The Examination Under Oath and Sworn Statement in Proof of Loss:
Superheroes That Can Rescue a Difficult Claim

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Introduction

Examinations Under Oath and Sworn Statements in Proof of Loss are valuable tools for an insurer investigating an insurance claim. Historically, these tools have been underutilized. Insurers typically use Examinations Under Oath to resolve suspected fraud claims. Proofs of Loss were used as mere formalities for claim payments. Now, insurance claims have become more aggressive and complex, giving rise to new considerations for the use of these simple but effective tools.

Part One: The Sworn Statement in Proof of Loss

I. The Proof of Loss Policy Provision

The Sworn Statement in Proof of Loss (“Proof of Loss”) is a formal statement of the insured’s claim. A provision requesting a Proof of Loss is contained in nearly all standardized policy forms. It requires that, upon request, the insured supply particular information that will enable the insurer to investigate and assess the loss. See, 13 Lee R. Russ & Thomas F. Segalla, Couch on Insurance §186:22 (3d ed. 2011). The completed return of a Proof of Loss is a condition precedent to coverage that a policyholder must satisfy, absent waiver by the insurance company.

The Proof of Loss provision can be traced back to the standard fire policy. In 1943, most states adopted the New York Standard Fire policy, known generally as the “165 lines,” because the original policy only contained 165 lines. See, §1.03, General Structure of the Property Insurance Policy, Property Insurance Litigator’s Handbook, Murphy, Downs, Levin (2007). That policy contained the language that is the foundation of the modern Proof of Loss provision, in the “Requirements in Case Loss Occurs” section:

90 The insured shall give immediate written
91 notice to this Company of any loss, protect
92 the property from further damage, forthwith
93 separate the damaged and undamaged personal property, put
94 it in the best possible order, furnish a complete inventory of
95 the destroyed, damaged and undamaged property, showing in
96 detail quantities, costs, actual cash value and amount of loss
97 claimed; and within sixty days after the loss, unless such time
98 is extended in writing by this Company, the insured shall render
99 to this Company a proof of loss, signed and sworn to by the
100 insured, stating the knowledge and belief of the insured as to
101 the following: the time and origin of the loss, the interest of the
102 insured and of all others in the property, the actual cash value of
103 each item thereof and the amount of loss thereto, all encum-
104 brances thereon, all other contracts of insurance, whether valid
105 or not, covering any of said property, any changes in the title,
106 use, occupation, location, possession or exposures of said prop-
107 erty since the issuing of this policy, by whom and for what
108 purpose any building herein described and the several parts
109 thereof were occupied at the time of loss and whether or not it
then stood on leased ground, and shall furnish a copy of all the
descriptions and schedules in all policies and, if required, verified
plans and specifications of any building, fixtures or machinery
destroyed or damaged.

Today, Proof of Loss provisions vary policy to policy, but most require the insured to submit one, when requested. The language appears typically in the section entitled “Duties After a Loss.” Here are two examples:

**LOSS CONDITIONS**

(7) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.

---

**LOSS CONDITIONS**

(6) Send to us if we request, your sworn proof of loss within 91 days of our request on a standard form supplied by us. We must request a signed sworn proof of loss within 15 days after we receive your written notice, or we waive our right to require a proof of loss. Such waiver will not waive our other rights under this policy.

(a) This proof of loss shall state, to the best of your knowledge and belief:
   i. the time and cause of loss.
   ii. the interest of the insured and all others in the property involved including all liens on the property.
   iii. other insurance which may cover the loss.
   iv. the actual cash value of each item of property and the amount of loss to each item.

Given the many variations of the Proof of Loss provision, it is important to know the exact wording. For instance, a Proof of Loss provision may only require that an insured complete the Proof “to the best of its knowledge and belief.” Obviously, the goal and the hope of the Proof of Loss is that the insured commit to a firm number under oath. Such a provision could make that impossible.


**II. Purpose of the Sworn Statement in Proof of Loss**


Generally, the Proof sets forth the insured's knowledge and belief as to the date, time, and cause of the loss; the encumbrances on the property; the persons with an interest in the property; the value of the property; the amount of the loss, and the amount of the claim.
While a Proof of Loss is not automatically requested in every insurance claim, there are common claim situations that give rise to the need for requesting a Proof of Loss. For example, the insurance adjuster may only interact with the insured through a public adjuster, attorney or other intermediary. The Proof of Loss is a relatively simple way of obtaining information directly from the insured. Supplemental claims, especially ones made years later, should almost always trigger Proof of Loss considerations. Appraisal demands also require a Proof of Loss request. The insured should commit to a number prior to entering the appraisal process, and that number should be used as a cap during appraisal. Also, if the insured claims differing amounts at different times, a Proof of Loss obviously will assist in committing the insured to a number under oath. Likewise, if the insured is vague about the covered portions of its claim, a Proof of Loss may require the insured to apportion amounts between covered and uncovered causes or damages. Lastly, the time requirement for returning the Proof will help to extract information from a recalcitrant insured.

The insurance company should make a formal, written request for the insured to complete return a Sworn Statement in Proof of Loss. A blank Proof of Loss form should always be provided to the insured. Some insurers complete the form for the insured, often in exchange for each partial claim payment or advance. This can reduce the effectiveness of the Proof. The point of the Proof is to obtain a trustworthy statement from the insured regarding its point of view as to its own loss. The insured should be allowed to do as much of the input as possible. Otherwise, the insurance company will face accusations that the insured did not agree with the number, but only signed the form as requested by the insurer.

III. Proof of Loss Is Condition Precedent to Recovery; Substantial Compliance May Suffice

Once requested, most policies require that the insured return the proof of loss within thirty or sixty days after the request (or after the loss, depending on the policy). At times, insureds do not comply, or only comply in part. The insured may return the Proof of Loss late, may not complete it properly, or may ignore the request.

A. Partial Compliance

The timely return of the Proof of Loss is usually deemed a condition precedent to recovery, a lawsuit, and appraisal. For example:

➢ When the policy requires that an insured provide a proof of loss signed and sworn by the insured containing specific policy and loss information within 60 days after the loss, and the insured wholly fails to comply, absent a written extension of time for submission of the proof by the insurer, coverage is completely barred. American Centennial Ins. Co. v. Wiser, 712 S.W.2d 345 (Ky. Ct. App. 1986); see also Harris v. North British Mercantile Ins. Co., 30 F.2d 94 (5th Cir. 1928).

➢ A New York policy required the insured to submit proof of loss within sixty days after loss. Insured’s failure to do so, as was required by the insurance contract was an absolute defense to coverage. It was immaterial that insurer did not request written proof of loss until after litigation commenced. Lentini Brothers Moving & Storage Co., Inc. v. New York Property Ins. Underwriting Ass’n, 428 N.Y.S.2d 684 (N.Y. App. Div. 1980).

➢ When a policy contained the statutory language requiring proof of loss within sixty days, the failure to file a signed and sworn proof of loss within that sixty day period after the loss barred recovery on a claim whether or not the insurer was prejudiced by this failure to comply. Dellar v. Frankenmuth Mutual Ins. Co., 433 N.W. 2d 380 (Mich. Ct. App. 1988).
An insured is required to comply with post-loss obligations prior to compelling appraisal. See, e.g., United States Fidelity & Guar. Co. v. Romay, 744 So. 2d 467 (Fla. 3d DCA 1999).

The case law above is straightforward. A more complex analysis arises when the returned Proof of Loss arrives late or the insured requests an extension of time to comply. Careful thought should be given regarding how much “extra” time an insurer will allow an insured to comply. For instance, it is not the best idea to deny a claim if the insured returns the Proof of Loss one day late. On the other hand, it seems far-fetched to propose that an insurer should accept a Proof of Loss one year late. How much additional time the insured should be allowed is not easily answered. It depends on the claim complexity, the reasons given by the insured, whether the insured has cooperated in general during the claim investigation, if the insured timely requested an extension of the Proof of Loss time requirements, and how much time the insurer is willing to allow. Keep in mind that in many jurisdictions, an insurer must prove that such failure prejudiced it. 1 Allan D. Windt, Insurance Claims and Disputes §3:3 (5th ed. 2011). Courts are trending toward a more liberal approach and transitioning from “strict forfeitures” for breach of notice and proof of loss obligations. 13 Lee R. Russ & Thomas F. Segalla, Couch on Insurance §186:6 (3d ed. 2011). The insurer needs to decide based on its usual practices, the insured, and the facts of the loss and claim, whether it will again make another request for compliance, or accept a late Proof of Loss. Along the same lines, the insurer may, when faced with a total lack of compliance, request the return of another Proof of Loss from the insured. If the insured fails to comply again, it will only solidify the claim position. It goes without saying that with any decision, an insurer must always reserve its rights.


B. Showing of Prejudice


When policies do not request the Proof within a timeframe after the request, but rather after “discovery of the loss,” courts seem to follow a “reasonable standard” regarding when the insured should have been on notice of the loss. For example:

➢ To be meaningful, an insured’s obligation to file proof of loss within a specified interval following date of “discovery of loss” was required to be construed according to objective standard of what a reasonable insured would conclude based on the information available to the insured. Otherwise, the determination of the date of discovery of the loss would be left exclusively in the

➢ The “discovery of loss” does not occur until an insured has a reasonable time to discover the extent and amount of the loss as nearly as can be ascertained. The policy imposed duty on insured to submit proof of loss upon “knowledge or discovery of loss” and court noted that loss was extensive, complicated and difficult to prove, requiring a considerable time for its investigation and ascertainment. *Russell Gasket Co. v. The Phoenix of Hartford Ins. Co.*, 512 F.2d 205 (6th Cir. 1975).

➢ If the policy does not have a specific time requirement, the insured generally has a reasonable time to submit the proof of loss. See, *Wendel v. Swanberg*, 185 N.W.2d 348 (Mich. 1971)(the policy should be construed to require notice within a reasonable time and that prejudice to the insurer should be considered in determining whether the notice is reasonably given).

### C. No Action Clause

If the insured sues its insurer without complying with the Proof of Loss request, it breaches the policy’s “No Action Clause.” Here is one example of this provision:

**LEGAL ACTION AGAINST US**

No one may bring a 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.

Courts will enforce this language. See, e.g., *Swaebe v. Federal Ins. Co.*, 2010 WL 785995 (11th Cir. 2010)(where the undisputed record showed that the insured filed a lawsuit prior to complying with provisions of policy and before any proof of loss had been filed, the insured thus breached the policy’s “no action” provision, and because it is a condition precedent to recovery, under Florida law, the insured committed a material breach of the insurance contract, barring recovery); *Starling v. Allstate Floridian Ins. Co.*, 956 So. 2d 511 (Fla. 5th DCA 2007)(insured’s failure to provide the insurer with a signed and sworn proof-of-loss document within 60 days after a house fire constituted a material breach of policy’s condition precedent and this failure to substantially comply with policy’s conditions precedent bars recovery); *Aryeh v. Westchester Fire Ins. Co.*, 525 N.Y.S.2d 628 (N.Y. App. Div. 1988)(an insured’s failure to file a proof of loss within 60 days after the insurer’s demand provided the Insurer with an absolute defense to coverage); *Valiant v. American Family Mut. Ins. Co.*, 698 S.W.2d 584 (Mo. App. E.D. 1985).

### D. Compare to Federal Programs

IV. How to Respond to the Proof of Loss

In general, an insurance carrier may either accept, acknowledge, reject or return the Proof of Loss form submitted by an insured. Special attention should be made to the policy’s Loss Payment provisions to find obligations triggered upon a returned Proof of Loss. The Proof must be responded to in a timely fashion, according to policy and any applicable statutory language. The failure to properly respond to a Proof of Loss may waive any defects, or waive the insured’s policy compliance.

A. When the Proof of Loss Is Incomplete in Form

Once the insured returns the Proof of Loss, it should be analyzed to ensure it is properly and fully completed. Often, the returned Proof of Loss contains defects that require correction. In those instances, the Proof should be “rejected,” the insured should be told of the defects, provided another blank Proof of Loss form, and asked to properly complete the document. See, e.g., Miles v. Iowa Nat’l Mut. Ins. Co., 690 S.W.2d 138 (Mo. Ct. App. 1984) (It is only fair for an insurer when it receives a defective proof of loss to promptly return the proof of loss to the insured, advising the insured of the defects and insufficiencies and allowing a reasonable time to cure the defects. When this is done, the ball is in the insured’s court and the insured must act to comply with the policy conditions or not, at his own peril); John Hancock Mut. Life Ins. Co. v. Highley, 445 P.2d 241 (Okl. 1968); Svea Fire & Life Ins. Co. v. Foxwell, 27 S.W.2d 675 (Ky. Ct. App. 1930); Hanover Fire Ins. Co. of N.Y. v. Hodges, 139 S.E. 822 (Ga. Ct. App. 1927).

Any “rejection” must use careful wording so that it does not appear as a denial of the entire claim. Make it clear that the insurance company continues to investigate the loss.

B. When the Carrier Disagrees with the Amount

A Proof of Loss should not be rejected simply because an insurer does not agree with the amount. Again, it could be viewed as a denial letter and may relieve the insured of compliance with policy conditions.

C. When the Investigation Is Not Yet Complete

If the carrier is still investigating, the returned Proof of Loss should be acknowledged, but the investigation should continue with the insured being told exactly what the insurance company still needs to know before a claim decision can be made.

V. Waiver of Right to Require Compliance with the Proof of Loss Requirement

Insurers may inadvertently waive their right to require compliance with the Proof of Loss policy requirement. Waiver, by definition, is a voluntary, intentional relinquishment of a known right. It may be express or implied, arising from acts, words, conduct or knowledge of the insurer. It is essentially unilateral and is a legal consequence of the insurer’s act or conduct so that no act of the insured is necessary to complete it. National Discount Shoes, Inc. v. Royal Globe Ins. Co., 424 N.E.2d 1166 (Ill. App. Ct. 1981) (internal citations omitted). Whether the insurer has waived this right is typically an issue for the jury. Brandon v. Nationwide Mut. Fire Ins. Co., 271 S.E. 2d 380 (N.C. 1980).

A. Express or Implied Waiver

Express waiver of a policy condition is fairly straightforward. An insurer can expressly notify the insured in writing or orally of its intent to waive the requirement. Many policies state that no policy provision
may be waived except by written agreement or endorsement. An insurer, however, can impliedly waive the right to demand a formal proof of loss through an action or pattern of conduct that leads the insured to reasonably believe that the proof of loss will not be necessary.

B. Implied Waiver Through Actions

An insurer cannot continuously negotiate with the insured through the deadline for the sworn statement in proof of loss and then insist on strict compliance when the insured is led to believe that a settlement requires no other requirement. *Truck Ins. Exchange v. Hale*, 386 P.2d 846 (Ariz. 1963).

- The requirement that an insured file a sworn statement in proof of loss is for the benefit of the insurers and may be waived by them. Because this condition is harsh in its bearing on the insured, and works as a forfeiture when upheld, courts will not require very stringent evidence in order to defeat its operation. When an insurer's express or implied conduct is inconsistent with its intent to enforce the proof of loss requirement, it can be waived. *Downing v. Wolverine Ins. Co.*, 210 N.E.2d 603 (Ill. 2nd DCA 1965).
- Insured does not have to provide strong proof to establish waiver of a policy defense, just enough facts to make it "unjust, inequitatble or unconscionable" to allow the insurer to assert the defense. *Kenilworth Ins. Co. v. McDougal*, 313 N.E.2d 673, 677 (Ill. App. Ct. 1974).
- Insurer may waive the Proof of Loss requirement by a shuffling, tricky or evasive course of conduct leading a reasonably prudent man to believe that a proof of loss is not required. *Maddox v. German Ins. Co.*, 39 Mo.App. 198 (1890).
- If for any reason the proof of loss submitted is unsatisfactory to the insurer, it is the insurer’s duty to notify the insured promptly that the proof did not comply with the policy and allow the insured an opportunity to rectify his mistake. Silence on insurer’s part for any considerable length of time after the receipt of such proof of loss, can constitute a waiver of the necessity of the insured to provide any further proof. *Czerwinski v. Nat’l Ben Franklin Fire Ins. Co. of Pittsburgh*, 10 A.2d 40 (Pa. Super. Ct. 1939).
- The policy requirement requiring submission of a sworn statement in proof of loss is obviated by an insurer’s actions amounting to a waiver of the contractual provision. The insurer responded to written notice of claim by getting appraisals of damaged property and attempted to engage in arbitration. The most conclusive evidence of waiver though was the insurer’s tender of a settlement check to one of the insured's attorneys. In doing so, the insurer demonstrated that it had investigated the accident and had sufficient knowledge to offer a sum certain in settlement of all damages. In doing so, the insurer expressed a complete willingness to ignore the policy condition requiring a sworn proof of loss statement. *Petrice v. Federal Kemper Ins. Co.*, 260 S.E.2d 276 (W.Va. 1979).

C. Waiver May Be Implied Through Denial of the Claim

- An insurer's denial is effective as a waiver of formal proof of loss. *Colonial Life and Accident Ins. Co. v. Whitley*, 664 S.W.2d 488 (1984). When the insurer denies liability or refuses to pay, it con-
stitutes a waiver of policy requirements as to notice and proofs of loss when such denial is not predicated on insured’s failure to give notice or file proofs of loss. *Decker v. Gov’t Employees Ins. Co.*, 511 F. Supp 563, 564 (1981).

- The law generally holds that the unconditional denial of liability within the period allowed by a policy for filing a proof of loss constitutes a waiver of the requirement. Such an action indicates that the insurer made its decision to refuse payment for any loss, making the filing of a proof of loss a vain and futile act. *Balogh v. Jewelers Mut. Ins. Co.*, 167 F.Supp. 763 (S.D. Fla. 1958).

- If a proof of loss is required by the policy, the insured may excuse his non-performance by establishing that the insurer denied liability before the time for submission of proof of loss expired, thereby obviating the need for presenting a proof of loss. *Miles v. Iowa Nat’l Mut. Ins. Co.*, 690 S.W.2d 138 (Mo. Ct. App. 1984).

### VI. Fraudulent Proofs of Loss

The majority of jurisdictions find that a fraudulent proof of loss submission bars recovery entirely. Others have found that the fraudulent submission prevents the insured from recovery only with respect to the part of the submission that is fraudulent.

#### A. Majority: Fraudulent Proof of Loss Submission Bars Recovery

- Insured’s submission of sworn statement of loss was a material and intentional misrepresentation or omission substantially overstating the value of the claim and therefore barred any coverage. *Cedar Hill Hardware and Const. Supply, Inc. v. Ins. Corp. of Hanover*, 563 F.3d 329, 349-350 (8th Cir. 2009).


- Insured committed material fraud in fraudulently including items on inventory list attached to proof of loss. Even though insurer made partial payments on policy after becoming aware of false statement, insurer was not estopped from voiding policy. The court noted that insurance companies rely on insureds honestly filling out inventory lists of destroyed property. Dishonesty by insureds cannot be ignored. *Mut. of Enumclaw Inc. Co. v. Cox*, 757 P.2d 499, 502 (Wash. 1988).

- False claims in proof of loss for personality allegedly lost in fire voided coverage under fire policy, which excluded coverage for intentional concealment or misrepresentation of any material fact or circumstance relating to coverage. *McConkey v. Cont’l Ins. Co.*, 713 S.W.2d 901 (Tenn.Ct.App. 1984).

- A claim for numerous, nonexistent items in a sworn proof of loss is fraud as a matter of law and defeats recovery on the entire policy. *Home Ins. Co. v. Hardin*, 528 S.W.2d 723, 726 (Ky. 1975).

#### B. Minority: Fraudulent Proof of Loss Submission Prevents Recovery Only Regarding the Part of the Submission that is Fraudulent

- In *Northern Security Ins. Co. v. Hatch*, 683 A.2d 392 (Vt. 1996), the Supreme Court of Vermont analyzed the issue of whether an insured’s fraudulent sworn claim on a homeowner’s policy voided the entire policy such that any coverage for a later unrelated claim of an innocent third party was precluded. It recognized that the majority of decisions give effect to concealment and
fraud conditions to void the entire policy but declined to apply that rule where the policy’s fraud language was ambiguous.

- Fraudulent proof of loss as to the contents of the house did not void recovery for the loss of the dwelling and additional living expenses, even though the overwhelming majority of jurisdictions hold that any fraud or misrepresentation as to any portion of property under an insurance claim voids the whole policy. *Johnson v. South State Ins. Co.*, 341 S.E.2d 793, 794-795 (S.C. 1986).

**Part Two: The Examination Under Oath**

**VII. The Origins of the Examination Under Oath**

The Examination Under Oath is deeply rooted in American History. Over 120 years ago, the United States Supreme Court defined the purpose of the Examination in the landmark case of *Claflin v. Commonwealth Insurance Company*, 110 U.S. 81, 3 S.Ct. 507, 20 L. Ed. 76 (1884). The Supreme Court explained that the Examination Under Oath (and policy records production requirements) enables an insurer to obtain both claim information and documents in the possession or control of the insured:

1. for a proper and fair claim evaluation;
2. to help an insurance company determine its own policy obligations; and
3. to enable the insurer to protect itself against fraudulent claims.

In short, the purpose of the Examination is to learn information to make accurate claims decisions. It is the insured’s opportunity to explain, in its own words, the basis of its claim. Many claims are resolved after the Examination, when an insured’s testimony is able to satisfy the insurance company’s questions. Unfortunately, the request for an Examination is not usually met with open arms. An insured becomes defensive, confused, and knows nothing about the process. Combine an aggressive Plaintiff attorney with an insured’s distrust of insurance companies, and the Examination will be deemed a device to harass and delay. And they will let an insurer know it.

To make matters worse, few judges understand the complexities of insurance policies and the esoteric case law. Judges may view the Examination as a deposition, or a mere technicality, the rejection of which should not be the basis for forfeiture of policy benefits.

So, the challenge here is to know when and how to ask for the Examination, as well as to properly execute it in ways that overcome the inherent prejudices that may exist against such a request. To that end, the insurance practitioner and insurance adjuster must understand the origins of the Examination, the process, the parameters and the consequences of mishaps.

**VIII. The Examination Under Oath Is a Creature of Contract**

The policy, of course, gives an insurer the right to request an Examination Under Oath. The Examination Under Oath clause usually appears in the section outlining an insured’s duties after a loss, otherwise known as “post-loss obligations.” The 1943 Standard New York Fire policy also contained an Examination Under Oath provision. Here is the original language:

113 ………The insured, as often as may be reason-
114 ably required, shall exhibit to any person designated by this
115 Company all that remains of any property herein described, and
116 submit to examinations under oath by any person named by this
117 Company, and subscribe the same; and, as often as may be
reasonably required, shall produce for examination all books of
account, bills, invoices and other vouchers, or certified copies
thereof if originals be lost, at such reasonable time and place as
may be designated by this Company or its representative, and
shall permit extracts and copies thereof to be made.

The language has not changed much. Here is a typical example of an Examination Under Oath clause.
This particular clause is almost always contained in the Duties in the Event of Loss section of a property pol-
icy:

LOSS CONDITIONS

Duties in the Event of Loss
a. You must see that the following are done in the event of loss:

(1) Notify the police if a law may have been broken.
(2) Give us prompt notice of the loss or damage.
(3) As soon as possible, give us a description of how, when, and where the direct physical loss
or damage occurred.
(4) Take all reasonable steps to protect the Covered Property from further damage and keep a
record of your expenses necessary to protect the Covered Property, for consideration in the
settlement of the claim. This will not increase the Limit of Insurance. However, we will not
pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered
Cause of Loss. Also, if feasible, set the damaged property aside in the best possible order for
examination.
(5) As often as may reasonably be required, permit us to inspect the property proving the loss
of damage and examine your books and records. Also permit us to take samples of dam-
aged and undamaged property for inspection, testing and analysis, and permit us to make
copies from your books and records.
(6) Send us a signed, sworn proof of loss containing the information we request to investigate
the claim. You must do this within 60 days of our request. We will supply you with the nec-
essary forms.
(7) Cooperate with us in the investigation or settlement of the claim.
b. 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.

In evaluating your claim, keep in mind that policy language varies tremendously. It is never safe to
assume that two property policies issued by the same carrier, or one of its subsidiaries, will contain the same
language. Unlike the provision quoted above, some policies do not suggest more than one Examination can be
requested. Some do not exclude other insureds from the examination room. Determine what the policy says
regarding who must appear, what may be asked, and how many examinations can be conducted. These issues
are the subject of litigation throughout the country.

Finally, a portion of jurisdictions have codified the Examination Under Oath Right. Make certain to
review the applicable statute to ensure you comply with any standards or guidelines enunciated beyond your
policy language.
**IX. Considerations for Requesting and Conducting an Examination**

Suspected fraud is the most common reason for Examination Under Oath requests. But Examinations are helpful for other reasons as well. Sometimes, without any wrongful motive at all, insureds simply do not respond to written or oral requests for information or respond timely. Often it is more efficient to interview, formally, the insured with respect to the particulars of a complex claim. An Examination Under Oath can transform factual belief into factual knowledge, which may be important to coverage. Finally, Examinations are a chance to review the claim in person with the insured, without an intermediary forwarding and perhaps influencing important information about the claim.

In general, the Examination Under Oath should attempt to clarify, confirm or resolve:

- Contested issues
- Ambiguities
- Informational gaps
- Losses for which supporting documentation does not exist
- Inconsistencies
- Issues of fraud
- Claim exaggeration
- The insured's perspective on the claim
- Motive for and background of supplemental claims
- Potential policy defenses
- Insurable interest
- Background of insured
- Financial condition
- Whereabouts at time of loss
- Claim basis when documentation lost, destroyed or not willingly provided

**X. Procedural Considerations Before the Examination**

The process of requesting an Examination begins even before it is scheduled and continues after the Examination. It does not end until the insured has produced all relevant information.

**A. The Formal Demand**

It is critical that you make a proper request for an Examination Under Oath. In any communication with an insured, what you write and say is evidence for a judge or jury. It will be memorialized and you will need to defend it. You should also keep your oral communications to a minimum. Creating a record is always best to maintain clear communications, and to document the timeline of a claim, which will be useful during litigation, if the claim unfortunately gets to that point.

A common mistake in an Examination Under Oath request is that a time certain is not requested at the outset by the insurer. A request for an Examination Under Oath must be definitive – a time and place for the Examination must be communicated in writing to the insured. A request that the insured contact the insurer to schedule an Examination Under Oath, without any specific scheduling of it for a specific date, time and place, does not constitute a sufficient demand. See e.g., *Green v. St. Paul Fire and Marine Ins. Co.*, 691
F.Supp. 700, 703 (S.D.N.Y. 1988) (“Since no demand was made that insured appear at a specific time and place, insured did not breach the insurance policy by not appearing”); Huggins v. Hartford Ins. Co., 650 F.Supp. 38, 42 (E.D.N.C. 1986)(“a notice to an insured which does not set a time, date and place for an examination under oath is insufficient notice”); Weber v. General Acc. Fire & Life Assur. Corp., 10 Ohio App.3d 305, 462 N.E.2d 422 (Ohio App. 1983) (“To be legally sufficient, a demand by the insurer that the insured submit to an examination under oath must specifically designate the time and place of the examination and the person before whom the examination is to be conducted.”).

The Examination should be scheduled unilaterally, with an indication to the insured that it can be rescheduled at a time or place more convenient, within reason. If the insured requests another time or place, do not cancel the existing Examination appointment until a new one is set.

Consider scheduling two days to conduct the Examination. This accomplishes several things. One, it provides sufficient time to ask questions and review any documents. Second, it communicates to the insured that the Examination will be taken seriously and a meaningful exchange is required. Third, it allows the insured to coordinate the attendance of more than one witness. Fourth, a late start, early finish and extensive breaks during the examination will have less of an impact if two days are set aside.

B. The Letter Requesting an Examination

The letter requesting an Examination Under Oath may be the first indication to an insured that the insurance company suspects fraud and may ultimately lead an insured to withdraw a fraudulent claim. Whatever the insured believes, it will be clear that a future payment will not come as easily as it may have previously thought. This is frustrating to most insureds. It is also costly for insurance companies in terms of attorney’s fees, travel costs and court reporter fees. However, if the goal is accurate and thorough coverage decisions, the Examination should not be avoided or ignored. It is a serious and important part of the claim investigation.

When making your request, be sure you provide an insured notice in writing. It is a good idea to send this request certified mail/return receipt requested with another copy sent via U.S. Mail. You should address it to the insured in care of its representative (attorney, public adjuster), if it has one. That is, you should communicate with your insured at all times. Include the following in your letter:

- That the insurer is exercising its right under the policy to conduct the Examination.
- The relevant policy language requiring the insured to comply
- The date and time of the Examination.
- The location of the Examination. A good rule of thumb is to choose the county where the insured lives, works or where the property is located. The convenience of the insured is the determining factor.
- A records request.
- The time and place for document production.
- The consequences of failing to appear for the Examination or failure to comply with the records demand.
- That the insured will be reimbursed for the cost of copying records.
- That the insurer cannot complete its investigation until completion of the Examination and receipt of the records.
- A Sworn Statement in Proof of Loss request.
• Consider informing the insured he/she may have an attorney present at his/her own expense.

Your letter should have a pleasant tone. Make your request clear, direct, informative and most importantly, accurate.

C. At the Start of the Examination—The “Preamble”

Ideally, the Examination Under Oath should not be an adversarial process and the need for full disclosure of all relevant information should be emphasized. To ensure an atmosphere of good faith and fair dealing, especially with an unrepresented insured, the examiner should explain the following prior to asking the first question:

• The purpose of the Examination (i.e., gathering information for an informed claim decision).

• This is the insured’s opportunity to provide all information to the insurer about the loss and claim, so the insured should volunteer relevant information, even if not specifically questioned about it.

• That the insured is under oath and that under the terms of the policy, any misrepresentations, concealments or omissions of material facts may result in denial of the claim.

• In an arson case, that there is evidence of a set fire and the insured will be directly asked if s/he deliberately caused the loss.

• If the insured appears without an attorney, consider asking him/her, on the record, if an attorney’s advice has been sought regarding the appearance, and confirm if s/he wishes to proceed without an attorney.

• Explain the process to the insured (i.e., transcript obtained at insurer cost will be sent to insured, errata sheet must be signed and returned).

Make sure the court reporter knows it is not a deposition. The court reporter should style the title page as “Examination Under Oath of (either the name of corporation, or the individual if a residential claim).” It should not be framed as a deposition. It is not a deposition.

XI. Conducting the Examination Under Oath

Preparation is key. The policy should be thoroughly reviewed and tabbed, and the applicable law researched. Arm yourself with an outline of the issues you need to know and the facts you need crystallized. Following a script of questions is not the best idea—it prevents flexibility. You need to be able to listen to the answers and respond with a goal of learning the most information. Review your topic area then alter the terms of possible question areas, considering different angles. Doing your homework allows you to conduct a more meaningful examination, and avoid the sinking feeling that you failed to ask a key question.

It is only human to forget some important questions in the heat of the moment. Think ahead regarding what you may encounter – a difficult insured, communication problems, an aggressive Plaintiff’s attorney. The preparation doesn’t involve only the facts and the law. You need to expect anything in an Examination environment and, importantly, be able to effectively work with people.

An important factor is communication between the insurance adjuster and the person conducting the Examination, if it is not the adjuster. The adjuster must effectively communicate his/her expectations. Too often lawyers are left to explore the claimant on their own. This sometimes leads to eliciting non-relevant testimony, which casts an unfavorable light on the entire process. The adjuster should consider attending the Examination in person, or via phone and text/email follow up questions to the questioner. It is also a good idea to obtain questions from your experts, especially when dealing with technical or specialized areas.
Some stylistic considerations:

1. **Open or closed ended questions**
   It is usually a good idea to begin with open-ended questions, however, it really depends on your claim and the person you are examining. Open-ended questions should be utilized as much as possible to encourage the insured to provide their version of the facts in their own words. The examiner can then go back and ask specific questions as needed. Of course, with a talkative insured, or one represented by a talkative attorney, it may be best to narrow your questions immediately. Again, it is situation specific.

2. **Listen to the answers**
   This cannot be understated. While it is important to make some notes during an Examination, if you only make notes, you cannot listen to the insured’s testimony. You may miss something big without realizing it, and miss your opportunity to correct it.

3. **Decide whether to confirm key testimony**
   If you receive an answer that may affect coverage, decide whether it should be confirmed by the insured. Depending upon the nature of your claim and the particular insured, you can ask the insured to confirm the answer, re-ask the question to make sure the answer is the same, or do nothing and rely on the testimony that you have. Remember, however, that what seems clear during an Examination may seem less clear when reading the transcript.

   Asking the insured to sign an errata sheet will again commit the insured to its original answers (unless, of course, changes are made – if the changes are substantive, request another Examination).

4. **Confrontational Opposing Counsel**
   Insureds may appear for an Examination with an aggressive, confrontational attorney. Try to avoid taking the bait, and focus on keeping your patience. You can interrupt counsel and remind him/her that while he/she has a right to be there to consult with the insured regarding legal issues, he/she does not have a right to interfere with the questions and answers. Some attorneys, as a practice, consistently object. It is best to allow these objections, if well-founded. If things get out of hand, consider warning opposing counsel that if he/she continues to interfere, the insurance company may very well consider it a breach of cooperation. You can also ask the insured to ratify the statements of its attorney.

   For attorneys conducting Examinations, remember that you are there on behalf of the insurance company. Representing an insurance company means holding yourself to a higher standard. You are not making claims decisions and should never speak on behalf of the insurance company. Your conduct, however, will be imputed to the insurance company. Keep making your record but remember that the transcript is admissible evidence at trial. Put much consideration into making any statements during an Examination, either on or off the record.

5. **Memorialize Conduct of Insured and its Attorney**
   If an insured is constantly whispering to its attorney or another representative, such as a public adjuster, note it for the record. Narrate what is happening and the time frames. Object to it and if it continues, note for the record that it continues over your objections. Sometimes, a represented insured will want to leave the room with its attorney during the Examination and even when a question is pending. Object and note it
for the record. If it gets to the point of preventing a meaningful Examination, consider continuing the Examination. Proceed carefully when doing so and make a clear record.

6. Make the Decision Whether to Confront

After you have completed the general open-ended question part of the Examination Under Oath and the insured has committed to certain statements (or misstatements), consider whether to confront the insured. There are many benefits. For one, the insured will be able to explain itself. Many times, at trial, plaintiff’s counsel will ask the claim representative why the insured was not confronted with the evidence against him or her, and given an opportunity to explain. Second, it will alert plaintiff’s counsel to weaknesses in the case. Third, it may lead to a claim withdrawal.

The issue of confronting the insured with known discrepancies may also present an ethical dilemma to the extent that the insured and insurer’s representative develop somewhat of a rapport and relationship.

What if the insured or the insured’s attorney asks the insurer’s attorney, adjuster or SIU representative, prior to the Examination, what information the company already knows? Is the insurer obligated to tell the insured or insured’s attorney this information? While an insurer’s representative cannot lie to the insured in order to induce the insured to lie at his or her Examination Under Oath, there is no ethical requirement for an attorney or adjuster to disclose confidential investigative work product to the insured prior to the Examination or even to confront the insured with the truth at the Examination after the insured has already lied. The insured should be told at the outset of the Examination to tell the truth and the pitfalls of breaching the fraud and misrepresentation clause. If the insured chooses to be untruthful, it does so at his/her own peril.

Whatever your style, it is vitally important to stick with material and relevant questions. Think about the scope of your Examination. If an insured is not represented by counsel, proceed very carefully. You want to avoid any perception that you are badgering or confusing the insured. The goal of the Examination is to yield useful testimony. “Fishing expeditions” are not favorably looked upon and, not only sour your entire Examination, but waste time.

XII. Post-Examination Follow-Up

If the insured identifies documents or witnesses during the Examination in support of the claim or other pertinent facts, it is critical to request the insured provide the documents and contact information for the witnesses prior to the conclusion of the Examination and to follow up with a written request and a deadline to provide the information in a timely manner following the Examination.

To avoid confusion and make your follow-up easier, it is a good idea to make a list during the Examination. At the end of the examination, recite the list on the record and confirm the insured will provide the requested documentation within a certain time frame. You can also ask the insured to review your list, agree that it understands the list, copy the list for the insured to take home, and make the list an exhibit to the Examination. During the Examination it may seem clear that the insured understands the requests and will happily and willingly comply. But as issues will almost always arise, create your record as best as you can as early as you can. Document everything. This can’t be stressed enough. The day after the Examination, send a follow-up letter to the insured again specifically setting forth the records request.

The insured should also be advised on the record that the insurer retains the right to reconvene the examination if any new facts come to light following the Examination and receipt of the promised information.
XIII. The Examination Is a Condition Precedent to Lawsuit

The Examination does not always proceed as planned. The insured may not show up (with or without an excuse), or may appear and not know as much as hoped, especially when the insured is a corporation. It is important to understand the rights and obligations under the policy when considering the response received from insureds.

In general, the requirement to submit to an Examination Under Oath is a condition precedent to filing suit for breach of contract. See Hanover Ins. Co. v. Cape Cod Custom Home Theater, Inc., 891 N.E.2d 703 (Mass. App. Ct. 2008)(holding that insured’s willful, unexcused refusal to comply with insured’s reasonable request for an examination under oath was material breach of condition precedent; insurer did not have to show prejudice to be relieved of its obligation to provide coverage); Rosenthal v. Prudential Property & Cas. Co., 928 F.2d 493 (2nd Cir. 1991)(insured’s continued refusal to submit to examination under oath was willful and material breach of obligation under fire policy under New York law; court refused to afford insured one “last opportunity” to cooperate because insured was already afforded such an opportunity when the district court denied Prudential’s first summary judgment motion on the condition that he submit to the EUO). Exceptions and distinctions come into play especially when an insured partially complies.

Courts are very sensitive to perceived “gotcha” tactics. To avoid any wrongful perception, make certain the insured has every opportunity to attend the Examination, even if the insured “no-showed” at the first scheduled Examination. Again, the most important factor is to obtain useful testimony.

A. Lack of Cooperation and the “No Action Clause”

If the insured refuses to attend a properly noticed and scheduled Examination, confirm the refusal in writing, and obtain a certificate of non-appearance from a court reporter. Whether a court will deem the refusal willful depends on the facts, namely, whether there is some degree of cooperation.

At times, the insured may have a good reason for not attending – or at least a reason a Judge may forgive as excusable. The point of scheduling an Examination is to afford the insured every chance to explain its claim. Give the insured every opportunity to attend, even scheduling the Examination another time. A refusal will not appear “willful” to most courts unless the failure to attend stands out measurably. Before you recommend, or consider denial based upon the failure to attend, ask yourself: How many opportunities should the insured be given to submit to an Examination before the insurer says enough is enough? And does the insurer flat out deny the claim at that point or just place it in abeyance pending further actions by the insured? Decisions should be made on a case by case basis.

The case law seems to suggest that the insured breaches the contract when the insured files suit without complying with the Examination provision in violation of the No Action Against Us clause. Although an insurer need not pay a claim until compliance with the Examination Under Oath provision and the claim can be denied for failure to comply, filing suit is the triggering event that precludes recovery in those states that enforce such limitations. See, e.g., Nationwide Ins. Co. v. Nilsen, 745 So.2d 264, 267 (Ala.1998)(submitting to examination under oath was condition precedent to insured’s recovery for fire loss under homeowners’ insurance policy; policy imposed duty on insured to submit to EUO as often as required by insurer; deposition of insured after filing of lawsuit is not an EUO); Krigsman v. Progressive Northern Ins. Co., 864 A.2d 330 (N.H. 2005)(compliance with policy’s EUO provision was condition precedent to filing action, and thus insurer was not required to show that it was prejudiced by failure to submit to EUO).
Another relevant policy provision that is tied to the Duties in the Event of Loss language is the “No Action Clause.” This provision seeks to prevent an insured from filing a lawsuit before it complies with policy conditions. Here is a typical provision:

**LEGAL ACTION AGAINST US**

No one may bring a 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.

The purpose of the “No Action Clause” is to provide the insurer an opportunity after the insured has complied with all its post-loss contractual obligations to reach a knowledgeable decision on the claim before having to defend itself in litigation.

The public policy benefitting such a reasonable contractual provision is apparent. Insurance claims must be adjusted before a lawsuit is filed, not during the pendency of a lawsuit. Courts should not play the role of insurance adjuster. Rather, an insurance company must be allowed to make claim decisions before an insured drags it into court. Courts will enforce this provision. See e.g., Bowers v. Safeco Ins. Co. of American; 187 Ga.App. 229, 369 S.E.2d 547 (Ga. App. 1988)(insured’s violation of no action clause and failure to comply with policy requirement to provide documentation in support of claims precluded suit on policy); Langhorne v. Fireman’s Fund Ins. Co., 432 F.Supp. 1274 (N.D.Fla.2006)(discussing that under Florida law a “no action” clause in an insurance contract may operate as a condition precedent barring suit against the insurer until the insured complies with the relevant policy provisions; where the plaintiff has failed to comply with policy requirements before filing suit, the proper remedy generally is an abatement or stay of the claim; insured’s failure to provide insurer with contents inventory for his personal property claim before bringing action did not warrant dismissal).

See also, Brantley v. State Farm Ins. Co., 865 So.2d 265 (La.App. 2 Cir.2004)(insured failed to cooperate with insurer’s investigation and failed to perform its duties under the contract by not providing sworn proof of loss and did not submit to examination under oath); Stringer v. Fireman’s Fund Insurance Company, 622 So.2d 145 (Fla. 3d DCA 1993) (insured’s failure to submit to an examination under oath in and of itself is a material breach of the policy, relieving the insurer of its liability); Lorenzo-Martinez v. Safety Insurance Company, 58 Mass.App.Ct. 359, 790 N.E.2d 692 (Mass. App. 2003)(holding that an insured’s willful, excused failure to submit to an examination under oath discharges insurer’s liability without proof of actual prejudice resulting to the insurer’s interests); Thomson v. State Farm Ins. Co., 232 Mich.App. 38, 592 N.W.2d 82 (Mich.App. Oct 02, 1998)(holding that willful noncompliance that will require dismissal with prejudice of suit involves deliberate effort to withhold material information or pattern of noncooperation with insurer; burden is on insured to show that failure to submit to Examination is not willful noncompliance); Southgate Gardens Condominium Ass’n, Inc. v. Aspen Specialty Ins. Co., 622 F.Supp.2d 1332 (S.D.Fla. 2008)(insured failed to comply with condition precedent to filing suit against the insurer by failing to submit to requested EUOs, but dismissal without prejudice was warranted to allow the insured to belatedly comply with the condition precedent; distinguishes factually the two year delay in Goldman from the nine month delay in this case); Ayuob v. American Guar. and Liability Ins. Co., 605 F.Supp. 713 (S.D.N.Y. 1985)(holding that insureds’ failure to submit to examination was not such an unexplained flaunting of their policies as to warrant an unconditional dismissal under New York law of their actions to recover on policies issued on property located in Liberia because the totality of the circumstances supported that four of the five insureds either came, or agreed to come, to New York for their examinations); Hanover Ins. Co. v. Cape Cod Custom Home Theater, Inc., 891
N.E.2d 703 (Mass.App.Ct. 2008)(holding that insured’s willful, unexcused refusal to comply with insured’s reasonable request for an examination under oath was material breach of condition precedent; insurer did not have to show prejudice to be relieved of its obligation to provide coverage); Rosenthal v. Prudential Property & Cas. Co., 928 F.2d 493 (2nd Cir. 1991)(insured’s continued refusal to submit to examination under oath was willful and material breach of obligation under fire policy under New York law; court refused to afford insured one “last opportunity” to cooperate because insured was already afforded such an opportunity when the district court denied Prudential’s first summary judgment motion on the condition that he submit to the EUO).

Compare, Selective Ins. Co. v. Mauro, 2005 WL 3691162 (N.J.Super.A.D. Jan 23, 2006)(holding that material fact existed as to whether insured’s failure to complete EUO concerning fire in insured’s home was willful and substantial breach of her duty to cooperate and whether this failure constituted intentional concealment of material facts barring coverage for damages); Erie Ins. Co. v. JMM Properties, LLC, 888 N.Y.S.2d 642 (N.Y.A.D. 3 Dept. Oct 29, 2009)(holding that insured’s noncompliance and refusal to submit to an examination under oath was a breach of the policy; however, the insured’s noncompliance was not so willful as to warrant the “extreme penalty” of excusing insurer from liability without giving insured one last chance to perform its obligations).

B. Partial Compliance

Frequently, an insured will appear at an Examination but will refuse to, or cannot, answer all questions. See, e.g., Borjeson v. Pilgrim Ins. Co., 2005 WL 3722420 (Mass.Super. Nov 28, 2005)(discussing that plaintiff’s failure to answer two questions at examination under oath regarding prior accidents and injuries did not rise to the level of a substantial and material breach of the insurance policy as a matter of law). If an insured refuses to answer a question, it is critical to confirm on the record that the insured understands the question, and explain clearly to the insured that the question is material to the insurer’s claim investigation and that failure to answer the question may result in a denial of the claim. The insured should then be asked the question again and his/her subsequent refusal recorded and noted. This will rebut any later claim that the insured did not understand the question, its relevancy to the insurer’s investigation, and the consequences for failing to respond.

The insured’s perceived cooperation will depend upon whether the questions are material. If the questions are material to the insurer’s claim investigation, failure to respond may constitute a breach. See, Wright v. Farmers Mutual of Nebraska, 266 Neb. 802, 669 N.W. 2d 462 (Neb. October 3, 2003)(holding the insured’s failure to answer questions about his finances, debts, other properties and other insurance during examination under oath were material to investigation and failure to provide such information was a material breach of the insurance contract); Kisting v. Westchester Fire Ins. Co., 290 F.Supp. 141 (W.D. Wi. 1968), aff’d, 416 F.2d 967 (7th Cir. 1969)(holding an insured’s refusal to answer questions about damages figures precluded recovery). This sometimes presents a fact question, however.

Compare, M.C.W. Inc. d/b/a Todd’s Restaurant v. Hamilton Mutual Insurance Company d/b/a EMC Insurance Company, et al., 2003 WL 193567 (Mich. App. January 28, 2003)(holding an insured’s failure to answer questions regarding their own origin and cause investigator and failure to produce audio tapes and fire scene photographs which were requested by the insurer could not be said “as a matter of law” to be a willful breach of the policy or a failure to cooperate); Paulucci, supra (holding insured’s production of one of his representatives who answered four hours of questions at an EUO “substantially satisfied” the policy’s EUO provision even though the representative could not answer all of the questions posed).

See also, Schnaged v. State Farm Mut. Auto. Ins. Co., 843 So.2d 1037 (Fla. 4th DCA 2003)(material issue of fact existed precluding summary judgment as to whether insured materially breached the insurance
C. Showing of Prejudice

Whether an insurer must show prejudice before denying payment based upon an insured’s failure to submit to an Examination depends upon the jurisdiction. For e.g., Miles v. Great Northern Ins. Co., 656 F. Supp. 2d 218 (D. Mass 2009)(under Massachusetts law, an affirmative showing of “actual prejudice” is required before an insurer can deny a claim for failure to appear for examination under oath); Brizuela v. Calfarn Ins. Co., 116 Cal. App. 4th 578 (2d Dist. 2004)(insurer not required to show prejudice before denying benefits to insured who violated examination under oath provision); National Athletic Sportswear, Inc. v. Westfield Ins. Co., 528 F.3d 508 (7th Cir 2008)(applying Indiana law, a showing of prejudice is not required and insured’s failure to appear for an examination under oath constitutes breach of the policy).

D. Condition Precedent to Appraisal

Compliance with post-loss obligations is also a condition precedent to appraisal. If the insured has not complied with the Examination, or Proof of Loss requirement, the matter is not yet ripe for an insurance appraisal. See Galindo v. ARI Mut. Ins. Co., 203 F.3d 771, 776-777 (11th Cir. 2001); United States Fidelity & Guar. Co. v. Romay, 744 So. 2d 467 (Fla. 3d DCA 1999)(holding that insured is required to comply with
all post-loss obligations before compelling appraisal irrespective of whether examination under oath not requested until time of appraisal demand).

XIV. The Examination Under Oath Is Not Recorded Statement or Deposition

An insured's submission to an unsworn recorded statement or appearance for a deposition does not constitute substantial compliance with the policy conditions which require an Examination Under Oath. See, e.g., Goldman v. State Farm Fire General Insurance Company, 660 So.2d 300 (Fla. 4th DCA, 1995); Pervis v. State Farm Fire and Casualty Company, 901 F.2d 944 (11th Cir.) cert. denied, 498 U.S. 899, 111 S.Ct. 255 (1990).

Depositions and Examinations Under Oath are easily distinguished and serve vastly different purposes, as enunciated in Goldman:

- The obligation to attend an Examination Under Oath is contractual rather than arising out of discovery rules in the applicable rules of civil procedure.
- The insured's counsel plays a different role during Examinations Under Oath than during depositions. While s/he will often object, there is no basis for such objections as the rules of civil procedure do not apply, and if s/he instructs the insured not to answer a question, the insured's failure to answer all questions may form the basis for denial of the claim.
- Examinations Under Oath are almost always taken before litigation to augment the insurer's investigation of the claim while a deposition is part of the litigation process, not the claim investigation.
- An insured has a duty to volunteer information related to the claim during an Examination Under Oath in accordance with the policy while s/he would have no such obligation in a deposition.
- If the policy so provides, an insurer has the right to examine insureds independently, outside each other's presence (in the case of spouses, business partners, or other co-insureds) in sworn examinations while there is no parallel right to do so under the civil procedure rules. Goldman, supra.

XV. Use of the Examination Under Oath at Trial

The Examination Under Oath is not just an excellent investigative tool but can be essential at trial. The insured's answers in an Examination Under Oath are admissible at trial. See, McIntosh v. Eagle Fire Company of New York, 325 F.2d 99 (8th Cir. 1963). The insured's answers during an Examination Under Oath can also be utilized, at trial, to establish the insurer's fraud defense. Miele v. Boston Insurance Company, 288 F.2d 178 (8th Cir. 1961).

XVI. Special Issues and Problem Areas

A. Insured's Assertion of the Fifth Amendment

An insured will attempt to avoid answering questions during an examination under oath by asserting his Fifth Amendment right against self incrimination, especially if under criminal investigation or prosecution. However, it is well settled that the Fifth Amendment privilege against self incrimination does not excuse an insured from fulfilling the contractual obligation to submit to an examination under oath. Pervis v. State
Farm Fire and Casualty Company, 901 F.2d 944 (11th Cir. 1990). The insured cannot use the Fifth Amendment, on one hand to avoid the contractual obligation to cooperate with the insurer, and, on the other hand, compel the insurer to provide coverage. Pervis, 901 F.2d 944; State Farm Indemnity Company v. Warrington, 795 A.2d 324 (Sup. Ct. N.J. 2002); Taricani v. Nationwide Mutual Insurance Company, 77 Conn.App. 139, 822 A.2d 341 (Conn.App. 2003)(holding the constitutional privilege against self-incrimination did not excuse insured’s failure to cooperate with insurer’s investigation of a fire loss).

Compare, Weathers v. American Family Mut. Ins. Co., 793 F.Supp. 1002 (D.Kan. 1992)(insured homeowner and her son did not breach insurance contract and properly invoked their Fifth Amendment privileges during examinations under oath when they refused to disclose opinion of their hired expert concerning cause and origin of fire and where insurer had invoked Kansas Arson Reporting Immunity Act and was under statutory obligation to forward any information it received to state fire marshal’s office); Anderson v. Southern Guar. Ins. Co. of Georgia, 235 Ga.App. 306, 508 S.E.2d 726, 98 FCDR 4053 (Ga.App. 1998) (holding that Fifth Amendment privilege against self-incrimination did not excuse insured from cooperating with insurer; but insured’s refusal to answer insurer’s questions material to determination of whether injuries to victim of alleged attack were intentional did not void coverage).

B. Waiver

The actions taken by an insurance company in adjusting the claim can amount to waiver of the Examination. For instance, a denial of liability will be deemed a waiver of the right to conduct an Examination. See e.g., Foreign Credit Corp. v. Aetna Casualty & Surety Co., 276 F Supp. 791 (S.D.N.Y. 1967)(under New York law, an insured need not comply with a provision which requires him to submit to an examination with regard to the loss after an insurance company has denied liability on the policy); Lentini Bros. Moving & Storage Co. v. New York Property Ins. Underwriting Assoc., 440 N.E.2d 819 (N.Y. 1981)(insurer may not, after repudiating liability, create grounds for its refusal to pay by demanding compliance with the examination and proof of loss provisions). Compare, Ayuob v. American Guarantee & Liability Ins. Co., 605 F. Supp. 713 (S.D.N.Y. 1985)( where denial of liability came after insured refused to appear for examination, insurer did not waive right its rights). Again, this ties into the Proof of Loss. Be certain the rejection of the Proof does not look like a claim denial.

An insurance company may also waive the right to conduct an Examination, if the request to appear for an examination is not entirely clear. See Western Assur. Co. v. McGlathery, 22 So. 104 (1897)(insurer waived right to conduct examination of insured wife when notice was not given to insured wife to appear for examination, but notice was given to her husband, and he appeared as her agent).

C. The Corporate Insured Appearing for the Examination

In the case of a corporation, which can only speak through its principals and representatives, insurers generally request the insured produce the person or persons with the most knowledge regarding the loss and claim, including corporate officers. If an insured does not, a denial of the claim for failure to cooperate or failure to fulfill the Examination requirement may be justified even though the insured has produced one or more representatives.

In Ausch v. St.Paul, 125 A.D.2d 43 (N.Y. 1987), a corporate insured failed to produce its principal shareholder and officer for Examination. The court determined that his interest in the corporation was sufficient to require his appearance at an Examination under the policy. Consequently, his willful refusal to comply was found to be a material breach barring recovery under the policy. Likewise, in Pogo Holding Corp. v. New York Prop. Ins. Underwriting Assoc., 73 A.D.2d 605 (N.Y.App. 1979), the corporation’s president and 50 per-
cent stockholder failed to submit to an examination under oath, but the corporate treasurer and other 50 percent stockholder had complied. The court determined the corporation had not fulfilled the examination under oath provision requirements and granted the insurance company a prospective summary judgment if the corporation still had not complied with the examination under oath request within 30 days after the decision.

But see, *Green v. St. Paul Fire and Marine Ins. Co.*, 691 F.Supp. 700, 703 (S.D.N.Y 1988) (failure of former officer, director or employee to appear for examination does not constitute breach of corporate insured’s contractual obligation to submit to examination under oath); *Florida Gaming Corp. v. Affiliated FM Ins. Co.*, 502 F.Supp.2d 1257 (S.D.Fla. 2007)(holding that president of company that insured allegedly hired to conduct analysis of hurricane-related damages was not required to submit to an examination under oath; insured was also not required to produce employee in charge of its maintenance department for an examination under oath; the decision emphasized that the policy language at issue contemplates examination of “the insured” only).

D. Examination of Public Adjuster

Not every jurisdiction has licensed public adjusters. If yours does, consider requesting the Examination of the public adjuster if needed to explain the claim, or when an insured constantly defers to its adjuster. *See Palace Café v. Hartford Fire Ins. Co.*, 97 F.2d 766 (7th Cir. 1938)(adjuster was Independent contractor and, as employee of adjusting firm, as opposed to insured, he was not “insured” for purposes of examination under oath provision).

In *Gipps Brewing Corp. v. Central Manufacturers Mut. Ins. Co.*, 147 F.2d 6 (7th Cir. 1945), a corporate insured’s adjuster and its officer both refused to answer material questions at their respective examinations. The court determined that coverage was forfeited due to this refusal. The court did not address the issue of whether the officer or the adjuster were required to submit to an Examination, but that is implicit from the holding. The court noted that the adjuster was the individual who had submitted the claim. But see *Palace Café v. Hartford Fire Ins. Co.*, 97 F.2d 766 (7th Cir. 1938) (adjuster was Independent contractor and, as employee of adjusting firm, as opposed to insured, he was not “insured” for purposes of examination under oath provision).

Taking the public adjuster’s Examination becomes especially critical when the public adjuster has been instrumental in the submission of the claim and the insured is unable to provide any information regarding the facts, circumstances or value of the claim. In fact, the insured will often testify at his own Examination that he has little knowledge of the information sought because his public adjuster handled the claim. An insured may even blame the public adjuster when confronted with discrepancies in the claim. In a claims fraud investigation, this could impede the insurer’s ability to establish the insured misrepresented or omitted material facts unless the insurer is able to conduct the Examination of the public adjuster.

When confronted with this situation, the insurer should do the following:

- Confirm with the insured on the record that the public adjuster ("PA") was authorized to submit the Proof of Loss and supporting documentation and otherwise act on the insured’s behalf;
- Confirm that the insured had an opportunity to review the Proof of Loss or consult with the PA prior to its submission;
- Confirm that the insured signed the Proof of Loss after the PA completed it with the understanding it would be submitted to the insurer in order to obtain insurance proceeds;
- If the insured will produce the public adjuster for an Examination to facilitate a claim decision and as part of the insured’s duty to cooperate. The basis for the request should be stated on the Examination record and followed up in writing.
• If the PA appears at the Examination, offers information but refuses to be sworn in, ask the insured to ratify the statements made by the public adjuster.

• If the insured or public adjuster refuse to agree to the PA appearing for an Examination, there will likely be nothing the insurer can do to compel an appearance. Remember, only the insured is obligated to submit for an examination under oath. See, e.g., Glados v. Reliance Ins. Co., 888 F.2d 1309 (11th Cir. 1989) (where the policy requires that only the “named insured” produce documents, Court held that personal financial records of corporate owners were not required to be produced under the policy). However, if the PA is the only person with knowledge regarding the basis for the claim, the insurer may be able to deny the claim based on the insured’s failure to cooperate.

Conclusion

The Examination Under Oath and Proof of Loss can be incredibly useful in adjusting difficult and extensive claims. As a host of problems can arise when an insurer demands that an insured participate in an investigation, it is critical to understand how to effectively use these policy conditions. It is equally important to be aware of, and avoid, roadblocks that may interfere with the claims adjustment process.