RECENT CASES OF INTEREST

EXAMINATIONS UNDER OATH

***QBE Seguros v. Morales-Vazquez*, No. 15-2091, 2017 WL 775789 (D.P.R. Feb. 27, 2017)**

Examinations Under Oath Need Not Comply with Federal Rules of Civil Procedure
by Jason P. Minkin and Jonathan A. Cipriani, Bates Carey LLP Chicago

Examinations under oath (EUOs) can be a critical investigative tool for an insurer. A recent decision by a federal magistrate judge in Puerto Rico demonstrates the flexibility that insurers have to use EUOs in investigating claims, free from the more formal rules that govern depositions under the Federal Rules of Civil Procedure. *QBE Seguros v. Morales-Vazquez*, No. 15-2091, 2017 WL 775789 (D.P.R. Feb. 27, 2017). In *QBE Seguros*, the court denied a policyholder's motion to dismiss his marine insurer's complaint to void the insurance policy based on a breach of the *uberrimae fidei* doctrine, holding that an EUO need not comply with Federal Rule of Civil Procedure 27. Contrary to the position taken by the policyholder, the statements allegedly obtained in the EUO could be used by the insurer in its complaint to void the policy. Notably, this is not the first time this case was discussed in the Marine Insurance and General Average Newsletter. A prior ruling in the case was discussed in the Fall 2016 Newsletter, where the court rejected the policyholder's argument that the passage of the United Kingdom's Insurance Act of 2015, which abolished the doctrine of *uberrimae fidei*, served as a model for likewise abandoning the doctrine in the United States. After ruling that the case could go forward, the policyholder then sought to dismiss the complaint on the grounds that the EUO did not comply with Federal Rule of Civil Procedure 27, because the insurer did not first file a petition with the court requesting a deposition under that rule.

Background

The insurer, QBE Seguros, issued an ocean marine insurance policy to the plaintiff, Morales, for his yacht. The insurance policy application stated that "answers provided [in the application] are warranted by [the applicant] to be true and correct." The insurance policy separately provided that it would "be void and without effect" if the insured made a false statement or concealed or misrepresented any material fact or circumstance relating to the insurance on the application form. After making a claim for damage to the yacht, Morales underwent an EUO at the insurer's request, pursuant to the requirement in the policy that he submit to an EUO. During the EUO, Morales allegedly made statements "which indicated that he had not been completely forthcoming" in his insurance policy application. Morales allegedly did not disclose a 2010 accident involving a boat he was operating, which resulted in a total loss, and failed to disclose his ownership of multiple other vessels. The insurer later filed a complaint for declaratory judgment relying on these statements to void the policy.

Decision

Morales sought to dismiss the insurer's complaint, arguing that the insurer improperly obtained his statements during the EUO because that examination did not comply with the requirements for taking a deposition under Federal Rule of Civil Procedure 27. Rule 27 is meant "'to apply to situations where, for one reason or another, testimony might be lost to a prospective litigant unless taken immediately, without waiting until after a suit or other legal proceeding is commenced.'" *QBE Seguros*, 2017 WL 775789, *2, *citing Petition of Ferkauf*, 3 F.R.D. 89, 91 (S.D.N.Y. 1943). The Rule permits a federal district court to authorize a deposition where the anticipated litigation is within federal jurisdiction; the petitioner is unable to bring or cause to be brought the underlying action; and there is a reason or need to perpetuate the testimony sought.

Morales took the position that any statements from the EUO should be stricken from the insurer's complaint, which he contended was not sufficient to state a claim without those statements. The court rejected this argument. The court noted that Rule 27 and EUO serve different purposes: the former is meant to preserve testimony that may otherwise be lost, while the purpose of the latter is for the insurer to obtain information as part of its investigation of a claim, rather than for litigation. Citing precedent from the Seventh and Eleventh Circuits, the court explained that the right to take an EUO is contractual, and that federal procedural rules governing depositions are at most of only persuasive value. *See Nat'l Athletic Sportswear, Inc. v. Westfield Ins. Co.,* 528 F.3d 508, 521 (7th Cir. 2008) ("[T]he Federal Rules of Civil Procedure are not authoritative or dispositive regarding the contractual obligations [relating to EUOs] at issue here"); *U.S. Fid. & Guar. Co. v. Welch*, 854 F.2d 459, 461 (11th Cir. 1988) ("right to obtain sworn statements" during EUO "arises from the policy provisions" and thus right to take EUO "is not to be confused with procedures authorized by statute for taking depositions"). It was uncontested, according to the court, that the insurance policy had at least two unambiguous clauses that required him to submit to an EUO. The court found the insurer "had a right – arising under the marine insurance contract" – to ask Morales to participate in the EUO. Such a contractual right, the court explained, was distinct from the protections under the Federal Rules, which meant the insurer did not have to abide by Rule 27 prior to conducting the EUO. Because the insurance policy unambiguously required Morales to submit to an EUO, and because the insurer did not have to comply with Rule 27 before taking the EUO, the court denied Morales' motion to dismiss.

Conclusion

The court's straightforward decision demonstrates what should, by now, be an uncontroversial point: EUOs are creatures of contract, not statute or rule. As such, they are not bound by the same formal restrictions that govern depositions under the Federal Rules of Civil Procedure, and those rules are no bar to including statements from an EUO in a complaint.