



THE MONSON

LAW FIRM, LLC

*Sworn Statements in Proof of Loss,
Examinations Under Oath and
Appraisal: Fraud Fighting Policy
Provisions*

Presenter's Biography

MATTHEW D. MONSON, ESQ. hails from New Orleans, Louisiana. He has been practicing law for the past twenty-three years and is the founder of The Monson Law Firm. He graduated from Georgetown University with a double major in International Business and Accounting. While at Georgetown, he studied International Business in Copenhagen, Denmark. Matthew received his law degree from Tulane University Law School, where he studied European Union Law in Amsterdam.

Matthew is admitted to practice in Louisiana and Texas, where he focuses his practice on issuing coverage opinions, defending premises liability and first-party property damage claims. Matthew worked with the Louisiana Department of Insurance to author the first policy language in the nation that allowed homeowners insurers to reject an Assignment of Benefits.

Matthew is a Past President of the New Orleans Claims Association and Louisiana Claims Association. He is also a founding member of The North Shore Claims Association. Matthew and his wife, Katherine, are proud parents of Andrew, 19, and Jessica, 15.

Overview



Introduction



Red Flags



Sworn Statement in Proof of Loss



Examination Under Oath



Appraisal



Questions and Answers

Introduction

- Sworn Statements in Proof of Loss, Examinations Under Oath and Appraisal are valuable tools for an insurer investigating a claim.
- Historically, these tools have been underutilized.
- Proofs of Loss were used as mere formalities for claim payments.
- Examinations under oath (“EUOs”) were typically used to resolve suspected fraud claims.
- Appraisal has been sparingly used to resolve disputes as to the amount of the claim.

Red Flags



Insured makes unreasonable demands at the outset.



Public adjuster or attorney is retained at the outset.



Insured threatens legal action at the outset.



Significant differences exist in scope and amount of loss between adjuster and insured.



Inability to obtain an agreement on the scope of damages

Red Flags



**PRE-EXISTING
DAMAGES ARE
CLAIMED AS
PART OF THE
LOSS**



**LATE
REPORTING
JEOPARDIZES
INVESTIGATION
OF CLAIM**



**EMERGENCY
REPAIRS/SERVICES
ARE UNDER WAY
PRIOR TO
REPORTING OF THE
CLAIM**



**CONTRACTORS/EXPERTS
RETAINED BY INSURED
HAVE HISTORY OF BEING
DIFFICULT TO DEAL WITH**



**LACK OF EXPERTS,
DOCUMENTATION,
ETC., TO SUPPORT
DAMAGES CLAIMED**

Red Flags



Lack of experts, documentation, etc., to support damages claimed.



Significant code upgrades claimed when little or none appear to be required.



Lengthy period of restoration not supported by adequate documentation.

Sworn Statements in Proof of Loss - Background

Formal Statement of
the Insured's Claim.

A provision
requiring a Proof of
Loss is in nearly all
policy forms.

Requires that, upon
request, an insured
supply detailed
information enabling
the insurer to
investigate and
assess the loss.

Appears in the
"Duties After Loss"
Section of the
policy.

Sworn Statements in Proof of Loss - Purpose

Quickly gets to
the heart of an
insured's claim.

Enables the
insurer to bind
the insured and
protect against
fraud.

Enables the
insurer to
obtain
information
directly from
insured.

Compels
insureds to
commit to a
number as a
“cap”.

Sworn Statements in Proof of Loss - Purpose

Great tool before
conducting an
EUO or
beginning
appraisal.

Enables the
insurer to extract
information from
an unwilling
insured.

Good for
committing an
insured who
claims differing
amounts and
different time to a
specific number.

Fantastic for
proving fraud the
insurer is not
aware of until
after a claim is
paid.

Sworn Statements in Proof of Loss - Condition Precedent to Recovery?



Most policies require the insured return the Proof of Loss within thirty or sixty days after the request.



Timely return of the Proof of Loss is a Condition Precedent to recovery.



In some jurisdictions, failure to comply is an absolute bar to recovery.



Courts are trending away toward a more liberal approach, requiring a showing of prejudice if the Proof is not returned.

Sworn Statements in Proof of Loss - No Action Clause

SUIT AGAINST US

No one may bring a suit against us under this Coverage Part unless:

1. There has been full compliance with all of the terms of this Coverage part; and
 2. The suit is brought within 2 years after the date on which the loss occurred.
- In Standard Flood Insurance Policy the failure to submit a Proof of Loss is an absolute bar to recovery.

Sworn Statements in Proof of Loss - How to Respond

- An insurer may either
 - Accept
 - Acknowledge
 - Reject
 - Return a Proof of Loss.
- When a Proof is defective, it should be rejected, the insured notified of the defects and another blank form provided.
- When a Proof is rejected, give reasons. Don't suggest a claim denial. Make clear that the investigation is continuing.

Sworn Statements in Proof of Loss Fraudulent Proofs

- Most jurisdictions find that a fraudulent proof of loss bars recovery completely.
- Fraud must be both material and intentional in order to gain a larger payment.
- May also void all coverage under the policy.
- Some jurisdictions hold that recovery is prevented only regarding the part of the submission that is fraudulent.

Examinations Under Oath Origins and Purpose

- Addressed by United States Supreme Court 130 years ago in *Claflin v. Commonwealth Insurance Company*
- Explained that the EUO enables an insurer to obtain both claim information and documents in the insured's possession:
 - For a fair and proper claim evaluation
 - To help an insurer determine its own policy obligations; and
 - To enable an insurer to protect itself against fraudulent claims.
- Many claims are resolved after an EUO.

Examinations Under Oath Acceptance by Insureds



The EUO request is not usually met with open arms.



Insureds become defensive, confused and have to be educated as to the process.



EUO is considered a device to harass and delay.



Few judges and plaintiff's lawyers are familiar with EUOs and view them as depositions or a mere technicality.

Examinations Under Oath Policy Language

LOSS CONDITIONS

Duties in the Event of Loss

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 and insured's books or records. In the event of an examination, an insured's answers must be signed.

Examinations Under Oath NOT A DEPOSITION!

- The obligation to attend an EUO is contractual and does not arise out of the rules of civil procedure.
- The insured's counsel cannot object or instruct an insured not to answer.
 - The failure to answer all questions may form the basis for denial of a claim.
- EUOs are taken before litigation as part of an insurer's investigation.
- Insured has a duty to volunteer information at an EUO.
- The insurer has the right to examine insureds out of the presence of each other.

Examinations Under Oath - Considerations



Suspected fraud is the most common reason for EUOs.



Also helpful when an insured do not respond to written or oral requests for information.



EUOs are sometimes the most efficient way to determine the particulars of a claim.



EUOs are a great way to get around a meddling public adjuster or attorney.

Examinations Under Oath Subject Areas

Contested
Issues

Ambiguities

Information
Gaps

Losses missing
supporting
documentation

Inconsistencies

Fraud

Claim
exaggeration

Insured's
perspective on
the claim

Motive for
Claim

Potential Policy
defenses

Insurable
Interest

Background of
insured

Financial
Condition

Location at
time of loss

Examinations Under Oath - Demand



Must be in writing.



Sent via Certified Mail *and*
standard U.S. Mail.



EUOs should be scheduled
unilaterally, but let the insured
know that it can be rescheduled at
a convenient time and place.



If a time and place is not set, then
the insured will not be found to
have breached the condition.

Examinations Under Oath - Demand



The insurer is exercising its right under the policy to conduct the examination.



Quote the policy language requiring the insured's compliance.



The date, time and location of the EUO.



Request for records.



Time and place for document production.

Examinations Under Oath - Demand



Consequences for failing to comply



Insured will be reimbursed for copying cost.



Insurer cannot complete investigation under EUO and records are received.



Sworn Statement in Proof of Loss Request.



Insured may have an attorney present.



Before a court reporter.



Not in the presence of another insured.

Examinations Under Oath - Conducting the EUO

Prepare

Prepare, prepare prepare!

Review

Review the potentially applicable policy provisions.

Have

Have an outline ready.

Know

Know the photographs and documents.

Discuss

Discuss in advance with attorney/adjuster.

Remind

Remind opposing counsel that they can attend, but they cannot interfere with examination.

Keep

Keep list of items that need a written follow-up.

Examinations Under Oath Lack of Cooperation

EUOs often do not proceed as planned.

No shows

Lack of
knowledge

Lack of
documents

The requirement to sit for an EUO is also a
Condition Precedent to coverage.

Some jurisdictions indicate that failure to sit
for EUO is grounds for dismissing suit.

Other jurisdictions require a finding of
prejudice to the insurer.

Appraisal - Introduction

- In most first party property claims, the fundamental issue is the amount of loss.
- Most property policies contain an appraisal clause, which provides an efficient and cost-effective means of resolving this core dispute.
- Great for getting the lawyers out of the room and letting the professionals cut to the chase.

Appraisal - Policy Language

E. Appraisal

If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent and impartial appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

Each party will:

- 1.** Pay its own appraiser; and
- 2.** Bear the other expenses of the appraisal and umpire equally.

Appraisal - Actual Dispute



Must be an actual dispute as to the amount of loss.



Demand for appraisal without proof of differing amount is not sufficient to establish dispute.



Make sure to formally deny appraisal demand and request proof of the dispute.

Appraisal - Not the Same as Arbitration

Parties opposing appraisal sometimes argue that the appraisal clause is an attempt at binding arbitration.

- They argue that the appraisal clause is not valid because it conflicts with the Federal Arbitration Act.

There are significant differences between the appraisal process and arbitration.

- Arbitration is a quasi-judicial proceeding with formal hearings, witnesses, etc.
- Appraisal is an informal process that does not involve the procedural requirements of a court proceeding

Appraisal - Competent and Disinterested Appraisers

Louisiana requires registration for appraisers.

By statute in Louisiana the original public adjuster cannot be the appraiser.

In Louisiana, insured's appraiser should also be a licensed public adjuster.

The original claims adjuster, however, can serve the insurer's appraiser.

- The mere fact that someone has previously computed the losses as an adjuster does not disqualify them from service as an appraiser
- Simply must be “disinterested, unprejudiced, honest and competent”

Appraisal - Jurisdiction/ Enforcement



In some states, such as Florida, the Appraisal process will take jurisdiction away from the courts until the process is complete.



In other states, such as Louisiana, suit can always be filed, but the lawsuit can be stayed until completion.



Awards will be enforced unless there is evidence of fraud, mistake, duress or other impeaching circumstances in either the appraisal process or its award.

Appraisal - Umpires

- Appraisers often make the mistake on trying to agree on the amount of loss and then choosing the umpire if no agreement is made.
- Should agree on the umpire first pursuant to most Appraisal provisions.
- Often difficult to agree with opposing appraiser on choice of umpire.

Appraisal - Umpires

- Technical knowledge versus impartiality?
- There is no requirement for either in most Appraisal clauses.
- Impartiality is paramount! Consider the use of mediators as umpires.
- Do not agree on public adjusters or contractors. They are usually biased.

Appraisal - Working with Umpires

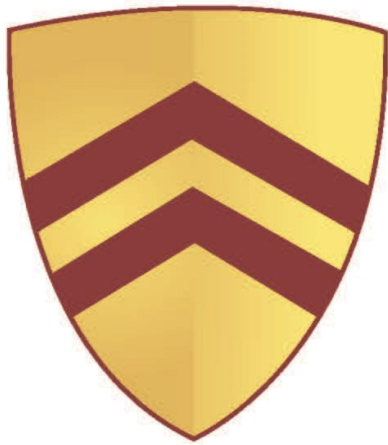
Supposed to submit only differences to Umpire.

Submit all supporting information

- Photographs
- Expert Reports
- Prior loss information

Go out to the loss location with the Umpire.

Umpires love bones!



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