

EXAMINATION UNDER OATH

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USE OF THE EXAMINATION UNDER OATH IN CLAIMS UNDER MINNESOTA FIRE INSURANCE POLICIES

INTRODUCTION

During the 1983 Session, the Minnesota Legislature modified the standard fire policy to provide for an examination under oath.[Ftn 1](#) The examination under oath has been a standard part of the property insurance lawyer's arsenal in all states except Minnesota until 1983, and was formerly a part of Minnesota law.[Ftn 2](#) It is, however, essentially a new procedure for Minnesota attorneys. The procedure for an examination under oath has been established by its wide use in other jurisdictions.

The examination under oath is a powerful tool which fire insurers will make use of.[Ftn 3](#) The Minnesota version also provides significant protection to the policyholder. Because of its recent arrival on the Minnesota legal scene, it is important for Minnesota lawyers to familiarize themselves with the procedures used in an examination under oath, and the rights of the parties concerning the examination.

ADOPTION OF THE EXAMINATION UNDER OATH IN MINNESOTA

The specific language added to the standard fire policy by Minn. Laws 1983, ch. 28, is as follows:

The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property hereinafter described, and after being informed that he has a right to counsel and that his answers may be used against him in later civil or criminal proceedings, the insured shall, within a reasonable period after demand by this company, submit to examinations under oath by any person named by this company, and subscribe the oath. The insured, as often as may be reasonably required, shall produce for examination all records and documents reasonably related to the loss, certified copies thereof if originals are lost, at a reasonable time and place designated by this company or its representatives, and shall permit extracts and copies thereof to be made.

Minnesota's policy language is unique because of the requirement that the insured be informed of the right to counsel and that his or her answers may be used against him or her in subsequent civil and criminal proceedings. No other state has such a provision, and this non-standard provision was apparently added to the Minnesota statute to allay the concerns of some legislators that the examination under oath would be unfairly used against insureds.

MECHANICS FOR TAKING AN EXAMINATION UNDER OATH

In order to take an examination under oath, it is necessary for the insurance company to follow

specific procedural requirements. If it fails to do so, the insured probably will not be required to attend the examination, and the insurer could not properly rely upon the insured's refusal to attend in denying coverage under the policy. In order to assure its entitlement to an examination under oath, the insurer should be certain to take the following steps:

1. Make a formal, written demand for the examination under oath. The demand should specifically state that the insurance company is exercising its contractual rights to conduct the examination under oath, and should demand or require the insured's attendance. One court has stated that a mere "request" for an examination is insufficient.[Ftn 4](#)
2. The demand should state a specific date, time and place for the examination, and should identify the person before whom the examination will be taken.[Ftn 5](#)
3. The demand for examination should specifically recite the insured's right to counsel and potential uses of the testimony as required by the statute. It is not clear when the statute requires this warning to be given, but prudence dictates that insurers include the language in the demand for examination, and repeat that warning immediately before the examination begins.
4. Use clear and unambiguous language in making the demand for examination under oath. Insist on compliance with the demand, or agree with the insured to an examination under other circumstances. If changes are made in the date, time, or place of the examination, a second demand should be submitted.[Ftn 6](#) Demand the examination under oath be held within a reasonable time after the loss and submission of the proof of loss, and make the demand promptly after receipt of the proof of loss.[Ftn 7](#)
5. Conduct the examination in the county where the loss occurs (unless the parties agree on a different location).[Ftn 8](#)

A sample letter which may be used to demand an examination under oath follows.

PURPOSE OF THE EXAMINATION UNDER OATH

The examination under oath is intended to enable the insurer to obtain any and all information known to the insured or within the insured's possession or control which may be material to the claim. The examination permits the insurer to observe the insured's demeanor and trustworthiness, and to obtain detailed information concerning the insured's claim.

The examination under oath also provides some protection to the insured. It requires the examination to be conducted after notice, and the Minnesota procedure requires that the insured be advised of his or her right to an attorney. The insured is given some protection by the requirement that the examination be under oath, rather than a simple interview or statement. Other courts have required the insurance company to provide the insured a copy of the transcript of the examination under oath.[Ftn 9](#)

The examination under oath has been on the American legal scene for a long period of time. The United States Supreme Court has given its blessing to the use of examinations under oath.[Ftn 10](#) The Supreme Court's interpretation of the purpose of the examination under oath is as follows:[Ftn 11](#)

The object of the provisions in the policies of insurance, requiring the insured to submit

himself to an examination under oath, to be reduced in writing, was 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 its rights, to enable it to decide upon its obligations, and to protect it against false claims, and every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the insured.

The policy language permits the insurer to demand production of books and records, and the insurer will usually exercise that right. In the *Clafin* case, the United States Supreme Court recognized that the insured has to be the sole source of that information, because it is the insured who possesses information about the extent of the loss. The failure to produce requested books and records can prejudice the insured's right to recover under the policy.[Ftn 12](#) Questions concerning financial status, income tax returns, and extent of financial gain from recovery of insurance policies are relevant to claims involving incendiary fires.[Ftn 13](#)

WHOSE EXAMINATION MAY BE TAKEN?

The insurer may obviously examine all named insureds. The insurer may probably also examine any person falling within the definition of "insured" as defined in the policy.

Employees and agents of the insured may be examined.[Ftn 14](#) Obviously, a corporate party can only be examined through examination of its officers and managing agents.

The insured has a right to have someone with him or her at the examination, including an attorney. Such a lawyer can be retained at the insured's expense.[Ftn 15](#) Any such person in attendance does not have a right to cross-examine the insured or to offer evidence on behalf of the insured.[Ftn 16](#) Refusal to allow the insured's attorney or representative to be present will bar the insurer from denying liability for failing to appear and answer questions at the examination.[Ftn 17](#)

A mortgagee named in a mortgage clause may be required to attend an examination and produce financial records.[Ftn 18](#)

Separate examinations may be conducted of each insured. The insurer may force two named insureds to be examined under oath separate and apart from each other, and without the other in attendance.[Ftn 19](#)

CONDUCT OF THE EXAMINATION

An examination under oath is quite similar to a deposition, and should be conducted by an attorney. Although a claims representative or investigator may conduct the examination, the procedure is best handled by an attorney. An attorney will bring a new viewpoint to the examination, and may assist the insurance company in obtaining useful information. Additionally, the examination procedure is similar to that used in depositions in civil litigation, and attorneys are well-versed in conducting this type of examination.

The examination of an insured is normally done orally. The insurer can insist on this method of examination, and the insured cannot satisfy his or her contractual obligation merely by agreeing to respond to written questions. The insurer is entitled to the familiar "question and answer" form of

examination.[Ftn 20](#)

The insured may object to examination on constitutional grounds (usually Fifth Amendment right against self-incrimination) but exercise of that right will be viewed as a refusal to answer the question.[Ftn 21](#) The Minnesota Supreme Court has repeatedly held that a party in a civil action may assert the privilege only as a “shield” and not as a “sword.” These cases, by analogy, should apply to claims under insurance policies.[Ftn 22](#)

The attorney conducting the examination should not make any statements concerning what decision the insurance company might make. The refusal to answer a particular question should not prevent completion of the examination. The attorney should note, however, that the examination is continuing without prejudice to the right of the insurance company to determine that exercise of a claim of privilege or other refusal to answer constitutes a breach of the policy.

The insurance company can deny coverage under a policy solely for refusal to answer relevant questions at the examination under oath.[Ftn 23](#)

REPRESENTING THE INSURED

The attorney representing an insured at an examination under oath plays a limited role. The courts have not allowed the attorney the right to conduct a separate examination, and it is not necessary for the insured to permit the attorney to ask questions. In practice, however, insurers will usually permit the insured to ask some questions to clarify prior testimony. It may be advantageous to do so.

Probably the most important function the attorney representing the insured at an examination under oath can have is to impress upon the insured the importance of telling the truth. The giving of false testimony at an examination under oath can be held to violate the “false swearing” or “fraud” clauses of the policy, and may permit the insurance company to deny coverage regardless of the validity of the balance of the claim. Even if the insured’s testimony does not rise to false swearing or fraud, the examination under oath will be heavily relied on by the insurer to impeach the insured at trial. To the extent possible, the attorney representing the insured should attempt to assist the insured in making a clear and accurate record of his or her testimony.

CONCLUSION

The examination under oath is a powerful tool. Although the Minnesota Supreme Court has not yet interpreted the rights given to an insurer who properly makes use of the policy, it is clear from the strong and favorable interpretation given by the courts of other jurisdictions that the tool should be established as a valuable one by the Minnesota Supreme Court.

NOTES

¹ The Minnesota fire policy can be found in Minn. Stat. §65A.01, *et seq.* (1982).

² See, e.g., *Gross v. St. Paul Fire & Marine Ins. Co.*, 22 F.74 (C.C. D. Minn. 1884).

³ See generally Houser, *Examinations Under Oath in First Party Arson Claims*, 32 Fed. Ins. Couns. Q. 211 (1982); Knoll, *Examinations Under Oath; The Insurance Companies’ Best Friend*, 16 Forum 777 (1981). Useful collections of cases relating to the standard policy, as well as versions of it enacted in each state are contained in Committee on Property Insurance Law, Tort and Insurance Practice Section, American Bar Association, *Annotations to the Homeowners’ Policy* (1980); Committee on Property Insurance Law, Section of Insurance, Negligence and Compensation Law, American Bar Association, *Property Insurance Annotations Fire and Extended Coverages* (1977, Supp. 1983).

- ⁴ *Nicolai v. Transcontinental Ins. Co.*, 61 Wash. 2d 295, 378 P. 2d 287 (1963).
- ⁵ *Citizens Insurance Co. v. Herpolsheimer*, 77 Neb. 232, 109 N.W. 160 (1906).
- ⁶ *C-Suzanne Beauty Salon, Ltd. v. General Ins. Co.*, 374 F.2d 106 (2d Cir. 1978).
- ⁷ See 5A J. Appleman, *Insurance Law & Practice* §3551 (1970); *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N.W. 125 (1896); *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315 (1894). See also *Beckley v. Otsego County Farmers Coop Fire Ins. Co.*, 3 App. Div. 2d 190, 159 N.Y.S.2d 270 (1957).
- ⁸ *Pierce v. Glove & Rutgers Fire Ins. Co.*, 107 Wash. 501, 182 P. 586 (1919).
- ⁹ See *Hart v. Mechanics Traders Ins. Co.*, 46 F. Supp. 166 (W.D. LA. 1942).
- ¹⁰ See *Clafin v. Commonwealth Ins. Co.*, 110 U.S. 81 (1884).
- ¹¹ 110 U.S. at 92.
- ¹² See, e.g., *Georgia House of Interiors v. Glen Falls Inc. Co.*, 21 Wash. 2d 470, 151 P.2d 598 (1944).
- ¹³ See, e.g., *Kisting v. Westchester Fire Ins. Co.*, 290 F. Supp. 141 (W.D. Wisc.), *aff'd*, 416 F.2d 967 (7th Cir. 1969).
- ¹⁴ *Myer v. Niagra Fire Ins. Co.*, 205 F. Supp. 108 (W.D. La. 1962) *Hallis Café v. Hartford Fire Ins. Co.*, 97 F.2d 766 (7th Cir.), *cert. denied*, 305 U.S. 634 (1938).
- ¹⁵ *Gordon v. St. Paul Fire & Marine Ins. Co.*, 197 Mich. 226, 163 N.W. 956 (1917).
- ¹⁶ *Liverpool & London & Globe Ins. Co. v. Cargill*, 44 Okla. 735, 145 P. 1134 (1914).
- ¹⁷ *Gordon v. St. Paul Fire & Marine Ins. Co.*, *supra*.
- ¹⁸ *Mortgagee Affiliates Corp. v. Commercial Union Ins. Co.*, 276 N.Y.S. 2d 404 (1967).
- ¹⁹ *Shelter Ins. Cos. v. Spence*, 1983 CCH Fire & Cas. Rep. 32 (Tenn. App. 1983), *noted in* 1983 Prop. Loss Res. Bur. L. Rev. 1442 (1983).
- ²⁰ *Boston Ins. Co. v. Mars*, 246 Miss. 36, 148 So. 2d 718 (1963).
- ²¹ *Restina v. Aetna Casualty & Sur. Co.*, 61 Misc. 2d 574, 306 N.Y.S. 2d 219 (1969); *Hickman v. London Assurance Corp.*, 184 Cal. 524, 195 P. 45 (1920). *But see*, *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 108 Cal. Rptr. 480, 518 P. 2d 1032 (1973) (insured stated bad faith claim for insurer's refusal to proceed with examination following completion of criminal prosecution. Court found insured had made a "conditional" rather than total refusal to be examined under oath, and that the insurer could be guilty of outrageous conduct.)
- ²² *Christenson v. Christenson*, 281 Minn. 507, 162 N.W. 2d 194 (1968), *noted in* 55 Minn. L. Rev. 348 (1970).
- ²³ *Kisting v. Westchester Fire Ins. Co.*, 416 F.2d 967 (7th Cir. 1969) *Restina v. Aetna Casualty & Sur. Co.*, 306 N.Y.S. 2d 219 (1969).

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SAMPLE LETTER

January 23, 1984

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Mr. R.U. Shure

123 Main Street

Minneapolis, Minnesota 55444

RE: Fire of December 24, 1983
Claim by Hopeless Supper Club

At Risk Insurance Co.
Policy No. 69 173 1051
Our File No. 83-825

Dear Mr. Shure:

At Risk Insurance Company acknowledges receipt of your Proof of Loss sworn to on January 17, 1984 with respect to the fire of December 24, 1983 at the Hopeless Supper Club. At Risk Insurance Company is holding the Proof of Loss without action at this time, pending completion of its investigation, which is continuing, and its evaluation of the claim and all relevant factual information.

At Risk Insurance Company is exercising its contractual right to examine you under oath, and is hereby demanding that you present yourself for an examination under oath on February 3, 1984, at 10:00 a.m., at the offices of Maslon Edelman Borman & Brand, 1800 Midwest Plaza, Minneapolis, Minnesota 55402. The examination will be conducted before Stacy A. Bauman, a Notary Public and duly qualified court reporter. Your obligation to attend this examination is set forth in the above-referenced insurance policy.

At Risk Insurance Company specifically advises you that you have a right to retain an attorney, at your sole discretion and expense, and to have an attorney to attend your examination. The answers used in the examination will be used by the At Risk Insurance Company to determine what action should be taken on your claim, and your answers may be used against you in later civil or criminal proceedings, if any.

By exercising its contractual right to conduct an examination under oath, At Risk Insurance Company does not intend to waive or abandon any other rights, claims, or defenses which it may have by law or under the terms and conditions of its policy of insurance, and hereby specifically reserves any and all rights and defenses that may now exist or which may arise in the future or which may be disclosed upon further investigation.

We appreciate your anticipated cooperation.

Yours very truly,

MASLON EDELMAN BORMAN & BRAND

By _____

David F. Herr