LAW UPDATE

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Court Rules that Insurer Cannot Exclude Public Adjuster from Insured's EUO
"Insurers Respond with Updated Policy Terms"

Background

Once an insurer is on notice that a public adjuster (PA) has been retained, they will generally recognize the PA as a representative of the insured and will, in large part, communicate with the public adjuster instead of the insured regarding issues relating to damages and proof of loss. However, insurers are often uncertain about the true nature of the relationship that exists between an insured and their public adjuster, and about the extent of their rights and obligations.

In that regard, two questions that are frequently asked by insurers is whether a PA has an absolute right to attend an insured's examination under oath (EUO); and whether an insurer has an absolute right to conduct an EUO of the PA? The reason that these questions come up so often is probably because there are virtually no published decisions that offer guidance on these issues. In fact, we were hard pressed to uncover any other reported decision outside of the one that is touched on in this article. So, while this is not a recent case, i.e., 2012, it is apparently still good law in Florida and, therefore, very instructive to insurers that seeks guidance on these issues.

Zafar Nawaz v. Universal Property & Casualty Insurance Company, 91 So. 3d 187, Dis. Ct of Appeal of Florida, Fourth Dist. (June 13, 2012)

Zafar Nawaz filed a claim under his insurance policy with Universal Property & Casualty Insurance Company for wind damage to his home. After inspecting the damages, Universal issued Mr. Nawaz a check for $14,416.00. Four years later, Mr. Nawaz and a public adjuster that he subsequently retained, submitted a new estimate for damages to his home totaling $138,419.00, and they also demanded appraisal. Universal responded with a demand for the insured's EUO.

On the date of his exam, Mr. Nawaz was accompanied by his public adjuster and Universal insisted that the PA leave the room. The insured refused to instruct the PA to leave so Universal suspended the EUO. Universal subsequently filed a Complaint for Declaratory Judgment, arguing that Mr. Nawaz failed to comply with the following

policy terms:

> **SECTION I—CONDITIONS**
>
> **Your Duties After Loss**. In case of a loss to covered property, you must see that the following are done:
>
> > As often as we reasonably require: …Submit to examination under oath, while not in the presence of any other "insured," and sign the same....
> >
> > "Insured" means you and residents of your household who are:
> >
> > a. Your relatives; or
> >
> > b. Other persons under the age of 21 and in the care of any person named above.

The trial court agreed with Universal and stated that the policy operated to exclude public adjusters from an EUO notwithstanding that the terms only precludes another *insured* from being present and is silent as to anyone else. Nonetheless, the trial court expressed concern that by interpreting the policy to exclude only another "insured" from an EUO would lead to results that might allow the presence of the press, other insurance companies, or members of the general public. Therefore, the trial court determined that Mr. Nawaz's public adjuster had no right to attend the EUO. Thereupon, the insured filed an appeal.

It Would Have been a "Simple Matter" to Clearly Identify Who is Allowed into an Examination Under Oath

The appellate court began its review by noting that "where the language of a contract is clear and unambiguous, the court can give to it no meaning other than that expressed." In that regard, the appellate court held that the clear language of Universal's policy states that Mr. Nawaz can be required to submit to an EUO while not in the presence of any other *insured*, which is defined as "you and residents of your household who are ... [y]our relatives; or ... [o]ther persons under the age of 21 and in the care of any person named above."

The court further held that a public adjuster does not fit into the plain language of the definition of "insured," and that it would have been a very "simple matter" for Universal to have written a restriction into its policy that clearly identified those who are, or are not, allowed to be present during an insured's examination under oath. Instead, the

policy reflects only the "insured" as being someone that could be excluded from the exam. The appellate court then clarified, even further, why the trial court's ruling should be reversed:

> By ignoring the plain language of the contract, the trial court essentially rewrote the contract. …. Courts may not rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties. It is well settled that courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain.

Accordingly, the appellate court held that the trial court erred by failing to give force and effect to the plain language of the insurance policy, and held that the insured was not prohibited from having his public adjuster present during his examination under oath.

Conclusion

It is interesting to note that following the appellate court's ruling, some insurers have modified their policy language, as noted below, regarding an insured's "Duties After Loss:"

> **Duties After Loss**
>
> In case of a loss to covered property, you must see that the following are done:
>
> Provide us with records and documents we request and submit to recorded statements and examinations under oath, while not in the presence of any other "insured," and sign the same.
>
> Also, your representative, including any **public adjuster** engaged on your behalf, must each submit to recorded statements and examinations under oath, while not in the presence of any other "insured," and sign the same (emphasis added).

In closing, it would be wise for insurers who are concerned about these issues to consider the appellate court's advice that it would be a very "simple matter" for an

insurer to write a restriction into its policy that clearly identifies those who are, or are not, allowed to be present during an insured's examination under oath..

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