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Adjusting and Investigating the Claim – Examinations Under Oath

**THE PROBLEM DEFINED:**

Homeowners’ policies typically contain a contractual provision allowing the insurer to request what is known as an Examination Under Oath ("EUO") from the insured in the event that a claim is filed. Originally intended to allow an insurer to investigate a claim with greater depth when fraud or similar circumstances were believed to exist, EUOs have become what some Florida courts refer to as a new "cottage industry" and a pretextual tool used by some Florida insurers to create a "perfect defense to payment" in order to avoid paying otherwise legitimate covered claims.

At present EUOs are frequently requested by Florida insurers, even in cases where no fraud or wrong-doing is suspected. There are, however, no governing EUO standards, except those which have very loosely developed at common law. The results of these cases are inconsistent and often challenged by Insurers and thus offer the consumer scant protection against abuses. Some of the issues which exist with respect to the EUO process include:

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2 EUOs are only one method of investigation and under most standard homeowners' policies, the insurer has the right to inspect the property as often as reasonably required, to request written information and documentation from the insured, to request a Sworn Proof of Loss valuing the claim, among others.

3 *See Whistler's Park, Inc. v. Florida Ins. Guar. Ass'n*, 90 So. 3d 841, 845 (Fla. 5th DCA 2012), reh'g denied (June 28, 2012).

4 While some panel members have suggested that EUOs are infrequently used as a tool of "last resort," this has not been the experience of the authors. Indeed, with deeply discounted legal fees charged by panel counsel doing volume work, EUOs can be taken by large insurers easily and inexpensively even when seemingly unwarranted.

5 *See, e.g., De Leon v. Great American Assurance Co.,* 78 So. 3d 585 (Fla. 3d DCA 2011) (finding that although it was clear the claim should be paid, the insurer used the EUO provision of its policy in an abusive fashion by making unwarranted and intrusive inquiries into the personal life of its insured); *First Home Ins. Co. v. Fleurimond*, 36 So. 3d 172, 174 (Fla. 3d DCA 2010) (finding the insured was justified in leaving an abusive EUO where the insured claimed he was badgered and yelled at, and that he was required to answer the identical series of questions twice, once in English and once in Creole).

6 This list is far from exhaustive but merely illustrates some of the problems observed by the practitioners in the absence of any governing regulation.

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• **Requirement to give a sworn statement which may impact coverage with no representation.** EUOs are generally taken by attorneys hired by insurers to assist with the claim but consumers often have no similar representation present (and may not be informed that they have the right to representation).

• **No guidelines for providing notice of the EUO.** Notice is generally left to the attorney taking the EUO and thus the consumer may be given little to no information about the process to be used, the purpose of the EUO, the scope of the EUO, and length of the EUO.

• **No guidelines for the conduct of the EUO.** There are no codified limits to the length of time for an EUO, the types of questions which may be asked (and what may result should a consumer fail or be unable to answer certain questions), and the number of EUOs which may be demanded. Further, there are no guidelines for what documents or materials may be demanded by the insurer leading to sweeping requests for voluminous document requests associated with the EUO which are often unrelated to the claim itself.

• **No requirement that the insurer set a “date and time certain” for the EUO to occur.** This leads to cases in which the insurer notifies the consumer that it intends to take an EUO and asks for recommended dates but fails to ever schedule the EUO, and then subsequently claims that the consumer refused to comply.  

Of great concern for policyholders is not simply that the EUO process can—absent any governing rules—be abused, but that any claimed failure to fully comply with an insurer’s EUO demand may result in a catastrophic total loss of all coverage, even if

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7 See infra note 11.

8 See Riviera S. Apartments v. QBE Ins. Corp., No. 07-60934-civ, 2007 WL 2506682 (S.D. Fla. Aug. 30, 2007) (citing Willis v. Huff, 736 So. 2d 1272, 1274 (Fla. 4th DCA 1999)). In Riviera, the insurer sought to dismiss a claim brought by its insured on the grounds that the insured failed to submit to an examination under oath before filing suit. The insurer had asked the insured for dates of availability on more than one occasion, but never scheduled the EUOs or requested they take place on a date certain. The examinations never occurred, and the insureds filed suit without having given EUOs. The Riviera court denied the insurers' motion, noting that "generalized requests for examinations, without evidence that specific dates and times were set for the examination, were insufficient to show noncompliance by the policyholder." Id. at *4 (emphasis added). Similarly, in Whistler's Park, the policyholder received two letters from the insurer requesting an EUO but not setting an exact date, time, location or providing any other detail. The trial court granted the insurer's motion for summary judgment because the policyholder did not sit for an EUO prior to suit. The Fifth District Court of Appeal reversed because even though the insurer had requested an EUO, it had never set a time or place for it. The court also found that the insurer had failed to meet its burden of demonstrating that it had been prejudiced by the lack of an EUO. Whistler's Park, 90 So. 3d at 847.
the claim itself is clearly covered by the policy. As a result, should a consumer feel that an EUO is improper and fails to fully comply in some way (even if justified) or if an insurer can make that claim by a variety of methods (see the last bullet point above for one example), the insured may risk losing coverage entirely under some existing case law.

Whistler's Park, a recent case from Florida’s 5th District Court of Appeal discusses the issue at length.⁹

As discussed in Curran, several of Florida’s district courts of appeal have concluded that the failure of an insured to appear for an EUO prior to filing suit to recover an unpaid claim is a material breach of contract, requiring forfeiture of coverage. These decisions have led to a cottage industry of EUO litigation. If an insurer can procure a failure to comply—or, even better, a refusal to comply—with the EUO requirement, they have a perfect defense to payment. Similarly, if counsel for insureds can bait the insurer into refusing payment without adequate justification, this may trigger a bad faith claim. The actual, if unglamorous, true purpose of the EUO—verification of the insured’s loss—has been lost in this larger battle. No doubt there can be genuine instances of insurance fraud, but the recent and ever—escalating number of EUO cases that have arisen all over the state appear to be more about strategy than truth.

Most policies provide that an insurer can demand multiple EUO’s and unlimited records and that insureds cannot even have counsel present. The breadth of this power, combined with the promise of forfeiture if the insured is not compliant, has had predictable results, an example of which can be seen in the recent decision of the Third District Court of Appeal in De Leon v. Great American Assurance Co. There, the court concluded that the insurer took advantage of its contractual right to conduct an EUO by “unwarranted” and “intrusive” EUO questioning that the court found to be impertinent, improper and irrelevant to the claim. In the face of repeated threats by the insurer’s counsel that refusal to answer whatever questions the insurer’s counsel chose to ask would void coverage, the Third District Court of Appeal said that the insured was “completely justified” in refusing to answer.

Whistler’s Park, 90 So. 3d at 845 [citing De Leon v. Great American Assurance Co., 78 So.3d 585 (Fla. 3d DCA 2011)].

⁹ Although the case is favorable to policyholders, it is currently being appealed to the Florida Supreme Court by the insurer involved.
In sum, while we agree that an insurance company has an absolute right and duty to fully investigate a claim, that investigation must be conducted fairly, reasonably, and with the interests of the consumer in mind.\textsuperscript{10} Although we see similar problems arise with other post-loss compliance requirements, EUOs raise particularly significant issues for Florida consumers. Insurers asserting a lack of compliance with EUO provisions frequently treat them as a device to avoid payment and absolute right rather than a legitimate tool for claim investigation where reasonably required. This bright-line approach, combined with a lack of governing standards and the potential for claims of policy forfeiture, creates a pressing need for greater consumer protection.

\textbf{RECOMMENDATIONS FOR CONSUMER SAFEGUARDS:}

1. Establish statutory standards for scheduling and conducting EUOs to include:

   a. Recognizing that EUOs are one of the most intrusive and burdensome tools used by an insurer and thus should only be requested when truly necessary to obtain specific information the insurer was unable to obtain by utilizing other post-loss compliance conditions such property inspections, informal interviews, requests for documentation, a Sworn Proof of Loss, etc.;

   b. An insurer may conduct an examination under oath only to obtain information that is relevant and reasonably necessary to process or investigate the claim;

   c. An insurer that determines that it will conduct an examination under oath of an insured shall notify the insured of that determination and shall include a copy of the Homeowners Bill of Rights in the notification. (Establish standardized informational language fully explaining the EUO process to the consumer, along with the consumer’s rights, to be used whenever a formal EUO request is made)

   i. Every letter demanding an EUO will tell the insureds he/she has a right to hire counsel and the date will be coordinated with the attorney that is hired by the insureds should the insured so desire;

   ii. Every letter demanding an EUO will clearly articulate to the insured the reason and purpose of the EUO and what specific

\textsuperscript{10} “[W]hen evaluating an insurer’s rights to investigation of a claim, ‘the insurer’s rights tend to be measured by “reasonableness,” with the courts attempting to balance the insurer’s legitimate interest in ascertaining the validity and extent of the claim against the insured’s . . . rights to both privacy and prompt payment of sums due under the terms of the contract.” Fla. Gaming Corp. v. Affiliated FM Ins. Co., 502 F. Supp. 2d 1257, 1261 (S.D. Fla. 2007) (quoting 8A G. Couch, Couch on Insurance 3d § 196:2).
information is required. This information must also be documented in the insurer's claim file.\textsuperscript{11}

d. Requiring that the burden to set a date and time certain for EUO be placed upon the insurer or its representative by providing the insured with a reasonable selection of pre-selected options.

   i. An examination under oath may only be conducted upon reasonable notice, at a reasonably convenient place and for a reasonable length of time;

  e. The insured may audio record the examination proceedings in their entirety;

  f. The insurer shall notify the insured that, upon request and free of charge, it will provide the insured with a copy of the transcript of the proceedings. Where an insured requests a copy of the transcript of their examination under oath, the insurer shall provide it within 10 business days of receipt by the insurer or its counsel of the transcript;

  g. An insured may make sworn corrections to the transcript so it accurately reflects the testimony under oath; and

  h. Limit the EUO to the insured(s) who are party to the insurance contract and make it clear that an EUO is not a discovery or trial deposition but instead an investigatory tool to ask questions of the insured(s) (not his or her public adjuster, contractor, etc.).

2. Codify existing case law for conducting EUOs to include:

  a. Treating EUO policy language as a cooperation clause requirement and not as a condition precedent, meaning that if an insurer wishes to avoid payment for a claimed failure to comply with an EUO, that insurer must demonstrate:

     i. How the insurer was prejudiced by the lack of EUO (\textit{i.e.}, what specific information it needed but did not have which was in fact necessary for it to adjust the claim);

     ii. That it was unable to obtain the information through other reasonable methods of loss investigation;

     iii. That there was a clear and actual refusal of a reasonable EUO request set for a date certain; and

     iv. Where the insurer can demonstrate that an EUO was legitimately necessary, appropriately requested, and was not obtained prior to suit by the insured, the court should abate premature litigation

\textsuperscript{11} See Fla. Stat. § 626.9541(1)(l) g-h (2012) (requiring insurers to promptly notify the insured of any additional information necessary for the processing of a claim and to clearly explain the nature of the requested information and the reasons why such information is necessary).
and allow an insured the opportunity to comply with EUO before considering a potential policy forfeiture.\textsuperscript{12}

\textsuperscript{12} This situation arises when the consumer is forced to file legal action against their insurer for lack of payment. If the insurer can assert that the consumer failed to comply with an EUO request, it can argue, using standard “no suits” policy language, that all coverage should be lost as a result. Standard policy language, however, does not specify any penalty for failure to sit for EUO, much less that the consumer should suffer complete forfeiture of policy benefits. See, e.g., State Farm Mut. Auto. Ins. Co. v. Curran, 83 So. 3d 793, 802 (Fla. 5th DCA 2011), reh'g denied (Jan. 6, 2012), cert. granted, 86 So. 3d 1114 (Fla. 2012). Rather, many Florida court have held that dismissal or abatement of premature litigation to allow EUO compliance (assuming it is actually needed) is the correct response. See Southgate Gardens Condo. Assn. v. Aspen Spec. Ins. Co., 622 F. Supp. 2d 1332, 1337 (S.D. Fla. 2008) (“[Dismissal without prejudice to allow belated compliance with the EUO provision is the most prudent course of action”); Wright v. Life Ins. Co. of Ga., 762 So. 2d 992 (Fla. 4th DCA 2000). Case law in this area, however, is inconsistent and under constant challenge by insurers who frequently seek policy forfeiture in these cases.