CARLTON FIELDS

Must Insureds Attend Examinations Under Oath Alone?

March 31, 2016

Most personal line insurance policies require policyholders to sit for examinations under oath (EUO) to answer questions concerning the validity of a claim. The reason for this is simple: often, the facts surrounding a claimed loss are known only by the insured and, as such, the insurer is dependent on its insured for a full and candid disclosure of the facts. Accordingly, the insured has duty to cooperate with the insurer under these circumstances. But what if the insured refuses to attend the EUO without having his nonlawyer friend sit beside him? May the insurer insist on examining the insured without the friend in the room? That was the question in Foremost Insurance Co. v. Freeman.[1] **When Bad Things Happen to Good Cars** Wayne Freeman had worked as a mechanic for Charles Pendleton for over a decade. In 2013, Pendleton sold his employee a '71 Chevelle. However, the terms of the sale allowed him to keep a lien on vehicle. Freeman, meanwhile, purchased a $75,000 automobile insurance policy with Foremost Insurance Co. In March 2014, Freeman used Pendleton's tow dolly to move the Chevelle. While on the road, the vehicle came off the dolly and hit a tree. Pendleton helped Freeman resecure the car but, a mile later, it detached again, collided with a truck and was completely destroyed. **No Witness Left Behind** Freeman filed a claim under his Foremost policy for the totaled Chevelle. Foremost investigated the accident and attempted to schedule Freeman's EUO. Freeman stated that he would not testify unless Pendleton was present for the examination. Foremost demurred, cancelled the EUO and filed an action for a declaration that it has no duty to pay the claim because Freeman's refusal to testify on his own had violated the cooperation provisions of his policy. Freeman counterclaimed for breach of contract, seeking $75,000 in compensatory damages and $2 million in punitive damages. Foremost moved for summary judgment. Freeman asserted that he needed Pendleton at the examination because he is "illiterate" and "unfamiliar with the EUO process."[2] However, the evidence showed Freeman could read and write, despite the fact that he was not highly educated. Even so, there were other individuals, such as an attorney, who Freeman could have sought assistance from to understand and attend the examination. The fact that Pendleton was not necessary to the EUO, however, did not resolve the question of whether it had been reasonable for the insurer to insist on excluding him from Freeman's examination. **When Two's a Crowd** The court found it was reasonable for Foremost to insist on excluding Pendleton from the EUO for several reasons. First, Freeman and Pendleton were both witnesses with respect to several issues that were important to the claim, including the

condition of the Chevelle before it came off the dolly, how it had been attached to the dolly, how it had been reattached to the dolly and how it had come to run into a tree and collide with a truck within the space of few hours. As to these matters, the court stated. It was perfectly reasonable for Foremost to seek to interview one witness without the other's input or reaction. Witnesses often see accidents from different perspectives and remember different things, so it is logical for a fact-finder to try and secure everyone's independent version. ... [3] In fact, during a deposition in Foremost's declaratory judgment action, Freeman testified that Pendleton knew "different things I didn't know."[4] Second, Foremost was entitled to question Freeman regarding his finances to determine whether he had a motive to cause the accident without "tipping off" Pendleton about its line of inquiry or the progress of its investigation. Because of his lien on the Chevelle, Pendleton would be the ultimate beneficiary of any payment on Freeman's claim — and, possibly, a co-conspirator in the event Freeman was filing a false claim. Pendleton, moreover, was no stranger to insurance litigation. In a lawsuit involving a different automobile insurance claim, another insurer had accused Pendleton of making false statements to the police about an accident involving his '56 Mercedes convertible — a collision with a vehicle driven, coincidentally, by another one of Pendleton's employees. As the court noted, separation of witnesses reasonably "exercises a restraint on witness 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid."[5] Last, the court noted Pendleton had a great deal of leverage over Freeman, both as his employer — Pendleton had initially refused to allow Freeman to attend the EUO during business hours — and lienholder. As stated by the court: Against this backdrop it was reasonable for Foremost to not allow its insured's employer and lienholder to sit in on the EUO. One would not want an employer, bank or other powerful institution to hover over sworn testimony — at least not if we are interested in the truth, the whole truth and nothing but the truth. The risk of the powerful person or entity improperly influencing the testimony is just too great.[6] **The EUO and the Insurer's Duty to Cooperate** Personal lines policies often specify, as a condition precedent to coverage, that the insured agree to be examined under oath in connection with a claim. Further, such policies also contain a duty of the insured to cooperate with the insurer in its investigation of a claim. The dilemma insurers face is that, in some courts, uncooperative insureds may not be sanctioned with any severity (if at all), thereby encouraging delays in compliance, and as the case herein, complying only partially when required to do so. This case confirms the obligation of policyholders to fully cooperate in the investigation of a claim. More precisely, and most importantly, the duty of cooperation also requires that insureds not place unreasonable conditions on their compliance with this condition, including for examinations under oath. By applying this premise to an EUO, the court in Freeman makes it clear that it recognizes the importance of these examinations as strong tools in an insurer's arsenal in order to determine the validity of a claim. --- [1] 2016 WL 380126 (S.D. Miss. Jan. 29, 2016).

[2] Id. at * 3.

[3] Id. at * 2.

[4] Id.

[5] Geders v. United States, 425 U.S. 80, 81 (1976).

[6] 2016 WL 380126, at * 3. Republished with permission by *Law360* (subscription required).

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