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LAW

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PRACTICE FOCUS: INSURANCE LAW

The reaffirmation of insurance companies' rights to question policy holders without releasing investigative files was an important decision by a federal appellate court, according to attorney Frank S. Goldstein. A8

PRACTICE FOCUS / INSURANCE

Court sides with insurers for exams under oath

Commentary by Frank S. Goldstein

In a Feb. 24 ruling, *Lester v. Allstate Property & Casualty Insurance*, the United States Court of Appeals for the Sixth Circuit endorsed insurance companies' right to question a policyholder under oath without providing its investigative files. The appellate court affirmed the district court's decision to grant summary judgment to Allstate, which had denied the plaintiff-appellant's claim because she did not submit to an examination under oath, or EOU, on a fire that damaged her home in 2012.

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Lester told Allstate she and her husband would submit to examinations only if the insurance company showed them its investigative files. Allstate refused, explaining that doing so "could jeopardize the integrity" of its investigation. After two months of back and forth, Allstate gave Lester 10 days to schedule the examination. She never responded to Allstate and sued the company, seeking payment of her claim.

Among other arguments, Lester asserted that Allstate's implied duty of good faith gave her the right to see the investigative files because the law reads that every contract honor the parties' "reasonable contractual expectations." But, the court disagreed that application of these principals supplied Lester with necessary traction.

It wrote: "Why is it reasonable to expect an insurance company to share its investigative files before investigating her? The point of an examination is to allow insurance companies to sort out fraudulent claims from honest ones, exorbitant claims from accurate ones. Telling the policyholder what the investigation has already uncovered undermines that purpose, as it would allow the policyholder to tailor her answers to the facts already discovered by the company."

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Allstate argued that allowing the insured to see its investigative files would allow the insured to tailor his or her answers accordingly.

The court also affirmed that the investigation files of an insurance company are not the investigation files of a police department. So, a claim for insurance coverage is not a Brady claim: *Brady v. Maryland*, 373 U.S. 83 (1963).

The court also wrote that is a "stretch" that Allstate must pay the claim because Lester never actually refused to attend the EUO.

"Lester's response to all of this—that Allstate could deny her claim only after scheduling an examination where she failed to show up—is long on formalism and short on merit," the court ruled.

For decades, the ability of insurers to request an EUO was unquestioned by the courts. It was assumed the insurance contract explicitly provided insurance companies with the right to conduct an EUO when it was deemed necessary. While EUOs are taken in only a small percentage of claims, in Florida—where estimated fraud almost reached $1 billion this past year—the EUO is a valuable tool in distinguishing fraudulent from honest claims.

Oddly, until 2012, there was no specific Florida statute addressing EUOs. So, attorneys, in the no-fault world, began challenging them on the basis that since the Florida no-fault statute had no EUO provision, insurers were prohibited from taking EUOs in a no-fault setting. Philosophically and practically, almost everyone agreed EUOs should be within the rights of the insurance companies, but on a legal, technical ground, some judges ruled that insurers were not entitled to EUOs, in the no-fault world.

The Florida Legislature addressed EUOs in 2012 as part of its revamp of the no-fault statute. Florida Statute 627.736(6) (g) reads:

"An insured seeking benefits under Ss. 627.730–627.7405, including an omnibus insured, must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath. The scope of questioning during the examination under oath is limited to relevant information or information that could reasonably be expected to lead to relevant information. Compliance with this paragraph is a condition precedent to receiving benefits. An insurer that, as a general business practice as determined by the office, requests an examination under oath of an insured or an omnibus insured without a reasonable basis is subject to S. 626.9541."

The statute has achieved its intended goal of formalizing EUOs, while at the same time, reminding insurers and their attorneys to keep their questions relevant.

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Certainly, EUOs and other fraud-fighting tools will continue to be scrutinized by the courts, but reaffirmation of insurance companies' rights to question policy holders without releasing investigative files was an important decision.

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