ARE INSUREDS ENTITLED TO PRIOR RECORDED STATEMENTS BEFORE SUBMITTING TO AN EXAMINATION UNDER OATH?: PRACTICE TIPS FOR INSURANCE DEFENSE COUNSEL

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An Examination Under Oath ("EUO") is a discovery device utilized by insurers, through their counsel, to investigate a first party insurance claim. It is essentially a deposition, with counsel examining the insured under oath in the presence of a court reporter; however, it is prescribed by a condition within the insurance policy itself rather than the rules of court. One issue that frequently comes up, particularly when an insured is represented by counsel, is whether the insured is entitled to a copy of a prior recorded statement. (Often, as a first line of defense, an adjuster or investigator will take a recorded statement of an insured, frequently over the phone, with the insured's permission.) More and more, insureds' attorneys are requesting this prior to submitting their client for an EUO. This article will examine this practice from insurance defense counsel's point of view.

At the outset, it must be noted that it is well-settled that an insured must cooperate with an insurer's investigation, including submitting to an EUO "as often as may be reasonably required". *See* N.J.S.A. 17:36-5.20; *DiFrancisco v. Chubb Ins. Co.*, 283 N.J. Super. 601 (App. Div. 1995). Other than a complete copy of the policy, insureds are not entitled to any other documentation prior to complying with their duties under the policy unless otherwise stated in the policy itself. This includes a copy of a prior recorded statement, be it the audio itself or a written transcript. (Although there are no cases directly on point in New Jersey, several foreign jurisdictions have addressed this issue and sided with the carriers.[1]) Nevertheless, this does not stop insureds' attorneys from requesting it, often upon the threat of not producing their client for an EUO. The question then is: what now?

There are three steps to answering this question. First is whether the carrier actually wants to withhold the statement or simply acquiesce to the request. An EUO is demanded for a reason—namely, because there is some issue with the claim, i.e., an available exclusion depending on the facts, a suspicion of fraudulent conduct, the insured's claim history, etc. The beauty of a claim investigation is that unlike in litigation, the carrier does not have to show its cards and turn over any investigative materials prior to conducting an examination. Thus, most carriers will not want to turn over the prior recorded statement to allow the insured to "get his story straight." While minor inconsistencies are not necessarily indicative of fraud, comparing the insured's EUO testimony with the prior recorded statement for significant factual discrepancies is a critical aspect of the investigation. Therefore, other than the most straightforward of claims (which likely would not necessitate an EUO in any event), the prior recorded statement should not be turned over prior to the EUO.

The second step is to determine how the request should be denied. This, of course, *could* be made in person or over the phone. However, we strongly suggest that it be in writing. Our office has encountered situations where the insured's attorney has claimed that either the adjuster or counsel promised to provide the recorded statement prior to the EUO. Such a commitment arguably could take the matter outside of the requirements of the policy and case law and create a duty to provide the statement. Therefore, the letter to the insured's attorney should confirm that no promise has ever been made to provide a copy of the recorded statement, and expressly state that it will not be provided. The author would suggest citing to the case law in footnote one of this article in support of this position, as well as the cooperation conditions in the policy (which

often explicitly refer to EUOs). Defense counsel also should inquire with the adjuster and/or investigator to confirm that no promise was made to provide the statement prior to counsel being involved. Assuming no promise was made, this should also be set forth in the letter. Defense counsel should also hedge his or her bets and indicate that even if any such representation was made, it is expressly revoked. Finally, the letter should indicate that if the claim is ultimately denied after the investigation is complete, a copy of the prior recorded statement and EUO transcript will be provided to counsel (if the claim is paid, then the issue is moot). This demonstrates good faith and may foster a spirit of cooperation.

The final step is whether the carrier wants to be proactive and file a declaratory judgment action ("DJ"), or simply deny the claim. Generally speaking, unless the claim is particularly large, we would not recommend filing a DJ. The case law suggests that the onus is actually on the insured to file a DJ if they have an issue with the investigation. *See DiFrancisco, supra*, 283 N.J. Super. at 613-14 (citing N.J.S.A. 2A:16-50 to -62).

If the carrier denies the claim, there are three possible outcomes. One, the insured drops the claim (which is a strong indication that he or she had something to hide). Two, the insured and/or counsel indicate a willingness to comply. If this occurs, the author would suggest recommending to the carrier that they conduct the EUO under a reservation of rights. (So as long as there is not a significant delay, it is unlikely that a court will hold that the insured forfeited his or her claim under these circumstances.) The third and final possible outcome is that the insured files either a DJ or a breach of contract action. If it is the former, defense counsel will be in the same position as if the DJ had been proactively filed and the issue can be litigated. If the insured files a breach of contract action, the author would recommend filing a motion to dismiss the Complaint with prejudice in lieu of filing an Answer. Given that most policies condition filing a lawsuit against the carrier upon full cooperation with all duties under the policy, such a lawsuit fails to state a valid claim. In the alternative, defense counsel should request that the complaint be dismissed without prejudice and that the insured not be permitted to reinstate it until he or she has fully complied with all policy conditions (i.e., submitting to an EUO without any strings attached).

In conclusion, insureds are not entitled to a copy of a prior recorded statement as a condition precedent to appearing for an EUO. In most instances, any request for the recorded statement prior to the EUO should be denied. The denial of the request should be made in writing, citing to the relevant policy conditions and case law, as well as denying that any promises to provide the statement were made. With the possible exception of a large claim, the carrier simply should deny the claim and put the ball in the insured's court. These disputes often resolve through communication between counsel. Thus, there is no reason to waste resources litigating an issue that may become moot, particularly if the insured ultimately files a lawsuit, which puts defense counsel and the carrier in the same position as if a proactive DJ had been filed.

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[1] *See, e.g., Morris v. Economy Fire and Cas. Co.*, 848 N.E.2d 663 (Ind. 2006); Brizuela v. Calfarm Ins. Co., 116 Cal. App. 4th 578 (Cal. Ct. App. 2004); *Gerke v. Travelers Cas. Ins. Co. of Am.*, 815 F. Supp. 2d 1190 (D. Or. 2011); *Jones v. Tennessee Farmers Mut. Ins. Co.*, No. M2003-00862-COA-R3-CV, 2004 WL 170359 (Tenn. Ct. App. Jan. 27, 2004).

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