



CLM 2020 Focus: Cannabis, Environmental, Insurance Fraud,  
Property, Subrogation, Claims & Litigation

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**Pulling the EUO Sword from The Policy Stone:  
The Effective Use of the Examination Under Oath**

**I. Why Conduct an EUO?**

**Claims Investigation**

The examination under oath (EUO) is a highly effective tool for the investigation of first-party claims. There is a wealth of information available to the defense bar on the parameters of an EUO and the case law surrounding it. It is a great tool particularly when documents requested in support of a claim do not tell the entire story. A vast majority of claims decisions on both commercial, specialty, and personal lines policies are made with basic documentation, claims forms, and telephone calls (which may or may not be recorded). In most cases, it is one of the last things done during the claim's investigation process. However, it is not unusual for an EUO to lead to additional areas of inquiry.

**Fraud Detection**

With the expected rise in fraud in the wake of the pandemic and subsequent expected rise in fraud, an EUO can greatly aid in the detection of fraud. Even the threat of sitting down with a fraudulent claimant can cause them to back down from their attempt to pursue claims under false pretenses.

**Timing Factors**

In order for the examination to bear the most fruit, it is advisable to obtain as much documentation as possible in advance. It follows that the EUO should ideally be conducted as one of the last things to be done as part of the investigation.

**Post Decision EUO?**

A question that sometimes arises is whether an EUO can be conducted after the claims decision has been made. Generally, the answer is a resounding no. However, there are rare circumstances where an examination may be reasonable after a claims decision has been made. If new information comes to light revealing fraud after a decision in favor of the claim has been made, then the insurer may choose to conduct an examination. In addition, an EUO may be necessary if there are questions about information provided in the policy application that might support a rescission of the policy. The EUO can be used to investigate any misrepresentations that were made at that time. In either situation, an insurer should tread carefully in making a request after a claims decision has been made, since a claimant may use a post-denial EUO request as evidence of bad faith.

## **II. Pre-EUO Request Letter**

### **Recipients**

The request to conduct an examination should be made in writing and sent to both the claimant and counsel, if represented. Some courts have held that notice to just counsel is insufficient to invoke the provision and that actual notice must be made to the insured (see *Weber v. Gen. Acc. Fire & Life Assur. Corp.*). The request must be clear and unambiguous.

### **Time and Place**

The request should list the date, time, location, and expected duration of the request. Case law has set some parameters along these lines in several jurisdictions. While they vary from court to court, those parameters should generally be reasonable in every respect. Avoid locations that are inconvenient for the insured or marathon examinations that are mere fishing expeditions.

### **Policy Provisions**

The request should provide a copy of the policy, and cite the portions that require the examination and required documents and/or authorizations. It should also advise the insured that, while every effort will be made to complete the examination in one sitting, the insurer reserves the right to ask additional follow-up questions, and that it is not complete until a claims decision has been made. The letter should reference or include any reservation of rights that has been asserted to date.

### **Document Request**

Document requests are common with the examination, and the letter should itemize each document requested as specifically as possible. For example, it is not advisable to simply ask for tax records for a certain range of dates. Such a request

should list Form 1040s, K-1s, 1099s, and all original documents used to prepare each document. Do not leave anything to the discretion of the insured. It should request that the insured to bring originals of each document when available.

Policies commonly require insureds to provide any authorizations and releases necessary to obtain records. Ideally, a request for these authorizations should be made so that the documents may be obtained prior to the examination. If that is not possible, then a copy of the authorizations should be provided in the request letter and the insured should be informed that they will be required to sign the authorizations at the examination.

### **III. Conducting the Examination**

The EUO is always conducted by a representative of the insurance company and typically an outside retained attorney. Because the examination may be used as a prior inconsistent statement in litigation should the claim be denied, the examiner should be familiar with the litigation process and how to properly frame questions to be used in a subsequent trial cross-examination. It is advisable for the carrier to retain counsel to conduct the examination.

#### **Pre-Examination Preparation**

The goal of the examination is to obtain the full information necessary to evaluate a claim and make a decision. The examination should create a definitive timeline of events from the insured's perspective. In order to do that, the examiner must be well-prepared. This includes a thorough review of the claims file, as well as the investigation conducted by the company prior to the examination. It is also helpful to confer with the SIU analyst assigned to the case just prior to the examination to be sure key questions are covered and there are no further updates to the investigation.

If he is represented, the insured will likely be instructed to carefully only answer the questions that are asked. The purpose is not to trick the insured or corner them into a misstatement. If the facts justify a misrepresentation defense, then a detailed and vetting examination will support that. It is also helpful in the pursuit of any subrogation interests that may be viable and for which the insured may have helpful information.

#### **Post-Examination**

After the examination transcript is complete, the examinee will need to "subscribe to" the transcript to verify its accuracy. Unlike depositions, where the deponent may waive the right to read the transcript and correct any transcription

errors, the subscription by the insured should be done in every EUO. The reason is simply to avoid any argument that there was an error that was relied upon in a subsequent denial.

Each examination should end with a comment on the record that there may be additional document requests or additional questions. While every effort should be made to cover everything necessary during the examination, most policies allow the insurer to conduct an EUO "as often as it may reasonably require" or words to that effect.

If conducted by retained counsel, timely reporting is essential. Be sure to confirm with counsel the expectation to get a verbal report within 24 hours of the examination and a written report shortly after that (and preferably without waiting for the transcript which can take weeks).

#### **IV. EUO Case Law and Pitfalls**

While jurisdictions may vary, states generally support the policy right of an insurer to conduct the examination. In many cases, refusal to submit to an examination can provide a policy defense for the insurer. However, a denial based on refusal to submit to an examination has limitations and requirements.

Some courts have held that a refusal to sit for an examination is not grounds for a denial but merely holds the claim in abeyance indefinitely (see *Aachen & Munich Fire Ins. Co. v. Arabian Toilet Goods Co.*). Other courts have held that the submission must be timely and not delayed unnecessarily (see *Lentini Bros. Moving & Storage Co. v. New York Prop. Ins. Underwriting Ass'n*). Courts have also held that the insurer must prove that the breach, through either failure to appear or refusal to answer certain questions, must be material (see *Darcy v. Hartford Ins. Co.*). The fact of the examination does not preclude further depositions and other discovery during litigation.

#### **V. EUO's in the Post-COVID Environment**

##### **Remote EUO's**

The claims process and special investigations in particular are almost unanimously slower in the Post-COVID environment. One concern is the proximity required to conduct an in-person EUO. Care should be taken to communicate with the examinee regarding their comfort level of an in-person EUO. One option is to conduct an EUO using remote technology. There is some functionality that is lost such as the ability to examine documents provided by the examinee at the time of the EUO. However, it allows the investigation to proceed faster if the examinee is willing. The need for additional follow up by way of document requests or

supplemental examination is greater, but it aids in moving along the process when an in-person examination is not possible.

### **Accommodations for the examinee**

If the examination is in-person, a documentation of the insured's acquiescence to the examination during the pandemic should be documented. The option of conducting the examination by other means, including remotely, delaying the examination, or conducting it in a location where appropriate distance can be maintained, should also be documented.

### **Fraud indicators and schemes**

All indicators are that we will be entering the largest spike in fraud in decades. Historically, fraud rises when there is a mass-catastrophe such as a hurricane, tsunami, etc., or when there is an economic downturn. Because of COVID, we have both a mass catastrophe and an economic downturn on a global scale. The economic recession in 2008 is a good example of a time when fraud increased as a result of financial hard times. EUO's should cover any of the developed fraud schemes that are sure to arise out of COVID.

## **VI. Conclusion**

The examination under oath is a powerful tool provided by the policy to aid in the claims investigation process. In addition, it can be very cost effective for the carrier on larger claims. The cost to retain outside counsel to prepare for, conduct, and report on the examination is minimal compared to the benefit it provides in defending a denial in litigation. It is a good use of resources when the viability of a claim is in question and a denial is a possibility.