

The Truth About EUOs and Their Use in Third Party Claims

For well over a century, insurance companies have used Examinations Under Oath (EUO) as an effective tool to investigate, verify and expose potentially fraudulent claims as well as to explore coverage issues and defenses.¹

The purpose of an EUO is to enable the insurer to possess itself of all knowledge and all information as to other sources, enable it to decide upon its obligations and to protect it against false claims.

As the use of EUOs to uncover staged accidents and patterns of fraud by medical providers, attorneys and claimants increases, insurance companies will be encouraged to implement innovative techniques to expose insurance fraud schemes.

from first party to third party claimants

Historically, EUOs were primarily used by property and casualty insurers to investigate first party property damage claims, such as arson-for-profit, and were taken in accordance with the specific terms and conditions of the insurance policy between the insurer and its insured. Indeed, the standard first party insurance policy contains a clause that, among other things, requires the insured to cooperate with the insurer's investigation of the insured's claim. This provision, commonly referred to as a "cooperation clause," contractually obligates the insured to appear for an EUO when reasonably demanded. Compliance with the terms of a cooperation clause has been deemed a condition precedent to the commencement of a lawsuit by the insured against its insurer.²

An insured's failure to comply with an insurer's demand for an EUO and produce requested documents relating thereto may be ruled a material breach of policy and may preclude recovery thereunder.³ State courts have uniformly held that an insured's failure to cooperate by not appearing for an EUO, producing relevant documents or answering questions while under oath may, alone, result in the denial of the insured's claim on any one of these independent grounds.

The prevalence and pervasiveness of fraud in the automobile bodily injury sector, however, has resulted in a number of states expanding insurer's rights to demand EUOs of third party claimants seeking first party benefits or personal injury protection, or PIP, under applicable no-fault laws.

The granting of the right to conduct third party EUOs is legally significant in that it abrogates the common law require-



truth

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ture boilerplate narrative reports; make similar referrals to the same specialists for the same reasons and prescribe the same treatments for virtually all suspect claimant's, including physical therapy, chiropractic adjustments, psychological testing and modality treatments.

Moreover, EUOs of third party claimant's serve as a potent tool to expose staged accidents or "add-on" situations where an insurer suspect that an accident was either staged or one or more of the claimant's was not involved in the accident. An EUO may confirm that suspicion. In these situations, the use of statement analysis is particularly useful in tracking a claimants use of pronouns and in determining whether a claimant adopts the story as his or her own and takes possession of the events to demonstrate his or her personal attachments to the story.

production of documents


Generally, in states that permit the taking of third party EUOs, the duty to cooperate analysis is the same as it is with respect to first party EUOs. A third party claimant that fails to attend an EUO or otherwise cooperate is subject to the same denial of coverage as the first party claimant who is in direct privity with the insurer, and his or her claim may be denied for failure to cooperate as well.

Thus, any claimant rightfully subjected to an EUO may be required to produce documents relevant to the claim. In instances involving loss due to fire or theft, state and federal courts have consistently upheld an insurer's right to obtain tax returns and other financial information necessary to explore an insured's financial condition at the time of loss, with an eye toward motive.⁷

Similarly, by analogy, no-fault claimant's submitting claims for lost wages can also be required to produce financial information, including their tax returns, for the purposes of income verification.⁸

the scope of EUOs

An EUO should not be confused with an examination before trail, or EBT. The former is taken pursuant to the terms of an insurance contract between the insurer and its insured or, in jurisdiction permitting



EUOs of third party claimants, pursuant to applicable regulations or law. Moreover, at least with first party claims, there is not action pending at the time an EUO is demanded. By contrast, an EBT is taken once a lawsuit is commenced and is part of pretrial discovery exchanged between the parties in accordance with statute.

The distinction between an EUO and EBT is significant. Being strictly a creature of contract, many jurisdictions have held that an EUO is not governed by the same procedural or evidentiary constraints as an EBT. As such, the scope of an EUO and the right to request documents are far broader than the right under an EBT, once again illustrating its far-reaching potential as a useful tool for insurance companies.

In commenting about the permissible scope of an EUO, the Supreme Court, in *Clafin*⁹, concluded that any relevant query made during an EUO is, by definition, material to an insurance company's investigation into a claim.¹⁰ Accordingly, a claimant's failure to respond to a relevant question may in and of itself provide the basis to deny a claim for failure to cooperate.¹¹

Indeed, an insured has a duty to respond to all relevant inquires and failure to do so may constitute a breach of the claimant's duty to cooperate. Importantly, a claimant may not hide behind the objection of his or her attorney as justification for refusing to respond to questions positioned by an insurer's counsel. One that refuses to answer questions based on the advice of their attorney does so at their own peril.¹²

unavailability of the 5th ammendment

Although occasionally invoked during an EUO, most jurisdictions¹³ have refused to uphold a claimant's right not to answer questions based on a claimed 5th Amendment privilege against self-incrimination.¹⁴ In fact, one may not invoke 5th Amendment grounds during an EUO without breaching the cooperation clause and thereby voiding the insurance policy.¹⁵

In holding that no such constitutional protections are afforded, a claimant seeking recovery under an insurance policy, the

ment of privity of contract between the insurer and claimant.

By virtue of this abrogation, in certain instances, insurance companies may take EUOs of third party claimants even though there is no contract between the parties.⁴

In 1994, for example, the New York State Insurance Department issued an opinion letter which stated that a no-fault automobile insurer has the right to conduct an EUO of a third party claimant submitting a claim for no-fault benefits even though there is no privity between the insurer and the claimant. However, to prevent insurers from conducting EUOs merely to harass or otherwise unnecessarily delay processing of no-fault claims, New York law holds that an insurer may demand an EUO of a third party claimant only when objective indicators of fraud accompany the no-fault claims.⁵ In fact, an insurer's failure to establish objective standards for conduct-

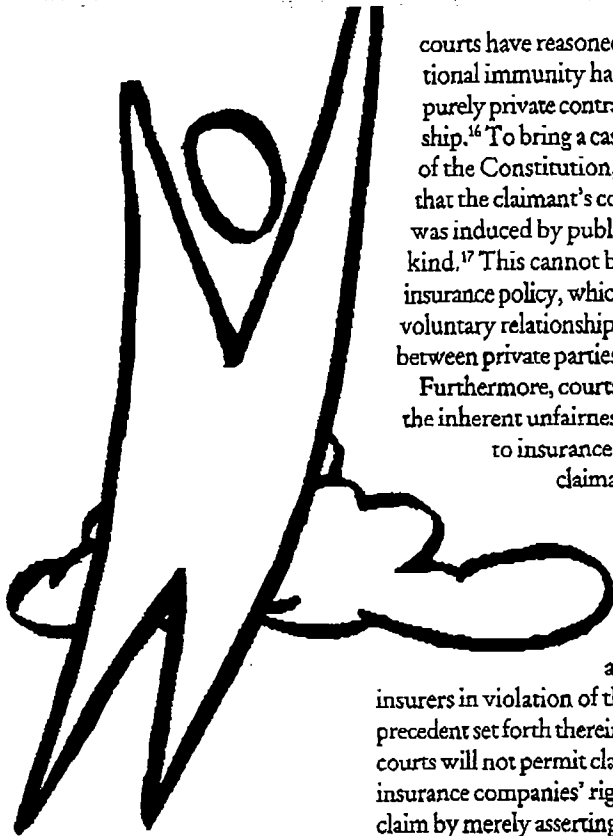
ing EUOs of the third party claimant may subject it to penalties under various state Unfair Claims Practices Acts.⁶

Similar to New York, New Jersey and Massachusetts have also granted its insurers the right to conduct EUOs of third party claimants seeking PIP benefits.⁷ As the systematic and insidious nature of insurance fraud continues to grow within the automobile bodily injury sector, more states are expected to allow their insurers to reasonably demand EUOs of any party seeking PIP coverage, regardless of privity of contract. Accordingly, insurers should consult with their local counsel to determine whether their particular state permits them to conduct third party EUOs.

The extension of insurers' rights to conduct EUOs to third party claimants with whom there is no privity of contract makes a watershed in the battle against insurance fraud. Prior to this extension of insurers' rights, investigations involving third party claimants were unnecessarily constrained. Insurance companies could not compel third party claimants to cooperate with their investigations, or even obtain a simple statement from the claimant. Moreover, counsel for these third party claimants were able to shield their clients from closer scrutiny by hiding behind laws that had the unintended consequence of insulating them from routine investigations that were warranted by the facts.

With the evolution of third party EUOs, however, third party claimants will now be required to appear for an EUO whenever their claims are accompanied by objective indicia of fraud. Consequently, insurance companies will be able to target particular providers and counsel those they believe are engaged in fraud by requiring that the claimant's appear for an EUO.

The ability to conduct an EUO of a number of claimants being treated by the same provider and/or represented by the same counsel can serve as an important tool in exposing a pattern of fraudulent conduct by a medical mill or ring. For instance, a suspect provider may prescribe the same treatments for the same, or different, injuries for each claimant; produce standard diagnoses; manufac-



courts have reasoned that constitutional immunity has no place in a purely private contractual relationship.¹⁶ To bring a case within the reach of the Constitution, it must appear that the claimant's compulsion to testify was induced by public process of some kind.¹⁷ This cannot be said of an insurance policy, which represents a voluntary relationship entered into between private parties.¹⁸

Furthermore, courts are cognizant of the inherent unfairness that would result to insurance companies if claimant's were allowed to commence an action to recover under an insurance policy prior to cooperating with their insurers in violation of the condition precedent set forth therein.¹⁹ Accordingly, courts will not permit claimant's to frustrate insurance companies' rights to investigate a claim by merely asserting a 5th Amendment privilege.²⁰

waiver of rights

To preserve its right to demand an EUO from its insured or claimant, an insurance company must guard against inadvertently waiving its right to conduct one. Waiver occurs when an insurance company denies a claim anytime prior to its conducting an EUO.²¹ Once an insurance company denies coverage, the claimant is excused from further performance under the terms and conditions of the insurance policy, including the right of the insurer to demand an EUO.²² In addition, an insurance company can waive its right to conduct one by taking the EUO of an agent of the insured rather than the insured.

familiarize against fraud

Examinations Under Oath continue to play an integral part in the fight against insurance fraud and serve as one of the most powerful tools available to insurance companies. As the cost of insurance fraud continues to mount, more states are likely to join New York and New Jersey in permitting insurers to conduct EUOs of

third party claimants seeking PIP coverage under no-fault statutes enacted throughout the country. Insurers are better equipped to expose instances of fraud by familiarizing themselves with state laws, consulting with local counsel and applying the statement analysis techniques. ●

footnotes

¹ See *Claffin v. Commonwealth Ins.*, 110 U.S. 81, 3 S. Ct. 507, 28 L. Ed. 76 (1884).

² 16 A.L.R. 5th 432 (1992).

³ *Johnson v. Allstate*, 602 N.Y.S. 2d 876 (2nd Dept. 1993).

⁴ 24233 *Mermaid Realty Corp. v. N.Y. Property Ins. Underwriting Assn.*, 142 A.D.2d 124, 534 N.Y.S. 2d 999 (App. Div. 2nd Dept. 1988).

⁵ See *Id.*

⁶ See e.g., N.Y. Ins. Law 2601

⁷ See *Dluogsz v. Exchange Mut. Ins. Co.*, 176 A.D.2d 1011, 574 N.Y.S.2d.864 (App. Div. 3rd Dept. 1991)

⁸ See *Raymond v. Allstate Ins. Co.* 94 A.D.2d 301, 464 N.Y.S.2d 155 (App. Div. 1st Dept. 1983).

⁹ 110 U.S. 81, 3 S. Ct. 507, 28 L. Ed. 76 (1884).

¹⁰ *Id.*

¹¹ *Twin City Fire Ins. Co. v. Harvey*, 662 F. Supp. 216 (D. Ariz. 1987).

¹² *Evans v. Int'l Ins. Co.*, 562 N.Y.S.2d 692

(App. Div. 1st Dept. 1990); *Pizzirusso v. Allstate Ins. Co.*, 143 A.D.2d 340, 532 N.Y.S.2d 309 (App. Div. 2nd Dept. 1988); *Allison v. State Farm Fire 7 Cas. Co.*, 543 So.2d 661 (Miss. 1989); *Gipps Brewing Corp. v. Central Mfrs. Mut. Ins. Co.*, 147 F.2d 6 (7th Cir. 1945).

¹³ *Weathers v. American Family Mutual Ins.*, 793 F. Supp. 1002 (Kan. 1992).

¹⁴ *Pervis v. State Farm Fire & Cas. Co.*, 901 F.2d 944 (11th Cir. 1990).

¹⁵ *Allstate Ins. Co. v. Longwell*, 735 F. Supp. 1187 (D.D. N.Y. 1990); *Azeem v. Colonial Assur. Co.*, 96 A.D.2d 123, 468 N.Y.S.2d 248 (App. Div. 4th Dept. 1983); *Kisting v. Westchester Fire Ins. Co.*, 290 F.Supp. 141 (W. D. Wis. 1968); *Hudson Tire Mart, Inc. v. Aetna Cas. & Sur. Co.*, 518 F. 2d 671 (2nd Cir. 1975).

¹⁶ *Warrilow v. Supp. Ct. of Ariz.*, 142 Ariz. 250, 689 P.2d. 193 (1984).

¹⁷ *Id.*

¹⁸ See *U.S. v. White*, 322 U.S. 694, 64 S.Ct. 1240, 88 L.Ed. 1542 (1944); *Dyno-Bite, Inc. v. Travelers Cos.*, 80 A.D.2d 471, 439 N.Y.S.2d 558 (App. Div. 4th Dept. 1981).

¹⁹ See *Hickman V. London Assur. Corp.*, 184 Cal. 524, 195 P. 45 (1920).

²⁰ See 24233 *Mermaid Realty Corp. V. N.Y. Property Ins. Underwriting Assn.*, (App. Div. 2nd Dept. 1988)

²¹ See *Raymond v. Allstate Ins. Co.*, (App. Div. 1st Dept. 1983).

²² See also *Foreign Credit Corp. v. Aetna Cas. & Sur. Co.*, (1967).