

Insurer didn't need to show prejudice: court

Today's column deals with a 7th U.S. Circuit Court of Appeals decision, which applied Indiana substantive law of first impression to examine the condition in a commercial property policy requiring the insured to submit to an examination under oath (EUO) about matters relating to his claim. *Employer's Mutual Casualty Co. v. Skoutaris*, 453 F.3d 915 (7th Cir. 2006).

John Skoutaris, owner of the Open Flame restaurant in Valparaiso, Ind., sought coverage for losses incurred during a fire, including the restaurant building, business personal property in the restaurant, and business income lost due to the fire. The policy condition requiring the insured to submit to an EUO read as follows:

"We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed."

The 7th Circuit, relying upon the recent Indiana Supreme Court case of *Morris v. Economy Fire & Casualty Co.*, 848 N.E.2d 663 (June 6), held that the insured's failure to comply with the EUO condition was a material breach of the insurance contract resulting in no coverage being owed by the insurer and that the insurer was not obliged to prove it was prejudiced by such breach.

Skoutaris was insured for fire loss to the restaurant by Hamilton Mutual Insurance Co., a subsidiary of Employers Mutual Casualty Co.

On April 7, 2000, a fire severely damaged his restaurant and he submitted a claim to Hamilton Mutual for \$642,700 as replacement cost of the building, which he had purchased for \$225,000 in 2000, and \$346,767 for business personal property.

Hamilton Mutual, through its claims adjuster, evaluated the replacement cost of the building at \$310,231.21 and the business personal property loss at \$158,292.57.

Two policies covered the Open Flame Restaurant: Hamilton Mutual's and Ohio Casualty Group's, and the loss was to be split equally between the two insurers. The issues on the appeal involve only Hamilton Mutual's share of the loss. Hamilton Mutual and Skoutaris agreed to a \$128,000 payment on part of the claim, leaving the building and business property claim open and agreeing to proceed with an appraisal of the claims, as provided for in the policy.



Federal Courts

By Jay S. Judge

Judge, a name partner of Judge, James & Kujawa LLC in Park Ridge, is a defense attorney who specializes in trials, appeals and insurance coverage. Judge graduated with honors from The John Marshall Law School and served as editor-in-chief of the school's law review.

Each party chose its own appraiser and, when they could not agree upon an umpire, the Porter County Superior Court appointed an umpire, as provided in the policy:

After the appraisal process started, Hamilton Mutual, by its attorney, requested Skoutaris' EUO in February 2001, plus documents showing how Skoutaris reached his figures on the building and business property. Three more requests over the next three months for the EUO were made unsuccessfully. Between May and October 2001, seven more requests failed to result in Skoutaris giving his examination under oath.

On Nov. 2, 2001, Hamilton Mutual denied Skoutaris' remaining claim and three days later filed its complaint for declaratory judgment seeking to deny coverage for the remainder of Skoutaris' claim based upon his violation of the condition requiring an "insured to give an EUO when requested by the insurer," among other grounds.

Hamilton Mutual moved for summary judgment on the EUO issue, among others, and the U.S. District Court, Judge Paul R. Cherry, U.S. Magistrate Judge, Northern District of Indiana, granted summary judgment. Judge Daniel A. Manion, authoring the 7th Circuit's opinion, affirmed.

Manion began consideration of the EUO issue by setting out Skoutaris' position that Hamilton Mutual could not deny coverage without first showing that his failure to provide the EUO caused "prejudice" to Hamilton Mutual.

"Skoutaris first contends that the district court misapplied Indiana law by failing to require that Hamilton Mutual show actual prejudice stemming from Skoutaris' breach of the EUO clause," Manion wrote. "When arguing before this court, the parties properly briefed

this issue in light of relevant cases from the Indiana Court of appeals, since the Supreme Court of Indiana had not ruled on this issue previously. That has changed during the pendency of this appeal, and thus, to a large extent, subsequent events have overtaken the parties' arguments. See *Morris*.

"Skoutaris asserted that the Supreme Court of Indiana would treat the breach of an EUO provision in an identical fashion to the breach of a cooperation clause in a contract. Previously, the Supreme Court of Indiana clearly established what an insurer needs to prove in a case of a breach of a policy's cooperation clause. See, *Miller v. Dilts*, 463 N.E.2d 257, 261 (Ind. 1984). Specifically, "[a]n insurance company must show actual prejudice from an insured's noncompliance with the policy's cooperation clause before it can avoid liability under the policy."

Skoutaris contended that since cooperation clauses and the EUO clauses both allow an insurer to recover information from an insured, they should be subject to the same standard. The district court erred, according to Skoutaris, because it rested its decision solely on his breach of the EUO clause, and never considered whether that breach prejudiced Hamilton Mutual."

The court explained that the "cooperation clause" and the requirement to prove prejudice before invoking it to deny coverage is treated differently, than the "examination under oath" condition, which does not require proof of prejudice before it can be invoked to deny coverage.

"The Supreme Court of Indiana, however, subsequently decided to treat EUO clauses in a different way than cooperation clauses. See *Morris*, at 666. In *Morris*, the Supreme Court of Indiana considered the failure of married insureds to submit to examinations under oath as expressly required in their insurance contract. The EUO provision in that case was contained in a portion of the contract detailing the insureds' duties after a loss. The Indiana Court of Appeals had analyzed the breach of this EUO clause using the framework developed by Indiana courts in cooperation clause cases, and thus required a showing of prejudice. *Morris v. Econ. Fire & Cas. Co.*, 815 N.E.2d 129, 135 (Ind. Ct. App. 2004). The Supreme Court of Indiana rejected this approach, stating: '[t]his case does not involve a "cooperation clause"'. The Supreme Court of Indiana proceeded to expressly distinguish the EUO

provision from a cooperation clause, which is defined as a 'policy provision requiring that the insured assist the insurer in investigating a claim.' The EUO provision, on the other hand, was an 'entirely separate provision that explicitly requires the policy holder to perform specific duties.' The insured's failure to comply with the EUO clause resulted in a material breach of the contract. ('In expressly refusing to submit to examinations under oath until their prior recorded statements were furnished by [the insurance company], the [insureds] breached their policy contract.') In such a case, 'prejudice is not a necessary consideration.' In the context of a breach of an EUO clause, therefore, the Supreme Court of Indiana has established that an insurance company need only show a material breach to prevail."

Applying the rule of *Morris*, Manion reviewed the history of some ten requests for Skoutaris' EUO and concluding that the District Court properly found Hamilton Mutual justifiably denied coverage based upon the violation of the EUO condition:

"Applying the rule to the present case, Skoutaris clearly breached the EUO clause through his actions over a nine- or ten-month period. As in the *Morris* case, the EUO clause here is contained in a section of the contract setting forth the insured's 'Duties in the Event of Loss or Damage' and imposes a specific duty on the insured to submit to an examination under oath as reasonably required. Using catalogs, Hamilton Mutual initially valued the building and business personal property of the Open Flame several hundred thousand dollars less than Skoutaris. Once it became clear that the parties could not bridge the gap, Hamilton Mutual invoked the appraisal process and requested an EUO to find out exactly how Skoutaris came up with his figures (as most documents were ostensibly destroyed in the fire). Despite over ten letters from Hamilton Mutual and its attorney, including many referencing the specific policy provision allowing an EUO, Skoutaris would not submit to an EUO. Skoutaris was aware throughout that Hamilton Mutual wanted his EUO and nonetheless he refused. Although the policy never qualified the time period for an EUO, Skoutaris claimed, apparently without contractual or legal support, that the EUO would be improper and that his off-the-record discussions in November

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2000 were all that Hamilton Mutual was entitled to receive. The contract does not allow Skoutaris to ignore his express duties because he felt that he had done enough. ('[T]he contract does not provide that an insured can impose this prerequisite upon the insurer before complying with agreed duties.')

Skoutaris' intransigence constituted a willful and intentional breach of the EUO clause, and the district court properly granted summary judgment in favor of Hamilton Mutual on this ground."

Therefore, the 7th Circuit affirmed the judgment of the District Court for Hamilton Mutual.