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THE EXAMINATION UNDER OATH--A CONNECTICUT OVERVIEW

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I. INTRODUCTION

For over 140 years, contracts of insurance have included the requirement that an insured submit to at least one examination under oath as a condition precedent to collection of insurance proceeds. [1] Today, insurance policies often amplify this condition, requiring an insured to submit to an examination 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 [the] insurance or the claim, including an insured's books and records. In the event of an examination, an insured's statement must be signed." [2] A breach of this condition, in the absence of a reasonable excuse, "generally results in the forfeiture of coverage, thereby relieving the insurer of its liability to pay, and provides the insurer an absolute defense to an action on the policy." [3] Further, an insured is typically not permitted to bring legal action against an insurer until he has complied with the policy's conditions, including submission to the examination. [4] As a result, the examination under oath has evolved from a mechanism to detect fraudulent claims into a formidable tool often viewed by the insured as intrusive and intimidating.

II. WHAT IS THE EXAMINATION UNDER OATH?

The function of the examination under oath has not changed for over a century.

> The object of the provisions in the policies of insurance,
> ***290** requiring the assured to submit himself to an examination under oath, to be reduced to writing, [is] to enable the company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims. And every interrogatory that [is] relevant and pertinent in such an examination [is] material, in the sense that a true answer to it [is] of the substance of the obligation of the assured. A false answer as to any matter of fact material to the inquiry, knowingly and wilfully made, with intent to deceive the insurer, would be fraudulent. [5]

In short, the examination under oath is a tool to identify false claims. It is often required in connection with an insurance policy's "cooperation clause," which obligates the insured to "[c]ooperate with [the insurer] in the investigation or settlement of the claim." [6]

The examination under oath requirement also implicates public policy issues because the procedure may ultimately affect the cost of insurance premiums, at least indirectly.

> The right to examination [under oath] ... is material because it is part of a bargained-for discovery process that *may lead* to the discovery of information barring recovery under a policy because a claim is based on fraud and criminal activity. Thus, from the perspective of setting a fair and adequate premium, which is essential to insurers if risk is to be allocated in a predictable way--predictable to profit margins necessary to sustain their business given possible claims .... [7]

A. ***The Examination Under Oath is Contractual***

The examination under oath is, typically, a requirement created within the confines of an insurance policy.[8] Such ***291** provisions are "valid and enforceable"[9] and "Connecticut courts have upheld insurance policy requirements that insureds submit to an 'examination under oath.'"[10]

The examination requirement in a standard insurance policy is usually located in the "Conditions" section as a component of the "Your Duties After Loss" clause. This clause typically requires that the insured: promptly notify the insurance agent of the loss; notify the police if a theft is involved; protect the property from further damage; keep an accurate record of repair expenditures; prepare a detailed and documented inventory of the damaged property; and provide the insurer with a sworn proof of loss statement within a specified period.[11] The examination under oath is often listed as a separate duty and, at first glance, appears innocuous.

Your Duties After Loss. In case of a loss to covered property, you must see that the following are done:

....

f. As often as we reasonably require:

(1) Show the damaged property;

(2) Provide us with records and documents we request and permit us to make copies; and

(3) Submit to examination under oath, while not in the presence of any other "insured," and sign the same[.[12]

"You" and "your" are usually defined as the "named insured" and his "spouse if a resident of the same household."[13] "Insured" may be defined as "you and residents of your household who are: a. [y]our relatives; or b. [o]ther[s]" under 21 in their care.[14]

These conditions can become onerous for the insured. Additionally, some have argued that the examination requirements ***292** favor the insurer.[15]

A breach of the examination under oath provision usually results in an insurer denying a claim. There are limited scenarios when refusing to submit to the examination will not preclude denial; e.g., if "'good cause"' or a "reasonable explanation for the failure" exists.[16] But "the burden is [still] on the insured to submit to a later examination and to offer to do so."[17] [18]

In the opinion of the authors, a "reasonable justification" to postpone an examination under oath occurs when the insured needs additional time to produce records or documents that were requested in connection with the examination. In this situation, the insured must, however, acknowledge that he will attend the examination once he has secured the requested information. And, to show his willingness to comply with the examination, the insured should indicate the date by which he reasonably believes he will obtain the requested material, and indicate future dates on which he is available to submit to the examination.

B. ***The Scarcity of Information Regarding the Examination Under Oath***

There is little authority discussing the parameters of the examination under oath. As a result, its application varies among insurers and the individuals conducting the examinations.

1. The Examination Under Oath is Contractual and Invoked Outside of Court Procedure

The examination under oath is not a legal proceeding. It is, instead, a provision of an insurance policy and "[a]n insurance policy is to be interpreted by the same general rules that govern the construction of any written contract ...." [19]

***293** If the insurance coverage is defined in terms that are ambiguous, such ambiguity is, in accordance with standard rules of construction, resolved against the insurance company. Where the terms of the policy are of doubtful meaning, the construction most favorable to the insured will be adopted. If however, the words in the policy are plain and unambiguous the established rules for the construction of contracts apply, the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning .... [20]

2. What Constitutes an Examination Under Oath?

While no formal rules exist, most examinations are "conducted by an attorney and the claimant gives sworn testimony which is generally taken down verbatim by a stenographer." [21] The insured may be required to sign the transcript. [22] A judge is not involved in the procedure.

"An examination under oath is not the equivalent of a mere conversation between the insurance company representative and the claimant." [23] A recorded examination by an insurance investigator has, however, been sufficient for purposes of "substantial compliance." [24] In *Kitzman v. Pacific Indemnity Co.*, the insured "claim[ed] that her recorded examination by the defendant's investigator resulting in a sixty-eight page transcript was substantial compliance." [25] The insured's attorney, who attended that examination, submitted an affidavit that he and his client were told by the investigator the examination and statement "'was being taken in accordance with the terms of her [the plaintiff] insurance policy."' [26] The insurer's motion for summary judgment on ***294** this issue was denied [27] and the case proceeded to trial. There, the court wrote "[t]he plaintiff was misled by the investigator ... in believing she was in fact complying with the terms of the policy as to the [examination under oath]" and ultimately held that she "did not in this case breach her contract for coverage" because the evidence did not show that she "did not substantially meet her compliance" with the examination clause; her claim was thus paid. [28]

In the view of the authors, if an insured is led to believe a "statement" is an examination under oath, or if a statement is taken "under oath" or is "sworn to," the insured should be considered in "substantial compliance" with the examination provisions.

3. Limited Judicial Assistance is Available

Judicial intervention occurred in *Southern New England Television Service, Inc. v. Hartford Ins. Group* when the plaintiffs applied for a protective order pursuant to the Connecticut Practice Book to "prevent the dissemination" of information in an examination under oath to fire and law officials, alleging it would "violate plaintiffs' right of privacy along with other constitutional rights." [29] Prior to the examination, the insurer "advised" the insured it planned to send the fire marshal, per his request, a copy of the examination transcript and related exhibits. [30]

The court wrote it "ha[d] authority to grant protective orders in discovery matters" and the defendant had not "challenged what seems to be an appropriate application of that practice rule to this type of proceeding." [31] The court noted the plaintiffs had "not specified with precision or clarity" the federal and state claims to which they referred and "pertinent ***295** factual

context" was required before making a ruling. [32] The court also noted "questions of relevance, materiality, as well as scope of the examination under the applicable statutory language of C.G.S. § 38a-318" could be made only by "reviewing the questions to be posed, with objections, or on the basis of an in camera review of the transcript of the examination proceedings, again, with objections specified clearly ...." [33] The court granted a protective order barring dissemination until it decided the issues of relevance, materiality, scope, and constitutional privilege. [34]

In contrast to *Southern New England Television Service, Inc*., a protective order involving the taking of an examination under oath was denied in *Thomas v. Response Ins. Co*. [35] There, after suit had been instituted by the insured seeking payment under the policy, the insured filed a motion for a protective order under Connecticut Practice Book Section 13-5 "asking [the] court to preclude" the taking of an examination under oath, even though the insurance policy clearly provided for such examination. [36] The court specifically "note[d] that the plaintiff d[id] not seek a protective order *limiting* the scope" of the examination "only to certain topics or subjects," but instead sought a protective order that would "*entirely preclude*" an examination "expressly authorized by the policy." [37]

The plaintiff argued, in her memorandum of law, that the examination under oath would "'deprive her of basic rights afforded to her in [a] deposition' and would place her 'at the mercy of the defendant."' [38] The court disagreed, writing that the examination under oath was "separate and distinct from ordinary discovery tools available after" a legal suit had been instituted, and that an examination under oath could be utilized in addition to a deposition. [39] Further, the court found ***296** the plaintiff did not show "good cause" for granting her protective order because she did not factually assert how such examination would be "annoying, embarrassing, oppressive or unduly burdensome or expensive." [40] Finally, the court noted that the examination under oath would be limited to "matters relevant and material to the loss" and that the plaintiff was permitted to have her attorney at the examination and that he could "object" to questions posed in certain circumstances. [41] As a result, the court denied the insured's motion for a protective order to preclude the insurance company from examining her under oath. [42]

Although the insured's motion for a protective order was denied in *Thomas*, the case emphasizes that an insured is entitled to certain "rights" during an examination under oath. Specifically, the court noted the insured is entitled to an attorney, that the attorney may object, and that questioning must be limited to relevant and material matters.

C. *Contexts of the Examination Under Oath*

The examination under oath is used primarily to detect fraudulent or inflated claims. [43] It is also used for coverage, motive, and motor vehicle accident issues. Health insurance policies, as well as life insurance policies, may also include ***297** examination under oath requirements.

1. Determination of Coverage and Loss Issues

An examination under oath may be used to determine whether coverage existed at the time of the claimed loss. In *Walter v. Bobrowiecki*, [44] the plaintiff was injured when the Ford Mustang in which he was a passenger crashed. Bobrowiecki, the driver, claimed via a third-party complaint that the Mustang was covered by her automobile insurance policy. [45]

Coverage for the Mustang hinged on whether it was a "newly acquired auto" "*in addition*" to the vehicle already insured (a Lincoln Navigator), or whether it was a "newly acquired auto" that "*replace[d]*" such vehicle. [46] The policy stated a vehicle owned "in addition" to a previously insured vehicle required notification of the addition "within 14 days" of ownership, whereas if a new vehicle "replace[d]" another, coverage was provided without any notification. [47]

Bobrowiecki, who never informed the insurer she owned the Mustang, was ultimately denied coverage for the collision and related medical expenses based in part on her examination under oath [48] where she "agreed that, at the time she acquired it, the Mustang was 'in addition to the Navigator.'" [49] The court thus granted the insurer's motion for summary judgment, which asserted it had "no obligation to defend or to indemnify" because the Mustang was not covered. [50]

2. Determination of Motive

An examination under oath may be used when there is a question of motive, particularly when the origin of a fire is in dispute. A fire classified as arson involving the insured is not covered by insurance. [51]

In *Double G.G. Leasing, LLC v. Underwriters at Lloyd's, London*, ***298** the plaintiff insured (a sole member LLC) appealed the trial court's grant of summary judgment for the insurer, arguing it had improperly determined there were no genuine issues of material fact as to whether the plaintiff had filed certain tax returns and not produced them during the examination under oath. [52]

The insurer had submitted affidavits from the fire marshal and a cause and origin fire investigator indicating the fire had been "intentionally set." [53] As part of the examination, the insured was asked to produce various documents, including his personal federal and state tax returns. The Appellate Court noted the tax records had been requested because "the fire was suspicious in nature" [54] and an insurer needed such records to "establish a prima facie case of arson for purposes of denying coverage under [the] insurance policy," including whether the "fire was incendiary [and whether] the insured, its agents or officers had an opportunity to cause the fire ...." [55] Quoting from the trial court's memorandum of decision, the Appellate Court added, "[a]rson is a difficult crime to prove. It can only be established by circumstantial evidence and by inquiries into motive. Financial records of the insured are, as the cases say, patently relevant to the insurance company's rightful scope of the investigation." [56]

The court continued its discussion of motive, writing that while the policy itself did not "impose obligations" on the insured to disclose "purely personal information or personal tax returns," those documents were required here because the insured was "the sole member, owner and manager" [57] of the plaintiff LLC and "pierc[ing] the corporate veil" was appropriate. The Appellate Court ultimately affirmed the trial court's grant of summary judgment for the insurer. [59]

***299 3. Motor Vehicle Insurance**

Auto policies may include an examination provision in conjunction with the cooperation clause. The Regulations of Connecticut State Agencies provide an auto liability policy may include "conditions" [60] "requiring the insured to assist and cooperate with the insurer" [61] and that a suit cannot be instituted "until all the terms of the policy have been complied with ...." [62]

In *Nelson v. Peerless Ins. Co.*, the insured submitted a claim for a vehicle that was stolen and damaged. [63] The insurer moved for summary judgment, alleging the plaintiff did not "submit *fully* to examination under oath" and made "material misrepresentations" during it. [64] The plaintiff argued she had responded to all "relevant and material questions" "to the best of her knowledge and recollection." [65] The court wrote that when "determining whether a condition to cooperate has been broken, we are dealing with contract rights, and if there has been a breach, prejudice need not appear ...." [66] The court ultimately denied the insurer's motion for summary judgment, noting that while the plaintiff had submitted to an examination, there was a genuine question of material fact as to whether she answered "to the best of her knowledge." [67]

Examination under oath requirements are "common in uninsured/underinsured motorist insurance policies as well." [68] The examination provision was questioned in *Saad v. Colonial Penn Ins. Co.* when the insured submitted a claim for underinsured motorist benefits and was told he would be examined under oath. [69] He initially indicated he would provide ***300** a "signed statement under oath," but "refused to be questioned under oath in the presence of a court reporter." [70] After the insurer asserted that refusing to submit to the examination was a breach of the policy's conditions that would result in denial of coverage, the insured agreed to "'the taking of a statement under oath as allegedly required by his policy.'" [71]

Examination under oath clauses in motor vehicle policies allow an insurer to question the insured under oath in the same manner dictated within property insurance policies. Further, a "statement," without more, will not constitute compliance with the examination provision.

D. *The Procedures Used in the Examination Under Oath*

Although the procedures used during the examination under oath differ among insurers and their examiners, certain common characteristics exist.

1. Procedures Common to Most Examinations

During the examination, a representative of the insurer questions the insured under oath and a transcript is produced. Questions are not provided in advance nor will a written statement by the insured substitute for the examination. [72]

Typically, nothing is said in the policy about the right to have the insured's attorney present. In practice, however, the insured's attorney can attend. Further, "[t]he insured has the right to be represented by an attorney at such examination, and to refuse to be examined if this right is denied." [73] The attorney cannot, however, cross-examine his client or present evidence. [74]

Although the insured's attorney can attend the examination, the attorney theoretically is not allowed to object. [75] [76] ***301** Insurance literature indicates that while the attorney is not "permitted" to object, he should, however, "protect the insured's interests." [77] And, the "right" to object has been discussed in certain cases. "[W]hile counsel for an insured is not permitted to conduct cross-examination during an examination under oath, the insured is 'entitled to have counsel present and to object to any questions put to him on any legal grounds available to him.'" [78]

The breadth of questioning is broad. Generally, the policy allows questioning on "any matter relating" to the claim. [79] Questions about motive, prior claim history, and the insured's financial condition are routine. [80] And, while the insured is not required to answer "immaterial" [81] questions, not responding may lead to the assertion he did not fully comply. [82]

The policy usually indicates more than one examination may be taken and the number of examinations is not capped. [83] Further, there is no limit on the duration of each examination; [84] an examination may therefore range from a few hours to more than one day.

2. Comparison to Procedures Used in a Deposition

It is clear that when an attorney represents a deponent in a deposition, both the attorney and the deponent have more rights than either the attorney or insured has when the attorney represents the insured in an examination under oath.

a. Procedures Involved in a Deposition

The examination under oath is not a deposition. A deposition is subject to rules of civil procedure; the examination ***302** is not, as it occurs outside the legal system. And, the examination "typically occur[s] prior to litigation,"[85] while a deposition occurs after suit has been raised.

Connecticut civil procedure provides that after an action or proceeding is initiated, the "testimony of any person, including a party" may be taken "by deposition upon oral examination" and witnesses "compelled" by subpoena.[86] The rules require proper written notice that "shall state the time and place for taking the deposition, the name and address of each person to be examined" and if a subpoena duces tecum is served, the material to be produced.[87] Other rules govern the location of the deposition and before whom it can be taken.[88]

"Examination and cross-examination of deponents may proceed as permitted at trial"; the deponent is under oath; and the testimony is recorded.[89] Testimony is typically taken stenographically, but can be "recorded by any other means authorized" including videotape, if ordered by the court upon motion.[90] Connecticut permits objections as to: the qualifications of the officer taking the deposition; the manner of taking the deposition; the evidence presented; and the conduct of the proceedings.[91] Such objections must be "stated succinctly and framed so as not to suggest an answer to the deponent"; "[a] person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion" that the "examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party."[92] The deponent may examine the transcript; he may make changes if he provides a reason; and he must sign the deposition to "certify[]" it is a "true record" unless this provision is waived.[93] Other rules provide for the ***303** "sealing," delivery, and use of the deposition in court.[94]

The Federal Rules of Civil Procedure are similar to Connecticut's, but there are differences. For example, the federal rules require leave of court if the person to be examined "has already been deposed,"[95] and they also state the deposition may be "recorded by audio, audiovisual, or stenographic means" "unless otherwise ordered by the court."[96]

b. Similarities Between the Examination Under Oath and a Deposition

The examination under oath bears a marked resemblance to a deposition. The examination and deposition are both performed under oath. The insured can have an attorney present, as in a deposition.[97] "[T]he insurer must notify the insured of its intent to examine him or her under oath" and the notice must include "at a bare minimum, ... the place ... and a reasonable time for the examination"; further, the notice will typically include "before whom the interviews will be conducted"[98] and it should be delivered to the insured and his attorney.[99] Such notice requirements are similar to those of a deposition. Additionally, the examination transcript, like the deposition transcript, may be admitted as evidence during a subsequent legal proceeding.[100]

c. Differences Between the Examination Under Oath and a Deposition

The most significant difference between the examination under oath and a deposition is that while the insured is permitted to have his attorney attend, the attorney typically cannot "make objections based on local rules of civil procedure."[101] The insured's attorney therefore is unable to actively advocate for his client. Nor can the attorney cross-examine ***304** or offer evidence.[102] And, if the insurer resorts to questioning that is "annoy [ing]" or "embarrass[ing]," the insured's attorney may

not be able to file a motion to try to terminate or limit the scope and manner of the questioning, as permitted by rules of civil procedure. [103]

The attorney for the insured can, however, object if the examiner's questions are immaterial or irrelevant. [104] In that instance, the examiner should explain why such questions are pertinent to the claim.

Another significant difference exists between the examination under oath and the deposition. The insurance policy clause describing the examination under oath often indicates the examination of an insured will take place while "not in the presence of any other insured," [105] while "the testimony of any person, including a party," may be taken by "deposition upon oral examination" in the presence of any party to the suit. [106] The purpose of taking separate examinations under oath of each insured should, theoretically, "lead to more accurate information" and "discourage or even prevent fraudulent claims." [107] And, in certain jurisdictions, the right of the insurer to conduct separate examinations of the insureds has been upheld even when the policy did not specifically provide for separate examinations. [108]

305 E. *Penalty for Failing to Answer

Failing to submit to or substantially comply with the examination under oath typically results in breach of contract. The penalty for such breach is generally a denial of the claim.

1. Claim May Be Denied

Few scenarios relieve an insured of his obligation to submit to the examination. And, when an insured is arrested or involved in a pending criminal investigation, he must choose between exercising his Fifth Amendment rights or violating the examination under oath provisions. Additionally, it does not appear that claiming a marital privilege will excuse an insured from complying with an examination under oath.

a. Fifth Amendment Issues

In *Taricani, Jr. v. Nationwide Mutual Ins. Co.*, the plaintiffs "declined to appear for examination under oath for a significant period of time" after the fire loss due to an investigation into whether they had committed arson; they did, however, "offer[] to cooperate fully once the police investigation had been concluded." [109] The insurer rescheduled the dates for the examinations and "advised" the insureds if they did not appear, "their inaction would be treated as a deliberate breach of a material condition in the policy." [110] The insureds did not appear and the claim was denied. [111]

The insureds were later exonerated and indicated they would produce the requested documents and submit to the examinations, but the insurer reaffirmed its denial. [112] The insureds sued, arguing they were "justified" in refusing to submit because of the arson investigation. [113] The trial court disagreed and granted the insurer's motion for summary judgment, finding the plaintiffs had not complied with the cooperation clause by not submitting and that whether the insurer suffered prejudice due to the delay in the examinations was not relevant. [114]

***306** On appeal, the Appellate Court also disagreed with the plaintiffs, who argued that by "expressing their willingness to be examined under oath ten months after the [fire,]" they had "substantially complied" with the cooperation clause. [115] The Appellate Court wrote:

[N]umerous cases in state courts, including our own Superior Court, have held that constitutional immunity from self-incrimination does not justify or excuse the obligation of an insured to cooperate in the prompt investigation of the event on which a claim of insurable loss is based.

....

We conclude, therefore, that, as a matter of law, the plaintiffs' failure to appear to be examined under oath was a breach of a material condition in their business property insurance policy. The language of the policy therefore justified the defendant's decision to decline the plaintiffs' claim for insurance coverage .... [116]

Another Connecticut case involving arson provides additional insight. There, the court succinctly summarized the relationship of the Fifth Amendment to the examination under oath. [117]
[T]he fifth amendment privilege against self-incrimination does not in this case excuse appellant from fulfilling his contractual obligations ... He must be held to the express terms of the agreement. He is not compelled to incriminate himself. He is, however, bound by the provisions to which he stipulated when he signed the insurance agreement. [118]

The *Pervis* court stated that the privilege against self-incrimination preserves the insured's right to choose between incriminating himself or violating the policy provisions. [The insured] has chosen to invoke the privilege but lose on his contract claim. [119]

***307** Thus, in Connecticut, as in other states, to avoid self-incrimination an insured will most likely not be able to pursue an insurance claim.

b. Marital Privilege Issues

There are no Connecticut cases discussing the relationship between the examination under oath and the “two types of marital privilege acknowledged by Connecticut courts, the adverse spousal testimonial privilege and the marital communications privilege ....” [120] The statutory adverse spousal testimonial privilege allows the spouse of an individual in a criminal trial to “elect or refuse to testify for or against the accused,” [121] while the marital communications privilege, “acknowledged” by Connecticut courts, allows an individual to prevent his “spouse or former spouse from testifying” about “any confidential communication made by the individual to the spouse during the marriage.” [122] New York has, however, considered spousal privilege and its relation to the examination under oath in *LeBaron v. Erie Ins. Co.* [123] Based upon the reasoning there, it would appear Connecticut would not permit the assertion of spousal privilege as a basis for refusing to submit to an examination under oath.

In *LeBaron*, a fire occurred in the insured's van. At the examination under oath, the insured was asked if he had spoken to anyone other than his attorney about his examination testimony. The insured answered that he had spoken to his wife and the examiner then asked about the “nature” of those conversations. [124] The attorney for the insured “refused to allow” the insured to answer, “citing a spousal privilege” and indicated the insured would not answer any questions regarding such conversations. [125] The examiner then “declined” to ***308** pose further questions and ended the examination.

The insured later filed suit, claiming damages caused by the insurer's denial of coverage. The insurer “contend[ed] that the complaint [was] premature” because the insured, by refusing to “cooperate” by “improperly asserting a spousal privilege,” breached a condition precedent to claim recovery. [126] The court wrote “it has been widely held” that refusing to answer on Fifth Amendment grounds voided the insured's policy rights. [127] The court elaborated, writing

While the Court recognizes the importance of protecting confidential communications between a husband and a wife, if an insured is not permitted to invoke at an [examination under oath] a basic Constitutional right, it certainly cannot be said that Plaintiff can refuse to answer questions at an [examination under oath] based upon a spousal privilege.

Having found that Plaintiff improperly asserted the spousal privilege at the [examination under oath], the Court must now determine the remedy. An insured's refusal to provide requested information, material and relevant to an insurer's investigation of the claimed loss, including the refusal to answer questions or participate in an [examination under oath], is a breach of the cooperation clause of the insurance policy and coverage may be disclaimed on that basis alone. [128]

Here, however, even though the insured had "improperly asserted a spousal privilege," the court determined that since the insurer concluded the examination, the insurer "failed to establish that they acted diligently" in obtaining the insured's cooperation. [129] As a result, the court held the "noncompliance" of the insured "was not so willful or extreme as to warrant dismissal of the action without giving [the insured] one last chance to answer the questions." [130]

2. Procedure May Favor the Insurance Company

Opportunities exist for the insurer to use the examination under oath strategically. And, if a claim proceeds to court, the burden is on the insured to prove compliance. [131]

***309** An insurer can determine the timing of the examination, making it difficult for the insured to meet the condition that "[n]o action can be brought [against the insurer] unless the policy provisions have been complied with and the action is started within one year after the date of loss." [132] [133] A court may, however, side with the insured on questionable timing.

In *Kitzman v. Pacific Indemnity Co.*, an insurer's representative conducted a lengthy taped "examination" of the insured in her attorney's presence within six months of a fire loss. [134] Less than three months later, the insurer indicated it would require the plaintiff and her husband to submit to an "examination under oath" within three weeks; the examination under oath was thus scheduled eight months after the fire. [135] Plaintiff's counsel told the insurer his client "was commencing legal action" and that she would appear for a deposition, but not for the "examination under oath." [136] The insurer replied that legal action could not occur until all policy conditions were met and "demanded" the action be withdrawn and the insured submit to the "examination under oath." [137] The insured refused and the insurer raised the "special defense" that the insured did not submit to the examination under oath, and moved for summary judgment. [138]

In court, the plaintiff argued that because the policy mandated a legal suit be raised within one year of the claimed loss, she "should not be required to wait for the defendant to decide to schedule an 'examination under oath' which would put [her] in a position of risking a violation of the contractually imposed one-year statute of limitations," since she had already waited eight months to file suit and had agreed to ***310** appear at a deposition. [139]

The court acknowledged an insurer could properly argue that complying with an examination under oath provision was a "material" "cooperation clause," but that requiring "more than substantial compliance" was "inappropriate." [140] Further, the court wrote:

> It is important to note that the request by the defendant for an examination under oath occurred nearly eight months after the plaintiff's loss and approximately four months before the one-year policy statute of limitations expired. It can be argued that any delay in requesting the examination under oath was caused by the defendant itself. If the court were to adopt the defendant's reasoning regarding strict compliance

> with the policy, the defendant could request an examination under oath or further documentation from the plaintiff up to the last day of the one-year statute of limitation for commencing suit.

The insurer's motion for summary judgment, which included other issues, was thus denied. [142] At trial, the court found "the claim made by the defendant that suit was instituted before the conditions of the policy were complied with is unavailing," and the claim was paid. [143]

The scope of questioning may often favor the insurer. Generally, "[e]ven irrelevant questions are tolerated if there is any possibility that the question may lead to an inquiry about facts relevant to the policy or claim." [144] And, if a claim is denied, "the burden to prove compliance with a condition precedent of an insurance policy is on the insured ...." [145]

Whether an insured may be examined more than once depends, first, on whether the policy provides for more than one examination. The trend among insurers is for the policies to indicate that multiple examinations under oath may be required. Second, to avail itself of further examinations, the ***311** insurer must "reserve" its right to continue the examination and/or to schedule a subsequent examination.

While the insurance contract typically indicates the insured may be subject to more than one examination under oath, the policy "does not limit the number" of examinations it may require; "[t]he only limitation on the number of [examinations under oath] is the subjective test of reasonableness." [146] Nor is there a limit on the duration of each individual examination and the only constraint is, once again, "reasonableness." [147] Further, the insured, his spouse, and even his child, under certain circumstances, may be required to submit. [148]

The "named insured" and his resident spouse are most often the individuals who must submit to the examination under oath. Because, however, "insured" is often defined as "you and residents of your household" who are relatives, children of the insured may be required to submit to the examination if they fit within this definition. In *Parrilla v. Travelers Ins. Co.*, whether an adult daughter of the insured was a "resident" of the insured property was "ambigu[ous]." [149] At the time of the fire, the daughter was living with friends in a neighboring state looking for a job, but she had left "many items of her personal property" in her father's home. [150] The court wrote that numerous factors determined if a person was a "resident," including intent; time spent at the household; financial ability to maintain a separate household; address used for voting, licenses, and tax filings; and where mail is received. [151] Here, there was a "question of fact" as to whether the adult daughter was a resident of the ***312** household at the time of the fire and, as a result, the insurer's motion for summary judgment, which included numerous issues, was denied. [152]

The wording within a cooperation clause varies by insurer. Some clauses extend the examination under oath provision to individuals not designated as an insured. The homeowner's policy in a California case included the following provisions in its cooperation clause:

After a loss to which this insurance may apply, you shall see that the following duties are performed:
....
d. as often as we reasonably require:

1. exhibit the damaged property;

2. provide us with records and documents we request and permit us to make copies;

3. submit to examinations under oath and subscribe the same; and

4. *produce employees, members of the household or others* for examination under oath to the extent it is within the insured's power to do so .... [153]

This article does not discuss the enforceability or interpretation of item 4. above, nor does it appear Connecticut courts have yet addressed the requirement that noninsureds submit to examination under oath. In the opinion of the authors, a policy requiring an insured to produce for examination under oath "employees, members of the household or others" is very broad in scope and they question whether an insurer could deny a claim for the failure of an insured to comply with such a provision.

III. POINTS TO CONSIDER WHEN CONDUCTING THE EXAMINATION UNDER OATH

The examiner is often an attorney whose duty is to protect insurer interests without alienating revenue-producing policyholders. ***313** The insurer must honor claims by its insureds, but it must ensure claim validity by a process that can be adversarial. The examiner must balance the needs of both parties, and realize an insurer risks being sued for breach of contract and the implied covenant of good faith and fair dealing if the examination is not properly conducted. [154]

A. *What is the Proper Breadth of Questioning?*

"The insurer is entitled to conduct a searching examination, though all questions should be confined to matters relevant and material to the loss." [155] "However, the insured need not answer immaterial questions." [156] The examiner is given a wide scope; questions regarding the claim itself are obviously permitted, but so are questions concerning previous losses; motive; alibi; and financial condition. [157] "Any question asked in an application for insurance is, by definition, material" [158] and may be investigated if fraud is suspected.

Videotaping the examination allows the insurer to later review the insured's "body language" and comfort level when posed with certain questions. [159] As videotaping is typically not mentioned in the policy, it should be discussed with the insured prior to the examination.

B. *The Examiner's Right to Insist on Answers and Threaten Claim Denial*

The examiner has the right to insist upon answers to his questions, assuming they are relevant, because the insurer has a duty to investigate claims to ensure their validity. The right to require an examination under oath has been upheld for over a century, and if the procedure is within the bounds of reasonableness, an insured must answer the questions ***314** posed to him.

The insurer has the right to threaten claim denial if the insured does not substantially comply with the examination. The examination requirement is typically clearly worded within the policy, which the insured is expected to read. Further, submission to the examination is normally a condition precedent to collecting a claim; as such, the insurer is within its legal rights to refuse payment unless and until this condition is satisfied.

C. *The Right to Assert a Lack of Cooperation*

An insurer may assert the insured did not cooperate during the examination. If subsequently upheld during a court proceeding, the claim will not be paid. "It is true that insurance companies can rightly claim that cooperation clauses requiring examination

under oath are 'material,' and thus, that compliance with them are conditions precedent to any claim." [160] "However, to require more than substantial compliance with them is inappropriate." [161]

In *Double G.G. Leasing, LLC*, the insured argued on appeal the trial court had "failed to apply the substantial compliance standard when it evaluated the plaintiff's cooperation with the examination under oath," asserting the lower court had "demanded 'absolute perfection, not substantial compliance,' in determining that [he] had failed to cooperate with the investigation." [162] The court wrote that when "an insured fails to comply with the insurance policy provisions requiring an examination under oath and the production of documents, the breach generally results in the forfeiture of coverage, thereby relieving the insurer of its liability to pay, and provides the insurer an absolute defense to an action on the policy." [163] The court noted a lack of cooperation "must be substantial or material" [164] and in Connecticut, the "burden is on the plaintiff to prove cooperation by the insured." [165] The ***315** court added that cooperation is "not broken by a failure of the insured in an immaterial or unsubstantial matter" because that would not prejudice the insurer [166] and a "cooperation clause" was required to "enable" an insurance company "to prepare for, or to determine whether there is, a genuine defense ...." [167]

The plaintiff maintained it had cooperated and "'almost completely complied"' with production requests, thus satisfying the "substantial compliance standard." [168] The trial court had found the plaintiff "breached the cooperation" clause "by not providing requested tax returns" and that the "plaintiff did not demonstrate that the insurer was not prejudiced by the breach." [169] The Appellate Court agreed with the trial court which had written when arson arises, "'income records are certainly material"'; that in a civil case, arson could often be proved by circumstantial evidence; and that "'[i]nformation gleaned from the tax returns of an individual insured or the officers of a corporate insured can be of crucial significance ...."' [170] The Appellate Court concluded "there was no genuine issue of material fact" as to whether the plaintiff failed to provide the requested information that the trial court had "properly deemed" "material to the investigation" and affirmed its grant of summary judgment for the insurer. [171]

In *Green v. Royal Indemnity Co.*, the insurer argued its motion for summary judgment should be granted because the insured failed to cooperate during his examination by not answering all questions and not providing all documents requested. [172] The trial court reviewed the plaintiff's responses, ***316** noting "many" questions were answered, but that "numerous others" were not. [173]

The court wrote "[i]n determining whether a condition to co-operate has been broken, we are dealing with contract rights, and if there has been a breach, prejudice need not appear ... The reason why immaterial and unsubstantial failures of an assured do not constitute a breach is because they are not included with the fair intendment of the requirement that the assured co-operate, and lack of prejudice to the insurer from such failure is a test which usually determines that a failure is of that nature." [174] The court added that lack of cooperation could not be "decided by determining whether there was an abstract conformity to ideal conduct" and that it was a "pragmatic question" that must be decided by the specific "facts and circumstances" of each case. [175] "Whether a contract of insurance has been breached by an assured is 'a question of fact to be determined upon the facts proven in the trial ...."' [176]

The *Green* court found the insurer had not shown there were no genuine issues of material fact as to whether the insured had "substantially breached" the cooperation clause and the insurer's motion for summary judgment on this point was denied. [177]

IV. POINTS TO CONSIDER WHEN REPRESENTING A CLIENT IN THE EXAMINATION UNDER OATH

An attorney can assist the insured in many ways during the examination under oath.

A. *The Right to the Presence of an Attorney*

"An insured may have an attorney present at ... the examination ***317** under oath, but such attorney cannot take part." [178] "It has been held that denial of an insured's right to have his ... attorney present during the examination under oath justifies a refusal to submit to an examination and bars the insurer from insisting upon the examination as a condition" of recovery. [179]

It is important the insured understand his attorney can attend the examination, even though it is not specified in the policy. A practitioner should also assist his client in reviewing the examination transcript to ensure it is accurate, does not reflect the insured answering a question he did not understand, and to ascertain required corrections are made.

B. *Tactical Considerations*

The practitioner must tell his client the examination under oath is not a casual conversation and inform him the procedure will consist of a series of questions that will not be provided in advance. The client should be told to answer to the best of his recollection but warned not to volunteer additional information, and that "I don't remember" is an acceptable response, if true. The insured must realize not substantially complying may result in claim denial; that he will be under oath; and that intentional misrepresentations may bar recovery. Finally, he must understand the examination may be used in court, possibly to his detriment.

The attorney should inform his client that not all discussions with an insurer are examinations under oath; the insured should thus confirm whether a discussion is an "examination under oath" or merely a "meeting." The insured should also ask if he will be examined by an attorney or an insurance investigator. And, the client should be told the examination might be videotaped.

The attorney representing the insured can intervene when production requests are burdensome and time frames for compliance are unreasonable by communicating with the ***318** insurer's representative to determine whether modifications can be made. If production requests involve costly expenditures for the insured, his attorney can again intervene to see if reimbursement by the insurer is possible or if there are alternative means of obtaining the information. The attorney can protect his client's interests by reviewing the documents the insured produces to ensure they are relevant and to ensure privileged information is not disseminated.

An experienced practitioner can be instrumental in facilitating his client's substantial compliance with the examination under oath. For example, when it appears an examination will not be completed because of the insured's refusal to answer a particular question, the practitioner can suggest the examination continue to see whether a claim determination can be made despite the lack of a response to certain questions. At the same time, the practitioner can inform the examiner that if a claim determination cannot be made, his client would be willing to return, at his own expense, to reconsider answering the questions. This may minimize an insurer's later assertion of a lack of cooperation and, at the same time, it might save the insured from answering an irrelevant or incriminatory question.

C. *Immateriality and the Risk of Not Cooperating*

While the insured's attorney is theoretically not permitted to object to immaterial questions, in practice he might want to do so to "protect the insured's interests." [180] If the examiner asks blatantly irrelevant or harassing questions, the attorney may feel obligated to object, if merely to let the examiner know he will not allow the examination to turn into a free-for-all session. [181] Further, because the insured expects his attorney to be his advocate, the practitioner must advise him of his limited role; otherwise, the client may feel he has been billed for services during which his interests were not protected.

***319** The insured's attorney wavers between advocating for his client and risking a lack of cooperation finding. The attorney must balance his role, objecting when his client is truly harassed or humiliated, or when the questioning is irrelevant and unreasonable. These situations, however, are subjective and require the practitioner to carefully gauge his behavior.

V. CONCLUSION

The examination under oath is a powerful tool utilized by insurers to avoid paying fraudulent claims. It is also, however, a mechanism that may be unfamiliar and intimidating to many policyholders. In short, the insured must submit to the examination under oath and answer "relevant" questions. If an insured does not "substantially comply," his claim is typically denied. Further, the insured may be required to submit to the examination before bringing a legal suit. As a result, the insured has little choice but to cooperate and participate in the examination.

Retaining legal counsel for an examination under oath is beneficial for the insured as well as for the insurer. The attorney representing the insured can ensure the scope of questioning is limited to material and relevant matters, and can object when legally permissible. On the other hand, the attorney for the insured can encourage his client to comply with a properly conducted examination so a valid claim is not later denied due to a lack of cooperation. The attorney can also assist the insured by reviewing production requests to make sure they are not unduly burdensome in volume or time for compliance, and he can make sure the insured realizes multiple examinations may be required.

An insurer also benefits by using an attorney to conduct the examination under oath. An attorney can formulate questions and request documents that are directed towards material and relevant issues, resulting in an efficient claim investigation. Further, an attorney is cognizant of the legal implications of denying a claim when an insured has, in fact, substantially complied with the examination conditions.

***320** The examination under oath, when properly used, can detect fraudulent claims and theoretically should result in lower insurance premiums. But, unless an insured is prepared for the onerous requirements of the examination under oath, his actions may fall short of substantial compliance resulting in the denial of a valid claim.

Footnotes

a1 Both of the Connecticut and New York Bars.

1 *See* Harris v. Phoenix Ins. Co., 35 Conn. 310, 312-13 (1868) ("the assured shall, if required, submit to an examination under oath ... and if deemed necessary by the company, to a second examination ...."; "until such ... examinations and appraisals [are] permitted, the loss shall not be payable.").

2 *See, e.g.*, Double G.G. Leasing, LLC v. Underwriters at Lloyd's, London, 116 Conn. App. 417, 427 (2009).

3 *Id.* at 432 (citing 13 G. COUCH, INSURANCE § 196:23 (3d ed. 1999)).

4 *Id.* at 428.

5 Claflin v. Commonwealth Ins. Co., 110 U.S. 81, 94-95 (1884); quoted in Bauco v. Hartford Fire Ins. Co., No. 375290, 2004 WL 573829, at *7, 36 Conn. L. Rptr. 799 (Conn. Super. Ct. Mar. 3, 2004).

6 *Double G.G. Leasing, LLC, supra* note 2, at 427.

7 Bergen v. Standard Fire Ins. Co., No. CV 93044099S, 1997 WL 809957, at *7, 21 Conn. L. Rptr. 154 (Conn. Super. Ct. Dec. 31, 1997).

8 In Connecticut, the policy language is mandated by statute. The standard form of fire insurance policy in Connecticut must include under the "Requirements in case loss occurs" section: "The insured, as often as may be reasonably required, shall ... submit to

examinations under oath ... and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices ....” CONN. GEN. STAT. § 38a-307.

9 Proto v. Am. Cas. Co., No. 70146, 1994 WL 109898, at *3 (Conn. Super. Ct. Mar. 18, 1994).

10 Kitzman v. Pacific Indem. Co., No. CV010449673S, 2002 WL 314177, at *2, 31 Conn. L. Rptr. 369 (Conn. Super. Ct. Feb. 8, 2002).

11 Information obtained from a standard homeowners policy issued in Connecticut.

12 Information obtained from a standard homeowners policy issued in Connecticut.

13 Information obtained from a standard homeowners policy issued in Connecticut.

14 Information obtained from a standard homeowners policy issued in Connecticut.

15 *See infra* Part II.E.2.

16 *Kitzman*, *supra* note 10, at *2.

17 *Bergen*, *supra* note 7, at *7.

18 “[A] need to attend to a sick relative” was “implied” to “provide cause to not attend an examination but it was then incumbent on the insured to offer to submit to an examination at a later date.” *Id.* at *6. Being deported and not permitted to return was a valid reason not to submit. 5A JOHN A. APPLEMAN ET AL., INSURANCE LAW AND PRACTICE § 3550 (1987).

19 Double G.G. Leasing, LLC v. Underwriters at Lloyd's, London, No. AANCV075003003, 2008 WL 2345205, at *5 (Conn. Super. Ct. May 16, 2008), *aff'd*, 116 Conn. App. 417 (App. Ct. 2009) (quoting Enviro Express, Inc. v. AIU Ins. Co., 279 Conn. 194, 199 (2006)).

20 Schultz v. Hartford Fire Ins. Co., 213 Conn. 696, 702 (1990) (internal quotation marks and citations omitted); quoted in Ehsan v. Ericson Agency, Inc., No. CV-01-0085772S, 2003 WL 21716345, at *7, n.5 (Conn. Super. Ct. July 3, 2003).

21 Wright v. State Farm Mut. Auto. Ins. Co., No. CV960561270, 1997 WL 746434, at *3 (Conn. Super. Ct. Nov. 18, 1997).

22 “In the event of an examination, an insured's answers must be signed.” *Double G.G. Leasing, LLC*, *supra* note 2, at 427.

23 *Wright*, *supra* note 21, at *3.

24 *Kitzman*, *supra* note 10, at *3-*4.

25 *Id.* at *3.

26 *Id.* at *3 (alteration in original).

27 *Id.* at *3-*4 (whether such examination “was in substantial compliance” was a genuine issue of material fact).

28 Kitzman v. Pacific Indem. Co., No. CV010449673S, 2002 WL 31758558, at *2-*3 (Conn. Super. Ct. Nov. 18, 2002).

29 S. New England Television Serv., Inc. v. Hartford Ins. Group, No. 92-702781, 1992 WL 154416, at *1, 6 Conn. L. Rptr. 588 (Conn. Super. Ct. June 23, 1992).

30 *Id.* at *1. The Fire Marshal can request in writing information from an insurer relating to an investigation of a fire of “suspicious or incendiary nature.” CONN. GEN. STAT. §§ 38a-318(a)-(i).

31 *S. New England Television Serv., Inc.*, *supra* note 29, at *2.

32 *Id.* at *2.

33 *Id.* at *2.

34 *Id.* at *2.

35 Thomas v. Response Ins. Co., No. CV08 6000662S, 2009 WL 5184190 (Conn. Super. Ct. Oct. 26, 2009).

36 *Id.* at *1.

37 *Id.* at *2 (emphasis added).

38 *Id.* at *2.

39 *Id.* at *2.

40 *Id.* at *3. The court also noted that even though cross-examination was not allowed in an examination under oath and that the parties do not "make stipulations designed to structure the parameters of an examination under oath prior to its taking," such facts did not rise to the level of being "so annoying, oppressive or burdensome" as to warrant granting the protective order. *Id.* at *3.

41 *Id.* at *3 (quoting from 13 G. COUCH, INSURANCE § 196:11 (3d ed. 1999) and Gross v. U.S. Fire Ins. Co., 337 N.Y.S.2d 221, 224 (Sup.Ct.1972)).

42 *Id.* at *3. The court also wrote that issuing the protective order would "eviscerate the defendant's contractual right to take her examination under oath in order to evaluate her underinsured motorist claim." *Id.* at *3.

43 The examination under oath does not always harm an insured. In *Parrilla v. Travelers Ins. Co.*, the insurer denied the insureds' loss, alleging they violated the policy's "concealment or fraud provision" and "misrepresented" the method of calculating the value of certain items. No. 483558, 2005 WL 2650779, at *1, *5 (Conn. Super. Ct. Sept. 27, 2005). The court referred to one plaintiff's examination, where she "no less than a dozen times" "testified or indicated that the value she ascribed to an item was only an estimate." *Id.* at *7. The court concluded the insurer had not established that no genuine issue of material fact existed as to whether the insured's "statements regarding the methods she used to estimate the worth [of] the items were wilful and material misrepresentations" and the insurer's motion for summary judgment, which included other issues, was denied. *Id.* at *7.

44 Walter v. Bobrowiecki, No. HHBCV054005696S, 2007 WL 2757358 (Conn. Super. Ct. Aug. 31, 2007).

45 *Id.* at *1.

46 *Id.* at *4 (emphasis added).

47 *Id.* at *4.

48 *Id.* at *4, *5. The case also included intent and impracticability issues.

49 *Id.* at *4.

50 *Id.* at *2, *5, *8.

51 *See Double G.G. Leasing, LLC, supra* note 2, at 428.

52 *Id.* at 418-19.

53 *Id.* at 428, n.4.

54 *Id.* at 428.

55 *Id.* at 428 (quoting from Travelers Ins. Co. v. Namerow, 261 Conn. 784, 801 (2002)) (internal quotation marks omitted).

56 *Id.* at 428.

57 *Id.* at 419, 429.

58 *Id.* at 429.

59 *Id.* at 434.

60 CONN. AGENCIES REGS. § 38a-334-8(b)(1) (2000).

61 CONN. AGENCIES REGS. § 38a-334-8(b)(1)(D) (2000).

62 CONN. AGENCIES REGS. § 38a-334-8(b)(1)(E) (2000).

63 Nelson v. Peerless Ins. Co., No. CV 93-0345800-S, 1994 WL 592031, at *1 (Conn. Super. Ct. Oct. 14, 1994).

64 *Id.* at *2 (emphasis added).

65 *Id.* at *2.

66 *Id.* at *3 (quoting Arton v. Liberty Mut. Ins. Co., 163 Conn. 127, 133 (1972)) (internal quotation marks omitted). *See infra* notes 116 and 169 for further discussion of prejudice.

67 *Id.* at *3.

68 *Thomas, supra* note 35, at *2.

69 Saad v. Colonial Penn Ins. Co., 32 Conn. App. 190, 191 (1993).

70 *Id.* at 191.

71 *Id.* at 192.

72 *See generally Id.* at 192.

73 5A JOHN A. APPLEMAN ET AL., INSURANCE LAW AND PRACTICE § 3551 (1987).

74 James L. Knoll & Randy L. Arthur, *Examinations Under Oath Revisited: The Insurance Companies' Quest for Candor*, 1992 A.B.A. SEC. TORT & INS. PRACTICE, 23.

75 "An insured may have an attorney present at the time of the examination under oath, but such attorney cannot take part." 13 COUCH ON INSURANCE 3D § 196:10 (3d ed. 2005).

76 In some jurisdictions, certain objections may be allowed pursuant to a state's insurance code. NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE, Vol. 1, § 12.21[5] (Jeffrey E. Thomas et al. eds., LexisNexis 2008).

77 13 COUCH ON INSURANCE 3D § 196:10 (3d ed. 2005).

78 *Thomas, supra* note 35, at *3 (quoting Gross v. U.S. Fire Ins. Co., 337 N.Y.S.2d 221, 224 (1972)).

79 *See supra* Part I.

80 *See generally* 13 COUCH ON INSURANCE 3D § 196:11 (3d ed. 2005).

81 *See generally* 13 COUCH ON INSURANCE 3D § 196:11 (3d ed. 2005).

82 "[T]he scope of an examination under oath must be 'confined to matters relevant and material to the loss'; [] meaning 'the insured need not answer immaterial questions."' *Thomas, supra* note 35, at *3 (quoting from 13 G. COUCH, INSURANCE (3d ed. 1999)) (internal citations omitted).

83 NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE, Vol. 1, *supra* note 76, § 12.21[7].

84 *Id.* at § 12.21[8].

85 PROPERTY INSURANCE LITIGATOR'S HANDBOOK, LEONARD E. MURPHY ET AL., 49 (ABA Publishing 2007).

86 CONN. PRACTICE BOOK § 13-26.

87 CONN. PRACTICE BOOK § 13-27(a).

88 CONN. PRACTICE BOOK §§ 13-28; 13-29.

89 CONN. PRACTICE BOOK § 13-30 (a).

90 CONN. PRACTICE BOOK §§ 13-27 (f)(1); 13-30(a).

91 CONN. PRACTICE BOOK § 13-30 (b).

92 CONN. PRACTICE BOOK § 13-30 (b) and (c).

93 CONN. PRACTICE BOOK § 13-30 (d).

94 CONN. PRACTICE BOOK §§ 13-30 (e), 13-31(a).

95 FED. R. CIV. P. 30 (a)(2)(A)(ii).

96 FED. R. CIV. P. 30 (b)(3)(A).

97 *See* INSURANCE LAW AND PRACTICE, *supra* note 18, § 3551.

98 13 COUCH ON INSURANCE 3D § 196:8 (3d ed. 2005).

99 13 COUCH ON INSURANCE 3D § 196:9 (3d ed. 2005).

100 *See, e.g.*, Part II.C.2; *see* CONN. PRACTICE BOOK § 13-31.

101 LEONARD E. MURPHY ET AL., *supra* note 85, at 49. Objections may be allowed depending upon a particular state's insurance code. NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE, Vol. 1, *supra* note 76, § 12.21[5].

102 James L. Knoll & Randy L. Arthur, *supra* note 74.

103 See CONN. PRACTICE BOOK § 13-30 (c).

104 "[T]he insured is 'entitled to have counsel present and to object to any questions put to him on any legal grounds available to him."' *Thomas*, *supra* note 35, at *3 (quoting Gross v. U.S. Fire Ins. Co., 337 N.Y.S.2d 221, 224 (Sup. Ct. 1972)).

105 *See supra* Part II.A.

106 "A party who desires to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action." CONN. PRACTICE BOOK § 13-27(a). "Section 244 [currently Section 13-27] of the Practice Book provides, regarding depositions, that reasonable notice must be given in writing to all other parties to the action. The obvious reason for this rule is to provide all other parties with an opportunity to exercise their right to attend the deposition." Helfferich v. Farley, 36 Conn. Supp. 333, 334 (Super. Ct. 1980).

107 State Farm Fire & Cas. Co. v. Tan, 691 F. Supp. 1271, 1273 (S.D. Cal. 1988).

108 *See id.* at 1274 ("A construction conferring the right to conduct separate examinations is reasonable ...."; "Thus, separate examinations are perfectly consistent with the obligations agreed to in the cooperation clause."). *See also* Shelter Ins. Co. v. Spence, 656 S.W.2d 36, 38 (Tenn. Ct. of App. 1983) ("Where there are multiple insureds, ... whether they be husband and wife or ex-husband and wife, or related not at all, we hold that under the cooperation clause of insurance policies ... the insurer ... may take a sworn statement from each insured privately.").

109 Taricani, Jr. v. Nationwide Mut. Ins. Co., 77 Conn. App. 139, 141-42 (2003).

110 *Id.* at 142.

111 *Id.* at 142.

112 *Id.* at 143.

113 *Id.* at 143.

114 *Id.* at 150. *See infra* note 116 for Appellate Court discussion of prejudice.

115 *Id.* at 145.

116 *Id.* at 146-47. The Appellate Court concluded: "The plaintiffs did not present a valid excuse for their failure to comply with the cooperation clause .... As a matter of law, even in the absence of such an excuse, they would have had a viable claim for coverage ... if they had been able to establish that their delay in presenting themselves for examination ... did not result in any prejudice to the defendant. They failed, however, to file an affidavit with sufficient factual allegations to show their delay in fact did not cause any prejudice. The trial court, therefore, properly granted the defendant's motion for summary judgment." *Id.* at 152.

117 Capello v. Aetna Life & Cas. Co., No. CV92-0510478 S, 1993 WL 119691, 8 Conn. L. Rptr. 582 (Conn. Super. Ct. Apr. 5, 1993).

118 *Id.* at *2 (quoting Pervis v. State Farm Fire & Cas. Co., 901 F.2d 944, 946 (11th Cir. 1990)) (internal quotation marks omitted).

119 *Id.* at *2.

120 Baeder v. Fourth of July Celebration Committee, Inc., No. CV045000893, 2007 WL 360707, at *1, 42 Conn. L. Rptr. 744 (Conn. Super. Ct. Jan. 24, 2007).

121 *See id.*; CONN. GEN. STAT. § 54-84a.

122 *Baeder*, *supra* note 120, at *1 (quoting from State v. Christian, 267 Conn. 710, 731 (2004)). "A marital privilege in the civil context was acknowledged by the Connecticut Supreme Court in *Spitz's Appeal from Commissioners* ...." *Id.* at *1 (quoting from Spitz's Appeal from Commissioners, 56 Conn. 184, 186 (1888)).

123 *See* LeBaron v. Erie Ins. Co., No. 96663, 2007 NY Slip Op 52588(U) (Supreme Ct. N.Y. (Steuben County) Dec. 12, 2007), *aff'd*, 2009 NY Slip Op 00744 (N.Y. App. Div. 4th Dep't Feb. 6, 2009).

124 *Id.* at *2.

125 *Id.* at *2.

126 *Id.* at *2.

127 *See id.* at *4.

128 *Id.* at *4.

129 *Id.* at *5.

130 *Id.* at *5.

131 "We have placed the burden to prove compliance with a condition precedent of an insurance policy on the insured." Watson v. Nat'l Surety Corp., 468 N.W.2d 448, 451 (Iowa 1991); quoted in *Bergen*, *supra* note 7, at *2. "However, to require more than substantial compliance with them is inappropriate." *Kitzman*, *supra* note 10, at *3.

132 Information obtained from a standard homeowners policy issued in Connecticut.

133 "Provisions within insurance policies requiring the claimant to bring suit within one year are valid contractual obligations in Connecticut." Mendoza-Molostvov v. Vigilant Ins. Co., 392 F. Supp. 254, 257 (D. Conn. 2005).

134 *Kitzman*, *supra* note 10, at *1.

135 *Id.* at *1.

136 *Id.* at *1.

137 *Id.* at *1, *2.

138 *Id.* at *2.

139 *Id.* at *3.

140 *Id.* at *3.

141 *Id.* at *3.

142 *Id.* at *4.

143 *Id.* at *5.

144 NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE, Vol. 1, *supra* note 76, § 12.21[8].

145 Watson v. Nat'l Surety Corp., 468 N.W.2d 448, 451 (Iowa 1991); quoted in *Bergen*, *supra* note 7, at *2.

146 NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE, Vol. 1, *supra* note 76, § 12.21[7]. "It has been held that ... failure to submit to a second examination as agreed upon at the close of the first examination constitutes a failure by the insured to comply with contractual obligations." *Bergen*, *supra* note 7, at *4.

147 NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE, Vol. 1, *supra* note 76, § § 12.21[4]; 12.21[8]. In *Ehsan v. Ericson*, the examination under oath took two days and resulted in a 142-page transcript. *Ehsan*, *supra* note 20, at *1.

148 *See supra* Part II.A.

149 Parrilla v. Travelers Ins. Co., No. 483558, 2005 WL 2650779, at *4 (Conn. Super. Ct. Sept. 27, 2005).

150 *Id.* at *2, *3.

151 *Id.* at *3 (quoting from Remington v. Aetna Cas. & Surety Co., 240 Conn. 309, 315 (1997)).

152 *Id.* at *4, *7.

153 *State Farm Fire & Cas. Co.*, *supra* note 107, at 1274 n.1 (emphasis added).

154 *See generally Double G.G. Leasing, LLC*, *supra* note 19, in which both claims were made.

155 13 COUCH ON INSURANCE 3D § 196:11 (3d ed. 2005).

156 13 COUCH ON INSURANCE 3D § 196:11 (3d ed. 2005).

157 *See* NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE, Vol. 1, *supra* note 76, § 12.22[3].

158 *Id.* at § 12.22[3].

159 *See generally* Paul B. Butler, Jr., *Smile! You're on Candid Camera-- Videotaping the Examination Under Oath*, 1992 A.B.A. SEC. TORT & INS. PRACTICE, 51-61.

160 *Kitzman*, *supra* note 10, at *3 (internal quotation marks and citation omitted).

161 *Id.* at *3.

162 *Double G.G. Leasing, LLC*, *supra* note 2, at 432.

163 *Id.* at 432 (citing 13 G. COUCH, INSURANCE § 196:23 (3d ed. 1999)).

164 *Id.* at 432.

165 *Id.* at 433.

166 *Id.* at 433 (citing Arton v. Liberty Mut. Ins. Co., 163 Conn. 127, 133-34 (1972)).

167 *Id.* at 433 (citing 14 G. COUCH, INSURANCE § 199:39 (3d ed. 1999)).

168 *Id.* at 433.

169 *Id.* at 434. "An insured who fails to timely cooperate may retain coverage if the insured can establish the failure to timely cooperate did not result in any prejudice to the insurer. The burden is on the insured to demonstrate lack of prejudice; the insurer need not show prejudice." Selective Ins. Co. v. Oliveira Bldg. Contractors, LLC, No. 07-cv-918, 2009 WL 1396260, at *3 (D. Conn. 2009).

170 *Id.* at 434.

171 *Id.* at 434.

172 Green v. Royal Indem. Co., No. CV030283499S, 2004 WL 1462919, at *1 (Conn. Super. Ct. June 8, 2004).

173 *Id.* at *6.

174 *Id.* at *6 (quoting Arton v. Liberty Mut. Ins. Co., 163 Conn. 127, 133 (1972)) (internal quotation marks omitted).

175 *Id.* at *6 (quoting O'Leary v. Lumbermen's Mut. Cas. Co., 178 Conn. 32, 38-39 (1979)) (internal quotation marks omitted).

176 *Id.* at *6 (quoting Beach v. Utica Mut. Ins. Co., 8 Conn. Supp. 468, 470 (Super. Ct. 1940)).

177 *Id.* at *7.

178 13 COUCH ON INSURANCE 3D § 196:10 (3d ed. 2005).

179 13 COUCH ON INSURANCE 3D § 196:17 (3d ed. 2005).

180 *See generally* 13 COUCH ON INSURANCE 3D § 196:20 (3d ed. 2005).

181 "[G]ood practice would be to allow the attorney for the insured to interject as many objections as he or she desires. The objections can be ignored since there is no court to rule on them but on the other hand they may be taken seriously." NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE, Vol. 1, *supra* note 76, § 12.21[5].

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