

INSURANCE CASE LAW UPDATE

Failure To Appear For Examination Under Oath Held Proper Basis To Deny Claim; Fatal To Bad Faith Claim

By Christopher W. Olmsted, Attorney

Most insurance policies obligate the insured to submit to an examination under oath ("EUO"). EUOs are powerful and often necessary tools used to gather crucial information from the insured during the claim process. What happens when the insured refuses to comply with his or her obligation to appear and testify? A Second Appellate District panel recently held that the refusal to appear for the examination justifies denial of the claim. *Brizuela v. CalFarm* (2004) 116 Cal.App.4th 578.

Mr. Brizuela's market burned down one month after he bought it. His insurer, CalFarm, assigned an investigator to obtain recorded statements from Mr. Brizuela, his wife, and an employee. CalFarm subsequently learned that Brizuela had a felony conviction for receipt of stolen property; that Brizuela had been denied transfer of the alcohol license for the market; that beer and wine sales had accounted for a substantial portion of the market's business; that the purchase price for the business was less than the amount Brizuela claimed; and that laboratory tests of the premises showed the presence of gasoline, an accelerant commonly used in arson fires. The claim was an ideal candidate for an EUO.

CalFarm's counsel scheduled an examination under oath and requested production of documents. Mr. Brizuela requested that he first receive a copy of the recorded statement. CalFarm's counsel denied the request. When Mr. Brizuela failed to produce the requested documents, counsel offered to reschedule the EUO. Mr. Brizuela again refused, and insisted on receiving copies of the recorded statements. The request was again denied, at which point Mr. Brizuela hired an attorney. Over the next six months, CalFarm's attorney unsuccessfully attempted to schedule the EUO.

Ultimately, CalFarm sent a denial letter to Brizuela. The letter stated that Brizuela "failed to cooperate in the scheduling of an examination under oath. As such, this constitutes a breach of not only the contract provisions, but also of a condition precedent to coverage." CalFarm also reserved the right to assert other terms and provisions contained in the policy as necessary, "due to the insureds' refusal to cooperate and appear for their examinations under oath and to produce supporting documentation."

Brizuela sued CalFarm for breach of contract and for tortious bad faith breach of an insurance contract. The court of appeal affirmed the trial court's summary judgment. The appellate court's decision included the following points:

- An insured's compliance with a policy requirement to submit to an examination under oath is a prerequisite to the right to receive benefits under the policy. The refusal to submit to such an examination causes a forfeiture of any rights under the policy.
- In scheduling the EUO, the insurer did all it had to do under the terms of the policy. In the event that the proposed date was not feasible, it was up to the insured to fulfill the requirement of being examined by offering to submit to the examination at a later time.
- Insured had no excuses for failure to appear. For example, he was not ill or incapacitated.
- Insurer had no obligation to provide copies of recorded statements to the insured prior to the EUO.
- The availability of a deposition once litigation commences does not save the insured from his obligation to appear for the EUO. An examination under oath and a pretrial deposition "serve vastly different purposes."
- Breach of the implied covenant of good faith and fair dealing ("bad faith") also failed because there was no breach of contract and the insured was unable to show that the insurer's request for an EUO was unreasonable. This case distinguished from an earlier case, *Gruenberg v. Aetna Ins. Co.*, where the insurer encouraged the filing of criminal charges against the insured, falsely implied that he had a motive to commit arson, and, knowing that the insured would not appear for an examination scheduled during the pendency of criminal proceedings against him, used his failure to appear at an examination as a pretense for denying liability under the policies. *Gruenberg* did not involve an insured's *unexcused* failure to attend an examination under oath.

Importantly, the California Supreme Court implicitly approved of the Brizuela decision when it denied review of the case on June 9, 2004.

The following points should help you make the most of the court's ruling:

- As with all claim activity, the right to demand an EUO must be exercised in a reasonable manner. Review Ins. Code § 2071.1 (a copy of which must be provided to the insured prior to the EUO).
- Reasonable flexibility should be given with respect to scheduling. For example, allowances should be made if the insured is ill, or his attorney is legitimately unavailable.
- Create a clear documented record of scheduling the EUO, and all attempts thereafter to reschedule it. Give the insured fair warning that if he or she refused to appear, the claim will be denied.
- Act promptly and do not create delays of your own.
- You are not obligated to provide the insured with a copy of his recorded statement.
- Should the insured refuse to appear, deny the claim in writing for that reason, but be sure to expressly reserve all applicable policy exclusions to avoid waiving them in the event that the EUO defense fails.
- Do not attempt to use the EUO defense in an unfair or unreasonable manner. For example, attempting to schedule the EUO for known inconvenient times or with insufficient notice will invite the court to reject the defense.



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Mr. Olmsted is an attorney practicing in the areas of employment litigation and compliance, business litigation, insurance defense, and insurance bad faith. His experience in insurance defense includes automobile, commercial, and homeowners claims, and encompasses personal injury, property damage, mold claims, and wrongful death matters. He has litigated bad faith cases including homeowners, mold, automobile, and disability insurance claims. Additionally, he has represented clients in the areas of business and commercial litigation, asbestos litigation, construction collection and construction defects. Mr. Olmsted is a member of: San Diego Risk and Insurance Management Society, Association of Business Trial Lawyers, California Bar Employment Law Section and San Diego County Bar Association Insurance Section.

Reported Cases: Wittkopf v. County of Los Angeles, 90 Cal.App. 4th 1205; Colmenares v. Braemar Country Club, 89 Cal.App. 4th 778.

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