

ALERT

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Washington Supreme Court Issues an Unprecedented Decision Regarding a First-Party Insured's Compliance with a Policy's EUO Provision

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The examination under oath has long served as a valuable tool to prevent fraud and exaggeration in property insurance claims, while also keeping the cost of insurance as low as possible. The Washington Supreme Court, however, did insurance consumers no favor when it recently held, in an 8-1 decision, that an insured may substantially comply with an insurer's request for examination under oath (EUO), even where the insured never submitted to the requested EUO. *Staples v. Allstate Ins. Co.*, No. 86413-6, Washington Supreme Court (Jan. 24, 2013). The court also held that an insurer must establish actual prejudice before denying a claim based on the insured's noncompliance with the EUO request. The court's decision is a departure from previous precedent.

In *Staples*, the insured's van and a large assortment of tools were stolen on August 18, 2008. In the police report, the insured identified the tools' value at approximately \$15,000 and stated the tools were for work purposes. The insured subsequently submitted a claim under his homeowners policy with Allstate and claimed the tools were for "personal use," valued between \$20,000 and \$25,000, but could also be used for work. Due to the inconsistencies, Allstate requested documents and additional information to substantiate the loss and provide additional details as to the insured's financial status. Allstate interviewed the insured twice, and while recorded, the interviews were not under oath. Despite additional requests, the insured did not provide any documentation until December 2008.

On January 15, 2009, Allstate requested the insured appear for an EUO on January 29, and further requested additional documents by January 16. Important to the Court's decision was the fact that, on January 23, Allstate wrote to the insured

and advised the EUO was canceled due to the fact he had not produced the requested documents and the EUO would be rescheduled once Allstate received the additional documentation. The court interpreted this to suggest Allstate conditioned the EUO on whether the insured produced the documents. Notably, however, the insured's attorney later advised Allstate of the insured's unavailability for the scheduled EUO. In response, Allstate requested the EUO be rescheduled and, again, requested documents, without indicating the EUO would only be rescheduled upon receipt of the documents. The court's decision did not acknowledge this fact, showing that there were other attempts by Allstate to reschedule the EUO, regardless of the status of the insured's document production.

The insured accused Allstate of bad faith, and Allstate responded by its continued efforts to request documents and to reschedule the EUO. In doing so, Allstate demanded the insured produce the requested documents by March 31, 2009, but then later extended the deadline until April 15. Allstate finally denied the insured's claim on April 30, due to his failure to submit to an EUO. Three and a half months later, the insured's attorney finally advised Allstate his client was "willing to appear at an EUO" if Allstate would agree to extend the contractual time limit for filing suit in the insurance policy, due to expire. Allstate declined to extend the one-year suit limitation period, and the insured filed suit, alleging breach of contract and bad faith. The trial court granted Allstate's summary judgment motion based on the insured's noncompliance, and, in an unpublished decision, the appellate court affirmed.

Upon review of the appellate court's ruling, the Washington Supreme Court reversed and issued three holdings. First, the court held "if an EUO is not material to the investigation or

handling of a claim, an insurer cannot demand it.” Though the court concluded that Allstate’s EUO request appeared justified due to inconsistencies between statements in the police report and in the insured’s claim, Allstate did not explain why it needed the additional information. In reaching its holding, the court noted there could be situations where an EUO request may constitute bad faith, for example where an insurer “demand[ed] an EUO from every single claimant simply to burden insureds and set up pretexts for denying claims.”

Second, the court held that summary judgment in favor of Allstate was not appropriate, as factual issues remained as to whether the insured “substantially complied” with Allstate’s EUO request. In essence, the court readily applied the “substantial compliance” test in the EUO context to determine whether the insured complied with the repeated document requests, despite the fact that substantial compliance has never been recognized as a legitimate excuse for an insured to refuse to submit to an EUO. The court focused on the fact that the insured previously appeared for two interviews, authorized broad access to a range of financial documents, and finally offered to appear for an EUO if Allstate extended his time to file suit. The court’s primary concern was the indication that Allstate conditioned scheduling the EUO upon his production of requested documents. The court’s substantial compliance analysis with respect to an EUO is a departure from established Washington law.

Third, the court held an insurer must establish actual prejudice to deny an insured’s claim for noncompliance with a requested EUO. Notably, Allstate’s policy provided that if an insured did not comply with its duties under the cooperation clause, including the duty to submit to an EUO, then Allstate had no duty to the insured if the failure to comply “is prejudicial to us.”(emphasis added). This unique policy language alone could have justified the court’s holding on prejudice, but the court

then extended the “actual prejudice” rule already applicable to the general duty to cooperate even further to apply to the duty to submit to an EUO — again, an extension of law without precedent under Washington law. Ultimately, the court, again, seemed focused on the fact that the insured sat for two interviews, produced at least some documentation, and Allstate did not take an affirmative step to reschedule the EUO. In light of these circumstances, the court concluded Allstate did not establish it was actually prejudiced by the insured’s failure to attend the EUO.

The lone dissenter, Justice Jim Johnson, concluded Allstate suffered prejudice because it was without access to all of the requested information at the time when “the claim was still fresh.” The dissent correctly noted Allstate’s policy both required the insured to submit all requested documentation and to submit to an EUO at Allstate’s request, and the insured only partially complied with the first request. The dissent also rejected the implication that unsworn interviews negated the need for an EUO.

The court’s decision in *Staples* does not eliminate the usefulness of the EUO in an insurer’s investigation of a claim. The *Staples* decision likely does mean insurers must exercise increased diligence as to when and how they demand examinations under oath.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:

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