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**Effectively Using Examinations Under Oath in Claims Investigations**

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The right of examination under oath is likely the most important right provided to an insurer investigating a claim. This session aims to educate on the practical and strategic nuances surrounding examinations under oath in a variety of claim contexts. The session is a comprehensive discussion on examinations under oath, spanning from the claim's inception to possible arbitration or litigation. The presentation will assist attendees in determining when and how to conduct examinations under oath. Additionally, it will explore the legal and logistical issues insurers face in relying on examinations under oath when making claim decisions. Attendees will leave understanding why examinations under oath are their most powerful investigative tool, and how to use this tool to lead to expedited, justified claim payments or denials.

**I. Bases to Take an Examination under Oath**

In this portion of the presentation the two main sources of power granting an insurer the right to conduct an examination under oath will be discussed, namely the policy of insurance and the legal precedent interpreting it.

**A. The Policy: Insured's Duties & Insurer's Right to Investigate**

The Company's policy specifically states that it is the duty of the insured to cooperate with the Company in its investigation of the claim, and that one of those duties include submitting to an examination under oath, when requested.

We expound upon the fact that the courts in California and nationwide have recognized the broad nature of an insurer's right to conduct a statement and to require the insured to produce various documentation during the course of a claims investigation as delineated by the provisions of the policy. One important example to be discussed is the case of Cummings v. Fire Insurance Exchange (1988) 202 Cal.App.3d 1407, in which the Court discussed a well-established United States Supreme Court case regarding statements and the production of documents, Clafin v. Commonwealth Ins. Co. 110 U.S. 81, 28 Lawyer's Ed. 76, as follows: "The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination...was to enable the company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to its rights, to enable it to decide upon its obligations, to protect against false claims."

We will explore different policy provisions, the varying constructions, and the effect the policy language can have when requesting and examination under oath.

### **1. Who Must Submit**

Per the cooperation clause of each policy of insurance, and the current law to be discussed ahead, an insured is obligated to submit to examination under oath in order to receive any benefits under the policy. We will discuss Martinez v. Infinity Insurance Company (C.D. Cal. 2010) 714 F.Supp. 2d 1057, in which the Court ruled cooperation clauses in insurance contracts are valid, necessary and enforceable under California law.

### **2. How Often Must One Submit**

Examinations under oath differ from depositions in many ways. Insurers are not limited to conducting only examination of its insured during the course of a claim investigation. The presentation will discuss the varying provisions that grant this right to the insured, as well as In Sarkisyants v. State Farm Mutual Automobile Insurance Company (N.D. Cal. 2005) 2005 U.S. Dist. LEXIS 30866, relying on Brizuela (2004) 116 Cal.App.4th 578, and Hickman v. London Assurance Corporation (1920) 184 Cal. 524, wherein the Court held that an insured was not only required to submit to an oral examination under oath, but a supplemental examinations under oath could be requested.

### **B. The Law: Insurer's Right to Request Examinations Under Oath**

An insurance company has a right and an obligation to investigate a claim to protect itself and its policyholders from false or invalid claims, and an insured's financial status is relevant to that inquiry. Robinson v. National Auto and Casualty Ins. Co. (1955) 132 Cal.App.2d 709; Morris v. Stulsfat Foundation (1966) 245 Cal.App.2d 409.

In Fine v. Bellafonte Underwriting Ins. Co., 725 F.2d 179 (2d.Cir. 1984), the Court explained that the purpose of a provision requiring an insured to submit to an examination under oath is to enable the insurance company to acquire knowledge or information that may aid it in its further investigation or that may otherwise be significant to the company in determining its liability under the policy and the position it should take with respect to a claim.

The Court held in Globe Indemnity Co. v. Superior Court (1992) 6 Cal.App.4th 725 that an insured's cooperation in the examination process is a condition for both collecting under the policy and filing suit if the claim is denied.

These and other cases will be referenced and discussed when navigating the laws that uphold an insurer's right to conduct an examination under oath.

## **II. Deciding to Take an Examination under Oath**

In this portion of the presentation, we will explore the critical time after a loss has been reported and a sufficient preliminary investigation has been conducted, when one must determine whether an EUO is warranted.

### **A. Applicability and Determinations**

An examination under Oath may not always be appropriate. This presentation will describe the many contexts in which conducting an examination under oath, outside of the Special Investigation Unit context, is both legally appropriate and strategically sound. In general,

the Examination Under Oath should attempt to clarify, confirm or resolve contested issues, damage disputes, Ambiguities, Informational gaps, Complex or confusing facts warranting further investigation, Losses for which supporting documentation does not exist, Inconsistencies, issues of fraud, or claim exaggeration, The insured's perspective on the claim, Motive for and background of supplemental claims, Potential policy defenses, Insurable interest, Background of insured, Financial conditions, Whereabouts at time of loss, Claim basis when documentation lost, destroyed or not willingly provided.

The case of Clafin v. Common wealth Insurance Company, 110 U.S. 81, 3 S.Ct. 507, 20 L. Ed. 76 (1884), which outlines the many parameters surrounding when an examination under oath is appropriate will also be discussed.

### **B. Timing**

This portion will discuss the importance timing, deadlines, and due dates in the claims context per California Insurance Code Section 790.03.

### **C. Strategy**

Additionally, the presentation will help determine when to conduct an examination under oath. Not only logistically, per California Insurance Code Section 790.03, but also strategically speaking. This will explore such issues as preparing one's claim file and conducting a thorough and efficient investigation, as is required by both California Insurance Code Section 790.03 and the California Code of Regulations Section 2698.36. We will discuss verifying coverage dates, amounts, exclusions, limitations and deductibles, and how to obtain the underwriting file and examine the application, change requests, or endorsements. Also the legal necessity of obtaining a non-waiver or a "Reservation of Rights."

The initial recorded statement will also be discussed briefly, with a focus on its force and effect during examination under oath. Specifically, how courts have held that an insured is not required to provide copy of recorded statement to insured prior to the Examination under Oath in Brizuela v. Calfarm Ins. Co. (2004) 116 Cal.App.4th 578.

## **III. Taking an Examination under Oath**

The portion of the presentation will instruct on conducting an effective examination under oath, and the issues to consider, both legal and logistical, after the examination is complete.

### **A. Notifying the Insured**

We will first outline the proper method of requesting the examination under oath.

#### **1. Written Requests**

We will look to the proper method to request an examination under oath per the California Insurance Code. This will break down exactly how to draft a letter to one's insured, including both legal and practical elements.

#### **2. Document Request**

We will further discuss the implications of Abdelhamid v. Fire Insurance Exchange (2010) 182 Cal.App.4th 990 (with some reference to Martinez v. Infinity Insurance Company (C.D. Cal. 2010) 714 F.Supp.2d 1057 and Cummings v. Fire Insurance Exchange (198) 202

Cal.App.3d 1407) when requesting documents to be produced at examination. In Abdelhamid, not only did the Court find the insured has an absolute duty to cooperate by submitting to an examination under oath, the court also found that the duties to cooperate clause will be violated when an insured fails to “provide a proof of loss with supporting documentation”; where an insured refuses to answer questions concerning finances as “it is relevant and material to inquire into the financial condition of the insured because an insurer is entitled to develop circumstantial evidence of the insured’s involvement in the suspected arson”; and where the insured refuses to answer questions on “advice of counsel” or, in the instant matter, on advice of her public adjuster as the insured’s “purported reliance on the alleged advice of counsel in refusing to answer [the insurer’s] questions and failing to supply requested documentation did not excuse her failure to comply with the policy conditions requiring her to supply the requested documents and answer material questions at her EUO.”

The presentation will guide participants in deciding what information is relevant to the investigation and the best methods of obtaining it.

#### **i. Financial Documents**

In McIntosh v. Eagle Fire Company of New York (8<sup>th</sup> Cir. 1963) 325 F.2d 99, the Court ruled that evidence of business income and tax returns was relevant on the issue of the insured’s motivation in bringing a potentially fraudulent claim. There are other contexts, outside fraudulent claims context, however, in which financial documents may be pertinent. We will explore these coverage questions and the proper method of requesting and obtaining sensitive information of this nature from one’s insureds.

#### **ii. Cell phone Records**

The California Public Utilities Commission (PUC Code Section 2891(a)) requires written consent of the subscriber to release records. In addition, many cellular telephone carriers now require a subpoena to release account holder records. There is no statutory authority in California that requires a cellular account holder to obtain a subpoena in order to retrieve their own cellular records. This is strictly a requirement of the cellular carrier. In certain instances, however, cellular telephone carriers are failing to comply with the subpoena, or directly requesting a court order to ensure compliance. We will briefly cover the importance of these records and the legal manner of obtaining them.

### **B. Conducting the Examination under Oath**

#### **1. Who May be Present**

The case law that dictates who may or may not present during the examination will be covered. An insured is entitled to have his/her counsel present. This has been expanded to include public adjusters, and at times even close family members. However, each of these individuals are limited in their roles, and these critical limitations will be covered in detail. Also of importance is State Farm Fire & Casualty Company v. Tan (S.D. Cal. 1989) 691 F. Supp. 1271, in which the Court held that an insurance company may request the insureds to submit to separate examinations. We will explain the logic and importance of this decision when conducting examinations under oath of multiple insureds.

#### **2. Who Conducts the Statement**

A variety of individuals may properly take the insured's examination under oath. Look to the policy, generally "any person named by this company," but the examiner is usually outside legal counsel or company representatives/employees. We will explore the pros and cons of sending the examination to outside counsel, inhouse counsel, or handling the proceeding oneself as a claims examiner.

### **3. Admonitions**

It is paramount that certain information is conveyed to the examinee prior to questioning. We will outline each item of information and explore its importance and implications. Specifically, (1) the purpose of the Examination (i.e., gathering information for an informed claim decision); (2) that this is the insured's opportunity to provide all information to the insurer, so the insured should volunteer relevant information, even if not specifically questioned about it; (3) that the insured is under oath and that under the terms of the policy, any misrepresentations, concealments or omissions of material facts may result in denial of the claim; (4) California Penal Code Sections 548-550 and the repercussions of fraud; (5) in an arson case, that there is evidence of a set fire and the insured will be directly asked if s/he deliberately caused the loss; (6) consider informing the insured of their right to an attorney; and (7) explain the process to the insured (i.e., transcript obtained at insurer cost will be sent to insured, errata sheet must be signed and returned.

### **4. Scope of Questioning**

The actual scope of questioning will also be explored in the presentation, with particular emphasis on areas of information the Court has explicitly found to be relevant. In Robinson, supra, the Court reaffirmed the insurer's broad scope of relevant inquiry to include an insured's prior lawsuits, prior insurance, and the source of funds to purchase the property which is involved in the claim. The Court also allowed questions concerning a private bankruptcy filed by the insured, and the comparison of the description of property is claimed in the bankruptcy to that which was included in the subject claim. See also: Powell v. Merrimac Mut. Ins. Co. (N.D. GA 1978) 80 F.R.D. 431; Esquire Restaurant, Inc. v. Commonwealth Ins. Co. (1985) 245 GA 742, 334 S.E.2d 155; and Williams v. American Home Assur. Co. (1983) 97 App.Div.2d 707, 468 N.Y. Supp.2d 341.

In McIntosh v. Eagle Fire Company of New York (8<sup>th</sup> Cir. 1963) 325 F.2d 99, the Court ruled that evidence of business income and tax returns was relevant on the issue of the insured's motivation to commit arson. The Court in Kisting v. Westchester Fire Ins. Co. (W.D. Wisc. 1968) 290 F. Supp. 141 also discussed the admissibility of evidence of income tax returns, of the insured's drawing of corporate salary, and of income tax problems with the IRS. The Court ruled that such material was relevant in that the insured's refusal to answer questions in this area consisted of a breach of contract. In Kisting, the Court, in interpreting almost identical language to the policy involved in this matter, ruled that the financial status and the financial gain to an insured are circumstances relevant to an insurance company's defense of arson on a fire policy.

Further, the Court in Dadurian v. Underwriter's at Lloyd's (1<sup>st</sup> Cir. 1986) 787 F.2d 756, stated: "We agree that where Dadurian got the cash was material to his insurance claim, since Dadurian insisted that he paid Howe a total of \$233,000 in cash over a 30-month period for the

jewelry, and the credibility of this story, and hence of Dadurian's ownership of the insured items, turned in part on his ability to explain plausibly where he obtained such large sums of cash."

We will refer back to our previous discussions on the importance of "cooperation clauses" in the context of document requests. In this vein, we will highlight the further significance of Martinez v. Infinity Insurance Company (C.D. Cal. 2010) 714 F.Supp. 2d 1057, where the Court went on to note the insured's failure to provide necessary records to the insurer substantially prejudiced the insurer under California law and its investigation of the claim, precluding coverage.

It can be difficult for an insurer to navigate these laws while protecting its interests and its insured's interests. However, through an exploration of these cases, with hypothetical examples and narratives, the presentation aims to simplify and educate its participants.

## **5. Post Examination**

Lastly, we will cover the post-examination under oath follow up. This will center on effectively completing one's investigation, forming an opinion, and making determinations as to materiality of any misrepresentations.

### **i. Follow Up**

We will reemphasize the importance of document collection and the proper method of advising a non-cooperative insured of his/her duties under the policy and the repercussions thereof. Specifically, how cooperation is condition precedent to suit and/or recovery and the insurer's right to deny one's claim based on noncooperation. We will turn to specific portions of Chan v. Empire Fire & Marine Ins. Co., 2011 WL 3267765 (N.D. Cal. July 29, 2011) quoting Brizuela v. CalFarm Ins. Co., 116 Cal. App. 4th 578, 587 (Cal. Ct. App. 2004), and Martinez v. Infinity Insurance Company (C.D. Cal. 2010) 714 F.Supp.2d 1057.

### **ii. Claim Decision**

In this portion of the presentation speakers will demonstrate the varying issues that present themselves in the course of claims investigations warranting examinations under oath and how to navigate them. Particularly centering around whether or not a denial of claim is justified based on certain findings. We will consider the concepts of contractual breach, coverage issues, and misrepresentations.

We will also discuss practical matter such as the importance of a post-EUO conference with counsel as well as drafted opinion letters from counsel when making the ultimate decision to deny a claim.

### **iii. Misrepresentations**

Regarding misrepresentations, there can be no loss within the meaning of the policy if, from the standpoint of the insured, the result was expected or intended. See Meyer v. Pacific Employee Insurance Co. (1966) 233 Cal.App.2d 321. Thus, when the insured deliberately caused the loss, it was not an accident. See Merced Ins. Co. v. Mendez (1989) 213 Cal.App.3d 41, 50; Zuckerman v. Underwriters at Lloyds (1954) 42 Cal.App.2d 460, 473.

We will discuss the California Insurance Code Section 533 as well as Abbott v. Western National Indemnity Co. (1958) 165 Cal.App.2d 302, 331, Toberlin v. Canadian Indemnity Company (1964) 61 Cal.2d 638, 648; and United States Fidelity and Guaranty Company v. American Employers Insurance Company (1984) 159 Cal.App.3d 277, 283. This Code Section has often been held to be part of every insurance contract that amounts to an exclusionary clause written into the contract by statute. It reflects the public policy against contracts that exempts anyone from personal responsibilities for willful injury in a policy to prevent insurance coverage from encouraging willful and wrongful conduct.

Materiality of any misrepresentations is a key issue when weighing the information gathered in EUO. It is defined in Insurance Code Section 334 as that which, “is determined not by the event, but solely by the probable and reasonable influences of the facts upon the party to whom the communication is due, informing his estimate of the disadvantage of the proposed contract, or making his inquiries.” The test of materiality is with respect to formation of an insurance contract, but has been used to imply, as well, in the context of the material misrepresentations during the context of the claimed presentation. We will take these legal concepts and break them down with practical examples to better aid the audience to understand the difference between simple misrepresentations and material misrepresentations.

The presentation will focus on California law, which holds that the materiality of a false statement in an insurance claim is determined by the reasonable relevance of the inquiry and if misrepresentation concerns a subject reasonably relevant to the investigation by the insurer, and if a reasonable insurer would attach importance to the facts misrepresented, then it is material. Cummings v. Fire Insurance Exchange (1988) 202 Cal.App.3d 1407, 1417. The distinctions between reasonably relevant are vast, and will be covered in detail.

#### **iv. Genuine Dispute Doctrine**

These considerations also lead to a final discussion of the genuine-issue defense and/or genuine dispute doctrine. This became firmly established in California after the decisions in Fraley v. Allstate Ins. Co. (2000) 81 Cal.App.4th 1282 [97 Cal.Rptr.2d 386], Guebara v. Allstate Ins. Co. (9th Cir. 2001) 237 F.3d 987, and Chateau Chamberay Homeowners Association v. Assoc. International Ins. Co (2001) 90 Cal.App.4th 335 [108 Cal.Rptr.2d 776]. We will discuss these cases, the changes in the current state of the law, and the importance the genuine dispute doctrine in the litigation and appellate context of a claims investigation.