SMITH FREED & EBERHARD P.C.

OREGON LAW UPDATE

case in point...

Examination Under Oath may be a Requirement for Insured to File Suit

From the desk of Jeff Eberhard: An examination under oath ("EUO") is one of the most useful tools available to insurers to investigate a claim. However, what happens when the insured refuses or delays the EUO and files suit? A federal trial court recently addressed the issue.

Claims Pointer: Property insurance policies typically set forth an insurer's right to demand an EUO, along with all records and documents to support a claim. An EUO enables an insurer to obtain information and documentation regarding the facts, its obligations, and to detect and protect against potentially false claims. If an insurer, in good faith, requests an EUO and the insured refuses or fails to attend, then the insured may be prevented from filing a lawsuit against the insurer.

Smith v. Mut. of Enumclaw Ins. Co., 1:13-CV-1201-CL, 2014 WL 584609 (D. Or. Feb. 12, 2014)

Michael and Walter Smith's home was burglarized resulting in the theft of their personal property. The Smiths had a homeowners policy with Mutual of Enumclaw ("MOE") and made a claim for the stolen property. During its investigation into the Smiths' claim, MOE requested that the Smiths submit to an EUO as provided by the terms of their homeowners policy. An EUO is a formal proceeding (much like a deposition) during which an insured, under oath and in the presence of a court reporter, is questioned by an insurance company representative. For reasons not stated in the opinion, the EUO process dragged on for more than six months and the Smiths filed suit against MOE alleging they were due benefits under their homeowners insurance policy and had a right to attorney fees under Oregon's attorney fee statute, ORS 742.061.

In response to the Smiths' complaint, MOE filed a motion for summary judgment claiming that, under the terms of the insurance policy, the Smiths were required to submit to an EUO and failed to do so. MOE argued that under the policy, the EUO provision is a requirement (or condition precedent) to coverage and that because of the Smiths' failure to attend the EUOs, they were barred from filing a lawsuit. In response, the Smiths claimed that they attempted to make themselves available for EUOs but that delay and lack of action on MOE's part required them to file suit to obtain relief. The relevant policy provisions were as follows:

> "SECTION 1—CONDITIONS
>
> 2. Your Duties after Loss. In case of a loss to covered property, you must see that the following are done:
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> * * *
>
> f. as often as we reasonably require:
>
> * * *
>
> (3) submit to examination under oath, while not in the presence of any other "insured", and sign the same;
>
> * * *
>
> 8. Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within two years after the date of loss."

The federal district court, interpreting Oregon law, held that submission to an EUO is required under the policy terms as a condition precedent. Thus, the Smiths could not bring suit until they performed that requirement. The Court dismissed the Smiths' argument that ORS 742.061 allows them to file suit any time settlement of a first party claim is not made within six months of the proof of loss. The Court stated that the statute clearly sets forth provisions allowing an insured who is forced to litigate a valid claim to seek attorney fees if (1) he or she prevails on such a claim and (2) the insurer had sufficient notice and time to investigate the claim. The statute does not allow an insured to file suit without complying with the conditions precedent stated in the policy merely because six months have passed since proof of loss was provided.

The Smiths also contended that MOE (or insurers in general) could potentially delay scheduling the EUOs long enough to run out the clock on the two-year contractual limitation for bringing an action based on the policy. The Court dismissed this notion stating that the parties are required to make a good faith effort to comply with the terms of the contract, and that the Court is confident that both sides will work together to accomplish what needs to be done in the appropriate time frame.

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