



E-Edition ADJUSTINGTODAY

Adjusters International Disaster Recovery Consulting

FROM THE EDITOR

Examination under oath. The term has an intimidating ring to it.

It refers to the process a policyholder can be required to go through if their insurance carrier has concerns about a claim they have submitted. The insured's obligation to participate is stipulated in the insurance policy.

But just how does such an examination work? What are a policyholder's rights and responsibilities? What constitutes non-compliance and what are the consequences? In the midst of attempting to recover from a loss, these become further matters the insured must address.

They are also among the questions that attorney Edward Eshoo Jr., an expert in assisting policyholders with their insurance claims, discusses in this issue of Adjusting Today. More than interesting, it is essential reading for any insured that could face an examination under oath in attempting to settle an insurance claim.

Sheila E. Salvatore
Editor



Property Insurance 101:

Everything You Always Wanted to Know About Examinations Under Oath – But Were Afraid to Ask!

By Edward Eshoo Jr.

This article is based on years of experience with the issues discussed and is for educational and informational purposes only. It is not intended to convey or to constitute legal advice, and should not be relied upon as legal advice. Readers should consult their own attorneys who are familiar with the applicable law in any particular jurisdiction.

Introduction

Property insurance policies impose certain duties or obligations upon an insured in the event of loss or damage.¹ One such enumerated duty is submitting to an examination under oath (“EUO”), a formal proceeding



during which an insured is orally questioned by a representative of the insurer, usually counsel, under oath and in the presence of a court reporter regarding matters relating to the loss, the claim and the insurance. The insurer's EUO demand raises a host of questions concerning the nature and the extent of an insured's duty to submit to an EUO and the consequence of non-compliance. This article will address those questions.

What is the Purpose of an EUO?

An EUO enables the insurer "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, and to protect it against false claims."²

Insurers use EUOs to investigate suspicious or questionable claims that have a higher possibility of being fraudulent. The EUO request often comes after the claim has been referred to the insurer's special investigative unit, or "SIU," for further investigation. SIU claim representatives are trained to look for suspicious loss indicators that have been associated with fraudulent claims. These indicators or "red flags" enumerated by the insurance industry include: loss reported as suspect by an informant or the authorities; an incendiary or arson fire; pending mortgage foreclosure/default; loss occurring just

after coverage takes effect, just before it ceases, or just after it has been increased; insured contacts agent prior to a loss to verify coverage or the extent of coverage; building for sale at the time of loss; misrepresentation as to the claimed value of the loss or damage; inconsistent loss facts; and insured behavior such as insisting on early settlement, avoiding mail or facsimile, or willing to negotiate rather than substantiate the claim.

Insurers also use EUOs to investigate coverage-related issues, including: misrepresentation in the procurement of the insurance; relationship between insureds; mortgagee and other creditor rights; nature and extent of insurable interest; late notice of loss; residency, vacancy or occupancy of insured property; increase in hazard; and compliance with warranty and protective safeguard endorsements.

And, insurers use EUOs to investigate potential third-party liability for a loss and their right of subrogation.

Does an EUO Differ from a Deposition?

All too often, lawyers agree to represent an insured at an EUO on the mistaken belief it is no different than representing a party at a deposition. Despite their similarity as sworn oral testimony taken before trial,³ depositions and EUOs are different in the following respects.

Insurers use EUOs to investigate suspicious or questionable claims that have a higher possibility of being fraudulent ... coverage-related issues ... [and] potential third-party liability for a loss and their right of subrogation.

- The EUO obligation is contractual and is governed by the express terms of the insurance policy.⁴ Therefore, the rules of civil procedure governing the taking of depositions, such as the three-hour time limit in Illinois or the seven-hour time limit in federal court, do not apply to an EUO.⁵
- Insureds may be represented by counsel at an EUO, though counsel technically is not permitted to participate in the examination either by asking questions or lodging objections.⁶ Still, insured's counsel should inquire at the EUO on the materiality of questions. But, he or she must exercise caution in instructing an insured not to answer questions based on immateriality, as a subsequent determination of materiality may bar the insured's recovery.⁷

While his or her role is limited during the EUO to providing legal advice to the insured when issues arise, counsel's real role is to prepare the insured for the EUO. Effective preparation includes obtaining information about the facts and the circumstances surrounding the loss and the claim. At a minimum, counsel should request from the insurer: all post-loss statements made by the insured, whether hand-written or tape-recorded; post-loss investigative reports; post-loss photographs; post-loss estimates and appraisals of the damaged or destroyed property; pre-loss underwriting inspection reports and photographs; application(s) for insurance; and a certified copy of the insurance policy. However, the insurer's failure to provide information concerning its investigation, including copies of previous statements, is not an excuse for the insured's non-compliance with the EUO requirement.⁸

- EUOs are taken before litigation to augment the insurer's investigation of the claim. In contrast, a deposition is not part of the claim investigation process; it is designed to facilitate the gathering of information once an insurer has made a claim decision, such as a denial of liability.⁹



Romanenko Alexey/Shutterstock.com

- Many courts view the EUO requirement akin to a cooperation clause often included in a liability policy.¹⁰ Cooperation is essential to the insurance relationship because that relationship involves a continuous exchange of information between insurer and insured interspersed with activities that affect the rights of both. The relationship can function only if both sides cooperate. So, unlike a deposition, an insured has a duty to disclose during an EUO all facts within his or her knowledge.¹¹
- Depending on the language of the policy, an insurer may be permitted to question insureds separately in sworn examinations; whereas, it would have no parallel right to do so under the rules of civil procedure.¹² In that regard, many recently drafted property insurance policies expressly provide for the insurer to examine multiple insureds separately and out of the presence of other insureds.¹³ Courts have reached opposite conclusions though where the policy contains no such express provision. Some courts have permitted the insurer to examine each insured separately out of the presence of the other insured, reasoning that the sequestration procedure would lead to more accurate information and would discourage or prevent fraudulent claims.¹⁴ Other courts have permitted an examination to be made of each insured separately but within the presence of the other insured, reasoning that the policy does not mandate requiring insureds to submit to an EUO outside the presence of other insureds and that if the insurer desired to impose such a condition it could have done so by an express term in the policy.¹⁵

- A party in a civil case can invoke his or her Fifth Amendment right against self-incrimination to prevent the disclosure of information that could be used against him or her in a criminal proceeding.¹⁶ Similarly, an insured may invoke the Fifth Amendment during the EUO.¹⁷ Unfortunately, most courts have concluded that the assertion of this constitutional right will not insulate an insured from the obligation to submit to an EUO and to answer material questions during the EUO, characterizing it as an impermissible attempt to utilize the right not only as a shield, but also as a sword.¹⁸ Thus, in deciding whether to submit to an EUO when he or she is a suspect in a criminal prosecution, an insured may have to choose between possibly breaching the policy and forfeiting benefits thereunder or revealing critical information to state or federal authorities which could be used against him or her. If, however, the insurer has been requested to turn over to the authorities information received from the insured pursuant to an arson reporting immunity act, then the insured's exercise of his or her Fifth Amendment right may not be a breach of the EUO requirement.¹⁹
- Absent good cause, a party deponent is rarely required to give more than one deposition.²⁰ On the contrary, most property insurance policies require an insured to submit to an EUO as often as is "reasonably required."²¹ The "reasonably required" language describes how often the insurer can make requests for an EUO, and not the subject,

topic, and scope of the EUO on the one hand, or the length, frequency, or time of the EUO on the other hand. In other words, the number or frequency of EUOs requested must be reasonable under the circumstances.²²

- A deponent is not required to sign the deposition transcript.²³ Conversely, property insurance policies normally require an insured to read and to sign a copy of the EUO transcript to ensure the accuracy of the testimony.²⁴ Absent a request by the insurer to do so, the insured's failure to sign or delay in signing the transcript will not result in a forfeiture of his or her rights under the policy unless the insurer is prejudiced.²⁵ If an insured's only omission is failing to sign the transcript, then the submission to an EUO may constitute substantial compliance with the policy requirement.²⁶
- The submission by an insured to an EUO does not deprive the insurer of the right to a deposition.²⁷ Even though insurers get a second bite at the testimony apple, a deposition should not duplicate the EUO. It should be limited to those areas not covered in the EUO.²⁸

Who Must Submit to an EUO?

Property insurance policies typically require "the named insured," "the insured," "an insured," or "any insured" to submit to an EUO. All persons who fall within the policy's definition of these terms must comply with the EUO requirement, which in a homeowner's policy may be limited to spouses.²⁹

... the insurer's failure to provide information concerning its investigation, including copies of previous statements, is not an excuse for the insured's non-compliance with the EUO requirement.

Recognizing that the EUO obligation is contractual and will be interpreted by courts in favor of the insured if there is ambiguity, some insurers have drafted their policies clearly and broadly to require employees, representatives of the insured, members of the insured's household, or others to appear for an EUO to the extent it is within the insured's power to do so.³⁰

Many insureds retain public insurance adjusters following a loss to assist them in negotiating or effecting the settlement of the claim.³¹ Unless the policy is drafted broadly enough to include them, public insurance adjusters are not required to submit to an EUO.³² Nor is a mortgagee named in a property insurance policy containing a standard mortgagee clause obligated to submit to an EUO.³³

When it is an entity and not a person, such as a corporation or a limited liability company, the named insured may select a representative to be examined, such as an officer, director, shareholder, member, managing agent or key employee. The person chosen must be prepared and knowledgeable regarding the subjects of inquiry to allow the insurer to conduct a meaningful examination.³⁴

Corporate officers, directors, shareholders, and key employees and limited liability company members who submit to an EUO may be required to answer questions about their personal life and to produce personal records such as tax returns, particularly if the policy's post-loss duties also require cooperation in the investigation of the claim.³⁵

When Must the Insured Appear for an EUO?

Absent any time limit in the policy, an insurer must request an EUO within a reasonable time after the loss, which, in turn, means the insured must submit to an EUO within a reasonable time after the request.³⁶ An insurer risks waiving its right to an EUO if it does not request the EUO until after suit is filed.³⁷ An insurer also may waive a breach of the EUO requirement by denying liability on grounds other than failing to submit to an EUO.³⁸

The insurer must give the insured reasonable notice in writing of the EUO, stating a definite time and place where the examination is to be held and designating a representative before whom the examination is to be conducted.³⁹ A defense based on an insured's failure to submit to an EUO is not available if the notice or demand lacks the requisite definiteness. Examples of defective notice include notice sent only to the insured's counsel and notice which shifts to the insured the responsibility to arrange the details of the EUO.⁴⁰

Can the EUO Requirement be Satisfied by the Insured Submitting to a Recorded Interview?

A recorded interview of an insured taken shortly after a loss does not constitute substantial compliance with the policy requirement to submit to an EUO.⁴¹ This is so even if the interview ends with the insured stating he or she truthfully answered the questions asked and even if the insured subsequently verifies the truthfulness of the interview.⁴² Likewise, the insured cannot satisfy the EUO requirement by providing answers to written questions.⁴³

Is the Insured Obligated to Answer Every Question Asked During an EUO and to Produce Every Document Demanded by the Insurer?

Although an insurer may conduct a "searching examination,"⁴⁴ questions posed of an insured during an EUO must be confined to matters "material" to the loss, the claim, and the insurance. The EUO notice is usually accompanied by a demand to produce documents, which is another post-loss duty required of an insured.⁴⁵ Not only must it be material, an insurer's demand for documents (or releases and authorizations if the documents no longer exist) also must be reasonable and specific.⁴⁶ Documents and questions are material if they concern "a subject relevant and germane to the insurer's investigation as it was then proceeding."⁴⁷ For instance, if the insurer has a reasonable basis for suspecting a fraudulent claim, then information and documentation concerning the insured's financial status and prior insurance losses are material to

determine whether the insured had a motive for committing fraud.⁴⁸

What is the Consequence of the Insured's Refusal to Submit to an EUO and/or Refusal to Answer Material Questions Asked During an EUO?

A "material" breach of the EUO requirement can be a bar to suit and/or recovery.⁴⁹ While some courts apply a "strict compliance" standard, most courts, including Illinois courts, apply a "substantial compliance" standard in determining whether a breach of the EUO requirement was material. Substantial compliance depends on (a) whether an insured cooperated or engaged in a pattern of non-compliance and (b) whether an insured provides a reasonable justification, explanation, or excuse for non-compliance.⁵⁰ An insured's reliance on the advice of counsel in refusing to answer questions at an EUO is not a reasonable excuse for failing to comply with the EUO requirement;⁵¹ but, death, physical or mental disability, and deportation are reasonable excuses.⁵² Under a

Can One Insured's Breach of the EUO Requirement be Imputed to Another Insured Who Submitted to an EUO?

An insured's breach of the EUO requirement can be imputed to an innocent co-insured (another insured who complied with the EUO requirement such as a spouse) if (a) the obligation to submit to an EUO is a "joint" as opposed to a "severable" or "independent" obligation among multiple insureds⁵⁵ and (b) the joint obligation provision is consistent with any mandatory minimum level of protection afforded by statute, such as the Standard Fire Policy.⁵⁶

What is the Consequence of Concealment or Misrepresentation During an EUO?

Property insurance policies invariably contain a provision traditionally referred to in the insurance industry as the "fraud and false swearing" clause, which operates to void coverage if an insured intentionally conceals or misrepresents a material fact concerning (a) the coverage, (b) the covered property, (c) the insured's interest in the covered property, or (d) a claim under the coverage.⁵⁷

To work a forfeiture and to void coverage under a "fraud and false swearing" clause, the concealment or misrepresentation must be made by the insured knowingly and willfully regarding a material matter with the intent to deceive and to defraud the insurer.⁵⁸ An innocent mistake or mere inadvertence, however, cannot sustain a charge of fraud or false swearing.⁵⁹ Also, it does not follow that an insured is guilty of fraud or false swearing simply because there is a difference of opinion on the value of insured property, though an insured cannot inflate or exaggerate the value to gain a bargaining advantage in the settlement of the claim.⁶⁰

Materiality of a false statement is not determined by whether the false answer relates to a matter or subject that proves to be decisive or significant in the ultimate disposition of the claim. A false statement is material if it might have affected the attitude and the action of the insurer.⁶¹ It also is material if it may be said to have been calculated either to discourage, mislead, or deflect the insurer's investigation in any



oleandra/Shutterstock.com

substantial compliance standard, the non-compliance may be cured, either by abating or staying litigation, or by a deposition, provided the insurer was not substantially prejudiced.⁵³ An insured who believes it has a reasonable basis for refusing to comply with the insurer's demand for an EUO should promptly file a declaratory judgment action seeking a determination of its rights and obligations under the policy.⁵⁴

area that might seem to the insurer, at that time, a relevant or productive area to investigate.⁶²

Conclusion

An EUO can be an effective tool in the investigation and the resolution of a property insurance claim.

Yet, the escalating number of EUO cases throughout the country appear to be more about strategy than

truth.⁶³ This cottage industry of EUO litigation shows that wrong advice given by counsel to an insured can lead to a material breach of the EUO requirement, resulting in a forfeiture of coverage. Because an EUO is not just another deposition, an insured's counsel must be well-versed on the nature and the extent of the contractual duty of an insured to submit to an EUO and the consequence of non-compliance.

¹ Insurance Services Office, Inc. ("ISO") Homeowners ("HO") Form 00 03 10 00 at p. 13 of 22; ISO Commercial Property ("CP") Form 00 10 04 02 at p. 9 of 14.

² *Clafin v. Commonwealth Ins. Co.*, 110 U.S. 76, 82 (1884).

³ Like deposition testimony, EUO testimony can impeach an insured if his or her testimony at trial is inconsistent or conflicts with such testimony. *Hart v. Mechanics & Traders Ins. Co.*, 46 F.Supp. 166 (W.D.La. 1942).

Like deposition testimony, EUO testimony also is an admission of a party opponent, and admissible as direct evidence in support of an insurer's affirmative defenses. *McIntosh v. Eagle Fire Ins. Co. of N.Y.*, 325 F.2d 99 (8th Cir. 1963); *Lentz v. Metro. Prop. & Cas. Ins. Co.*, 2001 WL 38934 (Mass. App. Ct.).

⁴ *Ahmadi v. Allstate Ins. Co.*, 22 P.3d 576 (Colo. Ct. App. 2001).

⁵ *Nat'l Athletic Sportswear, Inc. v. Westfield Ins. Co.*, 528 F.3d 508 (7th Cir. 2008).

⁶ See *Gordon v. St. Paul Fire & Mar. Co.*, 163 N.W. 956 (Mich. 1917); *Shelter Ins. Cos. v. Spence*, 656 S.W.2d 36 (Tenn. Ct. App. 1983).

⁷ In *Twin City Fire Ins. Co. v. Harvey*, 662 F.Supp. 216 (D. Ariz. 1987), the district court declined to find that the insured breached the EUO requirement in failing to answer certain questions because the insurer's counsel failed to explain during the EUO the relevance and the materiality of the questions.

⁸ See *Lester v. Allstate Ins. Co.*, 743 F.3d 469 (6th Cir. 2014); *Morris v. Econ. Fire & Cas. Co.*, 848 N.E.2d 663 (Ind. 2006). Nor is the insurer's refusal to execute a confidentiality agreement that imposes limitations on the insurer's use of the insured's personal information an excuse for the insured's non-compliance with the EUO requirement. *Safeco Ins. Co. of Oregon v. Masood*, 330 P.3d 61 (Or. Ct. App. 2014).

⁹ See *Zavakos Enters, Inc. v. St. Paul Surplus Lines Ins. Co.*, 2006 WL 83502 (S.D. Ohio); *Nationwide Ins. Co. v. Nilsen*, 745 So.2d 264 (Ala. 1998).

¹⁰ See, e.g., *Staples v. Allstate Ins. Co.*, 295 P.3d 201 (Wash. 2013).

¹¹ See, e.g., *Brizuela v. CalFarm Ins. Co.*, 10 Cal.Rptr.3d 661 (Cal. Ct. App. 2004); *Piser v. State Farm Mut. Auto Ins. Co.*, 405 Ill.App.3d 341 (1st Dist. 2010).

¹² See *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So.2d 300 (Fla. Dist. Ct. App. 1995).

¹³ ISO HO Form 00 03 10 00 at p. 13 of 22 ("As often as we reasonably require. . . [s]ubmit to an examination under oath, while not in the presence of another 'insured'. . ."); ISO CP Form 00 10 04 02 at p. 9 of 14 ("We may examine any insured under oath, while not in the presence of any other insured. . .").

¹⁴ See *State Farm Fire & Cas. Co. v. Tan*, 691 F. Supp. 1271 (S.D. Cal. 1988); *Lidawi v. Progressive County Mut. Ins. Co.*, 112 S.W.3d 725 (Tex. App. 2003).

¹⁵ See *U.S. Fid. and Guar. Co. v. Welch*, 854 F.2d 459 (11th Cir. 1988); *U.S. Fid. & Guar. Co. v. Hill*, 722 S.W.2d 609 (Mo. Ct. App. 1986).

¹⁶ See, e.g., *Cordeck Sales, Inc. v. Constr. Systems, Inc.*, 382 Ill. App.3d 334 (1st Dist. 2008).

¹⁷ The insurer's right to require an insured to submit to an EUO does not include the right to require the insured to submit to a polygraph test. *Mize v. Hartford Ins. Co.*, 567 F.Supp. 550 (W.D.Va. 1982); *Walker v. Tenn. Farmers Mut. Ins. Co.*, 568 S.W.2d 103 (Tenn. Ct. App. 1977). Nor does it include the right to conduct a warrantless search of an insured's residence. *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340 (7th Cir. 1975).

¹⁸ See *Warrilow v. Superior Court of Arizona*, 689 P.2d 193 (Ariz. Ct. App. 1984); *Hickman v. London Assur. Corp.*, 195 P.45 (Cal. 1920); *Tarciani v. Nationwide Mut. Ins. Co.*, 822 A.2d 341 (Conn. App. Ct. 2003); *Abraham v. Farmers Home Mut. Ins. Co.*, 439 N.W.2d 48 (Minn. 1989).

¹⁹ *Weathers v. Am. Fam. Mut. Ins. Co.*, 793 F.Supp. 1002 (D.Kan. 1992) (court's instruction to jury allowed it to consider the insured's constitutional rights in determining whether the insured breached the EUO requirement).

²⁰ Under Federal Rule of Civil Procedure 30 (a) (2) (ii) for example, a party must obtain leave of court to take a second deposition.

²¹ ISO HO Form 00 03 10 00 at p. 13 of 22 ("As often as we reasonably require. . . submit to an examination under oath. . ."); ISO CP Form 00 10 04 02 at p. 9 of 14 ("We may examine any insured under oath. . . at such times as may be reasonably required. . .").

²² *Foster v. State Farm Fire and Cas. Co.*, 674 F.3d 663 (7th Cir. 2012).

²³ Under Illinois Supreme Court Rule 207(a) and Federal Rule of Civil Procedure 30(f), the deponent is afforded the right to examine the deposition after it has been transcribed, which right may be waived.

²⁴ ISO HO Form 00 03 10 00 at p. 13 of 22 ("As often as 'we' reasonably require. . . submit to an examination under oath, . . . and sign the same."); ISO CP Form 00 10 04 02 at p. 9 of 14 ("In the event of an examination, an insured's answers must be signed."); Country Mutual Ins. Co. Home Insurance Policy Form at pp. 29-30 of 35 ("As often as 'we' reasonably require. . . submit to examinations under oath, . . . and sign the same within a reasonable amount of time of our' request, after having been informed: (1) of 'your' right to counsel; and (2) that 'your' answers may be used against 'you' in later civil proceedings or criminal proceedings;").

²⁵ See *Wood v. Allstate Ins. Co.*, 21 F.3d 741 (7th Cir. 1994); *Varda, Inc. v. Ins. Co. of N.A.*, 45 F.3d 634 (2nd Cir. 1995); *Campuzano v. Sentinel Ins. Co.*, 2015 WL 520901 (S.D.Tex.).

²⁶ See, e.g., *Herman v. Safeco Ins. Co. of Am.*, 17 P.3d 631 (Wash. Ct. App. 2001).

²⁷ *Joe's Mkt. Fish, Inc. v. Scottsdale Ins. Co.*, 1998 WL 851504 (N.D. Ill.); *Kamin v. Central States Fire Ins. Co.*, 22 F.R.D. 220 (E.D.N.Y. 1958).

²⁸ *Jones v. State Farm Fire & Cas. Co.*, 129 F.R.D. 170 (N.D. Ind. 1990).

²⁹ See, e.g., *GuideOne Mut. Ins. Co. v. Rock*, 2009 WL 1854452 (N.D. Miss.); *State Farm Fire & Cas. Co. v. Miceli*, 164 Ill. App. 3d 874 (1st Dist. 1987).

³⁰ See ISO HO Form 00 03 10 00 at p. 13 of 22 ("These duties must be performed either by you, an 'insured' seeking coverage, or a representative of either."). See also *West v. State Farm Fire and Cas. Co.*, 868 F.2d 348 (9th Cir. 1990); *Barrie v. Great N. Ins. Co.*, 2008 WL 3984159 (E.D. Pa.).

³¹ The Illinois Insurance Code defines a public adjuster as a person, who for compensation, acts or aids an insured in adjusting a claim arising under an insurance contract insuring the real or personal property of the insured. 215 ILCS 5/1510.

³² See *Palace Cafe v. Hartford Fire Ins. Co.*, 97 F.2d 766 (7th Cir. 1938); *H.T. Cain v. U.S. Fire Ins. Co.*, 2008 WL 2094235 (S.D. Miss.); *Florida Gaming Corp. v. Affiliated FM Ins. Co.*, 502 F. Supp.2d 1257 (S.D. Fla. 2007). Although a public adjuster may not be required to submit to an EUO, a public adjuster can attend an EUO unless the policy expressly excludes him or her from attending. See *Navaz v. Universal Prop. & Cas. Co.*, 91 So.2d 187 (Fla. Dist. Ct. App. 2012).

³³ See *U.S. Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229 (1986). A standard mortgagee clause grants special protection for the interest of a mortgagee named in the policy, in effect setting up a separate contract between the insurer and the mortgagee. Among other things, it grants continuing coverage for the benefit of the mortgagee in the event the policy is voided by some act of the insured, such as arson. See 4 *Couch on Insurance* 3d sec. 65:8 et. seq. (2018).

³⁴ See, e.g., *2000 Leslie Condo Ass'n, Inc. v. QBE Ins. Corp.*, 965 F.Supp.2d 1386 (S.D. Fla. 2013); *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F.Supp.2d 1312 (M.D.Fla. 2002).

³⁵ See, e.g., *Green v. St. Paul Fire and Mar. Ins. Co.*, 691 F.Supp. 700 (S.D.N.Y. 1988); *Miracle Sound, Inc. v. N.Y. Prop. Ins. Underwriting Ass'n*, 564 N.Y.S.2d 346 (N.Y. App. Div. 1991). But see *Glados, Inc. v. Reliance Ins. Co.*, 888 F.2d 1309 (11th Cir. 1987); *Double G.G. Leasing, LLC v. Underwriters at Lloyd's, London*, 2008 WL 2345205 (Conn. Super. Ct.).

³⁶ See *Marquis v. Farm Fam. Mut. Ins. Co.*, 628 A.2d 644 (Me. 1993); *Home Ins. Co. v. M.T. Olmstead*, 355 So.2d 310 (Miss. 1978).

³⁷ See *Crowley v. North British & Mercantile Ins. Co.*, 70 F.Supp. 547 (4th Cir. 1947); *Willis v. Huff*, 736 So.2d 1272 (Fla. Dist. Ct. App. 1999); In re Cypress Texas Lloyds, 437 S.W.3d 1 (Tex. App. 2011).

- ³⁸See, e.g., *Kerr v. State Farm Fire & Cas. Co.*, 934 F.Supp.2d 853 (M.D. La. 2012); *Ganz v. Pub. Serv. Mut. Ins. Co.*, 551 N.Y.S.2d 437 (N.Y. Sup. Ct. 1989).
- ³⁹See *Kisting v. Westchester Fire Ins. Co.*, 416 F.2d 967 (7th Cir. 1969); *Abudayeh v. Fair Plan Ins. Co.*, 481 N.Y.S.2d 711 (N.Y. App. Div. 1984).
- ⁴⁰See, e.g., *Adamowicz v. N. Country Ins. Co.*, 2009 WL 4348479 (N.Y. App. Div.); *Weber v. Gen. Acc. Fire & Life Assur. Corp.*, 462 N.E.2d 422 (Ohio Ct. App. 1983).
- ⁴¹See *Pervis v. State Farm Fire and Cas. Co.*, 901 F.2d 944 (11th Cir. 1990); *Fineberg v. State Farm Fire and Cas. Co.*, 438 S.E.2d 754 (N.C. Ct. App. 1994); *State Farm Gen. Ins. Co. v. Lawlis*, 773 S.W.2d 948 (Tex. App. 1984).
- ⁴²See *Knowledge A-Z, Inc. v. Sentry Ins. Co.*, 857 N.E.2d 411 (Ind. Ct. App. 2007); *Downie v. State Farm Fire and Cas. Co.*, 929 P.2d 484 (Wash. Ct. App. 1997).
- ⁴³See *Saucier v. U.S. Fid. and Guar. Co.*, 765 F.Supp. 334 (S.D. Miss. 1991); *Ransom v. Selective Ins. Co.*, 550 A.2d 1006 (N.J. 1998).
- ⁴⁴*Gipps Brewing Corp. v. Cent. Mfrs. Mut. Ins. Co.*, 147 F.2d 6, 13 (7th Cir. 1945).
- ⁴⁵ISO HO Form 00 03 10 00 at p. 13 of 22 ("As often as we reasonably require... [p]rovide us with records and documents we request and permit us to make copies."); ISO CP Form 00 10 04 02 at p. 9 of 14 ("As often as may be reasonably required, permit us to... examine your books and records.")
- ⁴⁶See *Chavis v. State Farm Fire and Cas. Co.*, 346 S.E.2d 496 (N.C. 1986).
- ⁴⁷*Fine v. Bellafonte Underwriters Ins. Co.*, 725 F.2d 179, 183 (2nd Cir. 1984).
- ⁴⁸See *Woods*, 21 F.3d at 747; *Powell v. U.S. Fid. & Guar. Co.*, 88 F.3d 271 (4th Cir. 1996); *Deguchi v. Allstate Ins. Co.*, 2008 WL 1780271 (D. Haw.); *Maurice v. Allstate Ins. Co.*, 570 N.Y.S.2d 654 (N.Y. App. Div. 1991); *Dlugosz v. Exch. Mut. Ins. Co.*, 574 N.Y.S.2d 864 (N.Y. App. Div. 1990).
- ⁴⁹See 13 *Couch on Insurance* 3d sec. 196:22-196:31 (2018).
- ⁵⁰See, e.g., *Woltman v. Am. States Ins. Co.*, 2006 WL 1305236 (C.D. Ill.); *Hartshorn v. State Farm Fire Ins. Co.*, 361 Ill. App.3d 731 (2nd Dist. 2005); *Patel v. Allstate Ins. Co.*, 211 Ill. App.3d 324 (1st Dist. 1991); *Piro v. Pekin Ins. Co.*, 162 Ill. App.3d 225 (1st Dist. 1987); *Horton v. Allstate Ins. Co.*, 125 Ill. App.3d 1034 (1st Dist. 1984). See also *Solano v. State Farm Fla. Ins. Co.*, 15 So.3d 367 (Fla. 4th DCA 2014).
- ⁵¹*Abdelhamid v. Fire Ins. Exch.*, 106 Cal. Rptr. 3d 26 (Cal. Ct. App. 2010); *Evans v. Int'l Ins. Co.*, 562 N.Y.S.2d 692 (N.Y. App. Div. 1990). Nor is a refusal to submit to an EUO unless it is a stenographic recording, as opposed to an audio recording, a reasonable excuse. *N.C. Farm Bur. Mut. Ins. Co. v. Lilley*, 2018 WL 414135 (N.C. App.).
- ⁵²See *Roberto v. Hartford Fire Ins. Co.*, 177 F.2d 811 (7th Cir. 1949); *Blackburn v. State Farm Fire & Cas. Co.*, 329 S.E.2d 284 (Ga. Ct. App. 1985). Postponement due to unavailability of counsel is not a failure to submit to an EUO, and thus is a reasonable excuse. *McCullough v. Travelers Cos.*, 424 N.W.2d 542 (Minn. 1988).
- ⁵³See *Crowell v. State Farm Fire & Cas. Co.*, 259 Ill. App. 3d 456 (5th Dist. 1994). Under ISO HO Form 00 03 10 00, there is no duty to provide coverage under the policy if the failure to submit to an EUO is "prejudicial" to the insurer.
- ⁵⁴See *DiFrancisco v. Chubb Ins. Co.*, 662 A.2d 1027 (N.J. Super. Ct. App. Div. 1995).
- ⁵⁵See *Miles v. Great N. Ins. Co.*, 2009 WL 2998529 (D. Mass.). See, e.g., *Aurelius v. State Farm Fire and Cas. Co.*, 384 Ill. App.3d 969 (2nd Dist. 2008); *Wasik v. Allstate Ins. Co.*, 351 Ill. App.3d 260 (2nd Dist. 2004).
- ⁵⁶Many states have adopted the 1943 New York Standard Fire Policy ("SFP") as the minimum coverage upon which an insured can rely under any fire insurance policy issued in that state. Any provision which provides less coverage than the SFP is unenforceable. See, e.g., *Lundquist v. Allstate Ins. Co.*, 314 Ill. App.3d 240 (2nd Dist. 2000). The SFP requires "the insured" to submit to an EUO. Courts have concluded that the term "the insured" as used throughout the SFP indicates an intent to provide "several" or "independent" obligations as to each insured, such that the wrongful acts of one insured defeats the rights of the malleasant insured, but not those of an innocent co-insured. See, e.g., *Streit v. Metropolitan Cas. Ins. Co.*, 863 F.3d 779 (7th Cir. 2017); *Century-National Ins. Co. v. Garcia*, 51 Cal.4th 564 (Cal. 2011); *Icenhour v. Cont'l Ins. Co.*, 365 F.Supp.2d 743 (S.D.W. Va. 2004); *Volquardson v. Hartford Ins. Co.*, 647 N.W.2d 599 (Neb. 2002).
- ⁵⁷ISO HO Form 00 03 10 00 at p. 13 of 22; ISO CP Form 00 10 04 02 at p. 9 of 14.
- ⁵⁸*Clafin*, 110 U.S. at 82. See *Weininger v. Metro. Fire Ins. Co.*, 359 Ill. 584 (1935).
- ⁵⁹See, e.g., *Harold J. Warren Co. v. Fed. Mut. Ins. Co.*, 386 F.2d 579 (1st Cir. 1967); *Sentry Ins. Co. v. Rice*, 2011 WL 2965799 (C.D. Ill.).
- ⁶⁰See, e.g., *Trzcinski v. Am. Cas. Co.*, 953 F.2d 307 (7th Cir. 1992); *Lykos v. Am. Home Ins. Co.*, 609 F.2d 314 (7th Cir. 1979); *Transp. Ins. Co. v. Hamilton*, 316 F.2d 294 (10th Cir. 1963); *Nagel-Taylor Auto. Supplies, Inc. v. Aetna Cas. & Sur. Co. of Ill.*, 81 Ill. App.3d 607 (4th Dist. 1980).
- ⁶¹See *Fine*, 725 F.2d at 183-184.
- ⁶²See *Barth v. State Farm Fire & Cas. Co.*, 228 Ill.2d 163 (2008); *A & A Inc. v. Great Cent. Ins. Co.*, 259 Ill. App.3d 73 (1st Dist. 1994); *Passero v. Allstate Ins. Co.*, 196 Ill. App.3d 602 (1st Dist. 1990).
- ⁶³*Whistler's Park, Inc. v. Florida Ins. Guar. Ass'n*, 90 So.3d 841 (Fla. Dist. Ct. App. 2012).

ABOUT THE AUTHOR



Edward Eshoo Jr., Esq.

Mr. Eshoo is a lawyer with the Merlin Law Group. Since 1990 he has dedicated his practice to assisting policyholders with their insurance claims. He has successfully coordinated the investigation of over 1,000 claims involving insurance recovery and related litigation. He has negotiated, adjusted and/or tried first-party and third-party claims from causes ranging from fire, explosion, tornado, hurricane, hail, theft, vandalism, frozen plumbing/water damage and mold, to defective construction and construction products.

Adjusting Today Basis for Institutes CE Courses

The Institutes, the leader in providing knowledge solutions for risk management and the property/casualty insurance industry, offers continuing education courses based on technical information compiled from issues of *Adjusting Today*. The courses — "Valuing a Property Insurance Claim" and "Natural Disasters: Coverage Issues" — include seven modules each and are approved for credit by insurance departments in most states. They are offered to property insurance producers, adjusters or both, depending on the state, for up to three continuing education credit hours per course. More information is available at CEU.com.



CORPORATE OFFICE

126 Business Park Drive
Utica, New York 13502
800.382.2468
Outside U.S. (315) 797.3035
FAX: (315) 272.2054

Editor@AdjustingToday.com

WEB ADDRESSES

AdjustersInternational.com
AdjustingToday.com

PUBLISHER

Ronald A. Cuccaro, SPPA

EDITOR

Sheila E. Salvatore

ADJUSTING TODAY is published as a public service by Adjusters International, Inc. It is provided for general information and is not intended to replace professional insurance, legal or financial advice for specific cases.

Copyright © 2018 Rising Phoenix Holdings Corporation. All Rights Reserved. Adjusters International and the AI logo are registered trademarks of Rising Phoenix Holdings Corporation.

Follow *Adjusting Today* on Facebook & Twitter:

Facebook.com/AdjustersInternational Twitter.com/AdjustingToday AT18 2007-E