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Property Insurance Law

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Examinations Under Oath: The Better Standard for Policyholder Noncompliance

Standard form property insurance policies contain itemized post-loss duties that policyholders are required to discharge in connection with their claim. Among these duties is the requirement that a policyholder cooperate with its insurer in the investigation and settlement of the claim. Additionally, if requested by the insurer, the insured may be required to submit to an examination under oath and produce documents related to the claim. The typical policy provision is phrased as follows:

> We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

See generally, State Farm Fire & Cas. Ins. Co. v. Miceli, 164 Ill. App. 3d 874, 883 (1st Dist. 1987); *W. World Ins. Co. v. Johnson,* 2007 WL 1100777, at *2 (S.D. Ill. Apr. 12, 2007).

The purpose of the examination under oath provision was set forth by the Supreme Court in *Claflin v Commonwealth Ins. Co.*, 110 US 81 (1884). The Court stated that the object of the policy provision is to enable the insurer to possess itself of all knowledge and information regarding the facts material to its rights, to enable it to decide upon its obligations. and to protect against false claims. In regard to the scope of questioning, the Court stated that every interrogatory that is relevant and pertinent in such examination is material in the sense that a true answer to it is the substance of the obligation of the insured.

Historical Approach to Noncompliance — Substantial Prejudice

Illinois courts have historically examined an insured's failure to appear for an examination under oath or failure to produce documents requested under the cooperation clause analysis, which examines whether the carrier was prejudiced by the insured's non-cooperation. For example, in *Piro v. Pekin Ins. Co.*, 162 Ill. App. 3d 225 (5th Dist. 1987), the insured's company was destroyed by fire. *Piro,* 162 Ill. App. 3d. at 226. Under the terms of the fire insurance policy, Pekin Insurance was allowed to examine and audit the relevant books and records of the insured and to request that the insured sit for an examination under oath. *Id*. While the insured did appear, he failed to produce requested documents and also refused to answer questions concerning the location, his rental properties, and the concerns of other businesses he owned claiming those matters were not relevant. *Id*. at 226-227. The insured subsequently filed suit demanding the proceeds of the policy. *Id*. at 227.

In its summary judgment motion, Pekin argued that the insured's actions at the examination under oath and refusal to produce documents amounted to a breach of a condition precedent to recovery under the policy. *Id*. In its response, the

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insured provided documents he claimed were responsive to the requested information. *Id*. The circuit court granted Pekin Insurance's motion and the insured appealed. *Id*.

In reversing the circuit court, the appellate court focused on the aspects of the insured's conduct it found to be cooperative. The court bolstered this viewpoint by citing to other jurisdictions where insureds were allowed to prosecute their actions to judgment without complying with the insurers' pre-suit requests for documentation and examination under the respective policies. *Id*. at 228. The appellate court noted that it was undisputed that the insured eventually provided documentation responsive to Pekin's requests. *Id*. The court took the position that if the proofs furnished by the insured are not satisfactory, the insured is entitled to be advised, and the insurer is bound to inform him of any want of compliance, and give the insured the opportunity to cure the objection. *Id*. at 229.

The appellate court held that the procedure followed in *C-Suzanne Beauty Salon, Ltd. v. General Ins. Co. of America*, 574 F. 2d 106 (2d Cir. 1978), was instructive. In *C-Suzanne*, the insurer moved for summary judgment on the basis that the insured failed to submit to examination under oath. *C-Suzanne Beauty Salon,* 574 F. 2d 106. The court denied the motion, and the insured was ordered to sit for an examination under oath. *Id*. The insurer was advised that it could renew its motion provided it could show that the delay prejudiced the investigation. *Id*. The insurer renewed its motion, which the court denied on the basis that the insurer failed to show any prejudice. *Id*. Applying *C-Suzanne*, requiring a showing of prejudice, the *Piro* court reversed the trial court. *Piro,* 162 Ill. App. 3d. at 230.

The cooperation clause standard was also discussed in great detail in the matter of *Piser v. State Farm Mt. Aut. Ins. Co.*, 405 Ill. App. 3d 341 (1st Dist. 2010). In *Piser*, the insured filed a claim related to a stolen motorcycle. *Piser,* 405 Ill. App. 3d at 343. State Farm denied the claim after the insured failed to provide requested documentation or to sit for an examination under oath. *Id*, at 344. The insured filed suit claiming breach of contract and vexatious and unreasonable delay pursuant to section 155 of the Insurance Code. *Id*. at 343. State Farm moved to dismiss based on its policy's cooperation clause. *Id*. The circuit court granted the motion, and the insured appealed. *Id*.

While the appellate court reviewed the importance of the cooperation clause to the insurer's investigation, it further noted that, "it is well settled law that 'unless the alleged breach of the cooperation clause substantially prejudices the insurer in defending the primary action, it is not a defense under the contract. This is the test to be employed in our courts in cases where the issue is a breach of the cooperation clause.'" *Id*. at 347. The court found that the insured's efforts to cooperate were negligible. *Id*. State Farm's showing of prejudice was the basis for the court's holding that it clearly set forth a defense barring the insured's claim. *Id*. at 348.

Analysis Under Condition Precedent Standard

As discussed, *supra,* standard property insurance policies contain "post-loss duty" provisions that enumerate various duties with which a policyholder is required to comply in order to present a claim and be entitled to coverage, including the requirement to sit for an examination under oath. Additionally, most policies also contain language requiring compliance with all policy provisions as a condition precedent to bringing suit on the policy. The standard language usually tracks as follows:

No one may bring legal action against us under this Coverage Part unless:

1. There has been full compliance with all of the terms of this Coverage Part; and

2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

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Omega Demolition Corp. v. Travelers Prop. Cas. of Am., 2015 WL 3857341, at *1 (N.D. Ill. June 19, 2015).

Seemingly then, if a policyholder refuses to appear for or complete an examination under oath, such a failure would constitute noncompliance with the "legal action against us" provision, which is a condition precedent to legal action on the policy. Recently, Illinois state and federal courts have begun to re-examine the substantial prejudice approach and, instead, focus on the plain language of the policy.

In *Allstate Ins. Co. v. Mack*, 2016 Ill. App. (1st) 141171, Allstate filed a declaratory judgment action alleging that the insured breached the contract by refusing to execute HIPAA authorizations for medical records and to appear for an examination under oath. *Allstate*, 2016 Ill. App. (1st) 141171 at ¶ 1. The insured conceded that she did not sit for the requested examination under oath and that she had failed to execute the records authorization. The court granted summary judgment in favor of Allstate, and the insured appealed. *Id*. at ¶ 3.

On appeal, the insured claimed that the American Arbitration Act precluded her from complying with Allstate's discovery requests. *Id*. at ¶ 1. The court found that the issue on appeal was not a discovery dispute, but whether the insured was in breach of the contract for, in part, failing to sit for an examination under oath. *Id*. at ¶ 5. It held that Allstate's requests for executed authorizations and for the insured to submit for the examination under oath were expressly provided for in the insurance policy. *Id*. at ¶ 7. Since the policyholder admitted that she had failed to comply with Allstate's requests, the court found that the insured had breached the terms of the policy and was not entitled to pursue her insurance claim. *Id*.

In affirming the trial court's decision, the appellate court ruled that Allstate was not required to make a showing of prejudice; rather, the analysis focused on the plain language of the contract and the insured's failure to comply with the same. The Seventh Circuit Court of Appeals has noted that the "Duties After Loss" provision is not a cooperation clause that requires only reasonable assistance with the investigation of a claim, but is "an entirely separate condition that explicitly requires the policyholder to perform specific duties." *Foster v. State Farm Fire & Cas. Co.*, 674 F.3d 663, 667 (7th Cir. 2012) citing *Morris v. Economy Fire & Cas. Co.*, 848 N.E.2d 663, 666 (Ind. 2006); see also *In re Intercontinental Sec. Corp.*, 62 B.R. 16 (N.D. Ill. 1986) (refusal to complete the examination under oath constituted a failure to comply with a condition precedent for recovery under the terms of the policy).

Conclusion

While traditionally analyzed under the "substantial prejudice" test of a policy's cooperation clause, an insured's failure to appear for or complete an examination under oath also constitutes a breach of the policy's "post-loss duties" provision. Compliance with this provision is a condition precedent to a policyholder's legal action against its insurer under the policy's "legal action against us" provision. In the wake of *Allstate v. Mack*, and accompanying federal cases, when confronted with an insured's failure to sit for an examination under oath or refusal to produce requested documentation, an insurance carrier should include the insured's breach of its post-loss duty obligations under the policy as a basis for declining coverage and should consider moving to dismiss any ensuing legal action for failure of condition precedent.

About the Author

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