damages being claimed to the insurer.

Any tool, however, can be dangerous if used improperly. An EUO, unlike a deposition, should not be approached as an adversarial undertaking. Insurers must be extremely cautious in selecting correct and competent counsel for the taking of EUO testimony. Many insurers fail to realize that the attorney is acting as your “agent,” and every question and exchange by your legal counsel may well be used in the courtroom to establish your company’s bad faith.

How, then, in this new millennium do we approach examinations under oath correctly to maximize their success and minimize any risk of failure or exposure? The process is simpler than you think.

Know Your Policy

Most insurance policies contain an EUO

requirement. While policy language is changing, many policies still do not contain a requirement to give a recorded statement. Unless policies require both a recorded statement and an EUO, be cautious in advising insureds that they have failed in their duty to cooperate if they refuse to give a recorded statement. Absent specific policy language, the court may determine that your policy provided a requirement for the insured to give you information through an EUO, which you failed to request.

Even if your insured does give a recorded statement, make certain to advise him at the start that the recorded statement is voluntary (unless required by the policy) and that the company is not waiving its right to require EUO testimony subsequently. Attorneys for insureds are becoming more aggressive in claiming 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 any right to an EUO.

Both attorneys and claims professionals also need to be cautious about what the policy states concerning the production of records and documents. For most EUOs, adjusters and investigators will want to request relevant financial records, purchase





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or damage documentation, and information concerning other insurance claims.

To take an effective EUO, attorneys cannot do a proper job if the insured arrives presenting hundreds of pages of documents for the first time. Smart attorneys will ask the insured or his counsel to produce all of the records outlined in the EUO request and, as required by the policy, to do so in advance of the EUO so that there is sufficient time to review and analyze the documents beforehand.

Select Counsel Wisely

Your company may have the best bodily injury defense attorney in an area, but that does not mean he is competent to handle a property loss EUO. Attorneys, out of fear of disappointing a client, often will not be candid in advising that they do not have experience or knowledge in taking EUO testimony. This is the single biggest mistake made by most insurers.

The purpose of an EUO should be to secure all relevant information necessary for a proper and complete investigation to be done and the correct decision to be reached concerning coverage. This must be done while positioning the company in the most favorable light to the insured and, ultimately, to the judge and jury. Unlike litigation, there is no “versus” between the company and the insured at the time an EUO is taken. Attorneys who feel that they must “win” for the insurer by proving a claim is fraudulent do their clients a disservice.

Insurers should have specific counsel identified either nationally or in geographic areas for taking EUO testimony—this is especially crucial for complex claims. These attorneys must have a thorough knowledge of the difference between an EUO and litigation and should have extensive experience in assisting insurers in investigating fraud and questionable claims. These lawyers should possess the requisite skills necessary to help guide the company through the investigation process and not mire their clients in an extended and overly

aggressive claims investigation process, which may form the foundation for a bad faith claim.

Preparing for the EUO

The old saying “preparation is everything” aptly applies to successful EUOs. It is important that legal counsel has all relevant information from the claims file and good lines of communication exist between claims, SIU, and counsel to identify early on the issues to be addressed and the documents required.

The EUO request letter is critical.

The letter should cite the policy requirement for giving testimony, advise of the right to be represented by legal counsel at the EUO, and contain not a laundry list but a well-prepared request for the documents necessary for the insurer to investigate the claim.

Even setting the date, time, and location of the EUO is important. There is nothing wrong with spelling this information out in the EUO request letter in an attempt to move the claims investigation forward promptly. However, the letter also should advise that if the time or location selected is inconvenient or needs to be rescheduled, counsel and the carrier are willing to do so. You do not want to learn in the bad faith case that unilaterally setting the EUO date caused your insured to miss his beloved aunt’s funeral.

No attorney can do a good job questioning an insured about relevant documents if he did not see those documents until the insured and his counsel walked in the morning of the EUO. When documents are requested via letter, it should set forth the duty to produce them at least 14 days before the EUO so that there is sufficient time for the company, counsel, and experts to review the documents, make copies, prepare, and not waste time at the EUO.

Attorneys also should consider preparing in advance a notebook containing all of the EUO exhibits. Beginning the EUO by creating one single notebook that contains all of the relevant information demonstrates to the insured that the company is serious and approaching the investigation in a clear and organized

manner. The first exhibit should be a certified copy of the policy followed by financial information, histories of other claims, police and fire reports, expert reports where appropriate, and, perhaps, transcripts of recorded statements. Each section should be tabbed with a table of contents for easy reference. If the claim later results in litigation, it certainly presents better to a judge and jury to offer a bound EUO transcript and notebook containing all of the underlying claims investigation EUO materials rather than an EUO transcript with exhibits crammed in the back.

Taking the EUO

One of the crucial aspects of EUO testimony is to approach the process as a team. Claims, SIU, and counsel must work together even if the attorney is charged with the responsibility of doing the actual questioning. It is often advantageous to have representatives of claims, SIU, or both present at the EUO. For certain claims, you may want to have experts such as forensic accountants in attendance as well. Having additional eyes and ears present not only makes questioning more efficient, but also gives greater insight when the time comes to decide to extend or deny coverage for the loss.

The most important distinction between an EUO and a deposition is that an EUO should be nonconfrontational. The purpose of the EUO is to gather necessary information so that the insurance carrier can make an informed and correct decision regarding coverage. While this may require counsel to fully question the insured concerning his whereabouts, how a loss occurred, or facts that may be in dispute, it is not a time to badger the insured into a confession or force the insured to withdraw his claim. It is crucial to remember that every question at the EUO may be blown up and shown in a courtroom as evidence of your company prejudging the claim or not conducting a fair investigation. EUO attorneys are acting on the insurer’s behalf, and their actions may be the basis for your company’s bad faith if



they do not do their jobs properly.

It requires a balancing act to aggressively investigate a claim while not being confrontational. The tenor of counsel's voice, how questions are phrased, and explaining why documents are necessary for the investigation rather than simply demanding them are keys to a proper EUO. The counsel's goal should be to document the requests made by the insurance carrier for information, the attempts made to work professionally and politely with the insured to gather that information, and the extensive steps taken by the insurance carrier to explain, in a nonthreatening manner, why the insured's cooperation, testimony, and documents are necessary to make an informed and correct decision. Approaching the EUO in this manner will present the company in a much better light to a judge and jury, especially in situations where a claim may be denied for lack of cooperation, and it may be the difference in the jury finding the company liable for bad faith damages.

Attorneys can achieve this goal by being direct in EUO questioning. Explain why 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 documentation provided by the insured. The attorney should clearly notify the insured that his role is as counsel to the insurance company, but the insured's duty is to make certain all information is provided to the insurer to make a correct decision.

The Promise

One of the key points in any EUO should be "The Promise." During the introductory phase of the EUO, advise the insured that you can make him a promise that contains two parts: (1) no decision has been made regarding coverage for the claim, and (2) you will not conclude the EUO until the insured is satisfied that he has been afforded the opportunity to tell the insurance company everything and provide all documents he wants his insurer to

have before a decision is made. At the end of the EUO, return to that promise and have the insured confirm that he is fully satisfied and has been given the opportunity to tell the company everything and provide all documentation concerning his claim during the EUO. The claim decision may still be one the insured does not like, but the insured's testimony that he is satisfied that the company gave him the opportunity to provide all testimony and documentation may be sufficient for the company to win a summary judgment or jury verdict on the question of whether the company acted in bad faith.

Also consider having the insured review his recorded statement at the end of the EUO. A recorded statement is not sworn testimony and, in some jurisdictions, may not be admissible in court. When the insured is afforded the opportunity to read and even correct the recorded statement transcript during the EUO and is then asked, "Is everything you said in the recorded statement now true and correct?" you have converted the recorded statement to sworn testimony and may have cleared a significant hurdle regarding its admissibility in a jury trial.

There also may be the need at the


end of the EUO to advise the insured that his testimony is being continued in progress and the company is retaining its right to request additional documentation or testimony as the claims investigation proceeds.

Your Best Tool

If you use the EUO properly, it is your single best tool for claims investigation. The EUO and proof of loss are the only times when the insured must provide information under oath to the insurance carrier regarding his claim. In most cases, there will only be one EUO, so it's important to have the proper procedures, personnel, and plan in place to get it right. In doing so, the result should lead us to the correct and proper decision to either extend or deny coverage as the evidence, properly gathered and presented, so warrants. **CM**

Matthew J. Smith, Esq., is founder and president of the CLM Member Firm Smith, Rolfes & Skavdahl Co. LPA. He also is a member of CLM's Insurance Fraud Committee and can be reached at (513) 579-0080, msmith@smithrolfes.com, smithrolfes.com.

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