

# COUNTERPOINT

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## Truth Or Consequences: The Fifth Amendment Privilege Does Not Excuse An Insured's Failure To Submit To An Examination Under Oath

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"You have the right to remain silent. Anything you say can and will be used against you in a court of law." This ubiquitous refrain has—thanks to television and film crime dramas—become indelibly etched into America's collective psyche. But does the Fifth Amendment right to remain silent permit an insured to avoid questioning by his insurer in an examination under oath ("EUO") pursuant to his insurance policy? Pennsylvania's courts have held that although an insured is entitled to exercise his Fifth Amendment right against self-incrimination during the EUO, there may be consequences for his silence, including a denial of coverage. As it turns out, when it comes to an insurance coverage dispute, anything you **do not** say can—and likely will—be used against you in a court of law.

### The Protection Afforded By the Fifth Amendment Is Not Implicated By An EUO

Standard personal property and casualty insurance policies require the insured to cooperate with his insurer in its investigation of his claim. This duty to cooperate may include the duty to submit to an EUO. The duty to cooperate—including submission to an EUO—is, therefore, a contractual obligation that exists solely because of the private contractual relationship between the insurer and the insured.

Because submission to an EUO is a contractual obligation, the Fifth Amendment privilege—the "right to remain silent"—does not apply in the

context of an EUO; thus, invocation of this right will not excuse the insured from his duty to cooperate. As the California Supreme Court explained in the seminal case of *Hickman v. London Assurance Corporation*, 195 P. 45, 49 (Cal. 1920), "the compulsion secured against by the constitution is a compulsion exercised by the state in its sovereign capacity in some manner known to the law." *Id.* However, the Fifth Amendment

privilege does not apply to "a private examination arising out of a contractual relationship" and existing "purely by virtue of a contract between the parties." *Id.* Therefore, an insured may not cloak himself in the protection of the Fifth Amendment during his EUO and yet still demand coverage. See, e.g., *Metlife Auto & Home v. Cunningham*, 797 N.E.2d 18, 22 (Mass. App. Ct. 2003)

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(holding that the insured’s “assertion of rights under the Fifth Amendment to the United States Constitution . . . afforded him no sanctuary from his obligation to cooperate [with his insurance company], for it is not by the [Government] or by [MetLife] that [Cunningham] is compelled to . . . furnish evidence against himself, but by his own contractual undertaking.”)

Thus, an insured’s Fifth Amendment “right to remain silent” does not necessarily extend to an EUO taken pursuant to the terms of the insured’s policy.

### Invoking The Fifth Amendment Privilege Against Self-Incrimination During An EUO May Constitute Non-Cooperation

An insurer’s investigation into whether a loss or claim comes within the scope of the policy’s coverage can often touch on or reveal criminal activity. For example, while a homeowner’s insurer is investigating a suspicious fire loss, local police may also be conducting a criminal investigation of the homeowner for arson for the same fire. In such a circumstance, the insurer has a right to conduct an EUO as part of its investigation to determine whether the fire was intentional or accidental. The insured, on the other hand, has a right to avoid giving sworn testimony implicating him criminally in arson. Pennsylvania courts have held that although the insured is certainly within

his rights under the Fifth Amendment to remain silent during an EUO conducted by the insurer, his silence may have consequences: specifically, a denial of coverage.

For example, in *Aetna Casualty & Surety Company v. State Farm Mutual Automobile Insurance Company*, 771 F. Supp. 704 (W.D. Pa. 1991), the insured refused to give a statement to State Farm regarding a motor vehicle accident in which she was involved. She did so on the basis of her Fifth Amendment right to remain silent in light of criminal charges pending against her. *Id.* at 706. Following the insured’s refusal to give a statement, a civil action was filed against State Farm’s insured by the party injured in the accident. *Id.* State Farm denied a defense and indemnity for the insured on the grounds that she failed to cooperate with State Farm’s investigation by not appearing for the EUO. *Id.* The court upheld State Farm’s coverage denial, and it rejected the insured’s “argument that [her] Fifth Amendment privilege excuses her breach of the contract as a matter of law.” *Id.* at 707-08. In so holding, the court provided a word of caution for an insured invoking his Fifth Amendment right to avoid questioning in an EUO: “A person may not be penalized for asserting the Fifth Amendment privilege against self incrimination, but that does not mean that if a person refuses to make a statement in a civil proceeding that the failure to provide evidence may not have adverse consequences.” *Id.* at 707.

Similarly, in *Bogatin v. Federal*

*Insurance Company*, 2000 U.S. Dist. LEXIS 8632 (E.D. Pa. June 21, 2000), various former officers and directors of Federal’s insured—including the plaintiff—made claims for coverage in connection with lawsuits and criminal actions filed against them. *Id.* at \*63. However, Bogatin asserted his Fifth Amendment right and refused to submit to interviews by Federal in connection with its coverage investigation. *Id.* His failure to do so “prevented [Federal] from having as complete an understanding as it would like to have had about the claims it was asked to cover.” *Id.* at \*64. In upholding Federal’s denial of coverage for lack of cooperation, the court agreed with Federal, and held that “a Fifth Amendment privilege against self-incrimination does not trump an insurance policy’s duty to cooperate requirement.” *Id.* at \*\*78-79 (*citing Aetna*, 771 F. Supp. at 708). The court thus found that Bogatin “breached his duty to cooperate by failing to disclose information and documents reasonably requested by defendant and by refusing to submit to an interview,” and that his failure to do so “substantially prejudiced [Federal’s] ability to complete its investigation.” *Id.* at \*\*78-79.

Thus, under Pennsylvania law, the insured’s refusal to testify at an EUO may constitute a violation of the insured’s contractual duty to cooperate, even if that refusal is based on the Fifth Amendment privilege against self-incrimination. In such a case, Pennsylvania courts have upheld the insurer’s denial or avoidance of coverage based on the insured’s breach of the policy.

### Courts Of Other States Agree That The Fifth Amendment Privilege Does Not Trump The Duty To Cooperate

The *Aetna* and *Bogatin* decisions are consistent with the position taken by state and federal courts around the country: that is, that an insured may breach his duty to cooperate with his insurer’s investigation when he asserts his Fifth Amendment privilege to avoid testifying at an EUO.

Courts have held that a pending criminal investigation against the insured does not release him from his duty to submit to an EUO. For example, *Taricani*

*v. Nationwide Mutual Insurance Company*, 822 A.2d 341 (Conn. Ct. App. 2003), illustrates that the hypothetical arson facts presented above are not so hypothetical at all. In *Taricani*, the insurer refused to provide coverage to its insureds in connection with a fire loss, on the grounds that the insureds failed to cooperate with the company's investigation. *Id.* at 341-43. The insureds argued that because they were under investigation for arson at the time the insurer sought the EUO, they were entitled to avoid testifying at the EUO pursuant to the Fifth Amendment. *Id.* at 343. The court disagreed with the insureds' contention that the insurer improperly denied coverage, and held that the insureds had breached a material condition of their policy by not cooperating with the request for an EUO. *Id.* at 344-45.

Likewise, even where charges have been filed against the insured, he is still required to submit to, and fully cooperate with, an EUO. In *Miller v. Augusta Mutual Insurance Company*, 335 F. Supp. 2d 727 (W.D. Va. 2004), for example, the insured's son witnessed a fatal shooting that occurred in his parents' home. *Id.* at 729. He was subsequently charged with second degree murder and other charges in connection with the shooting. *Id.* at 730. When the family of the victim filed a wrongful death action against the insured's son, Augusta Mutual conducted an investigation into whether the wrongful death action was covered under his parents' homeowners' policy. The insured's son refused to give a statement under oath in connection with that investigation because of the pending criminal charges and his Fifth Amendment rights. *Id.* The court held that Augusta Mutual properly denied a defense and indemnity to the insured's son in connection with the wrongful death action, as his failure to provide a statement under oath to August Mutual violated the policy's requirement that the insured "help us ... to secure and give evidence." *Id.* at 733. According to the court, "An insured 'may avoid incriminating [himself] by refusing to submit to relevant requests made by [the insurer] under the policy ... although to do so may ultimately cost

[him] insurance coverage.'" *Id.* at 731. Similarly, in *Pervis v. State Farm Fire & Cas. Co.*, 901 F.2d 944 (11<sup>th</sup> Cir. 1990), the court held that the insured's policy required him to give a sworn statement when requested by his insurer, even though the insured had been indicted on the same day that the insurer requested the EUO. *Id.* at 945-46. According to the court, "[Pervis] is not compelled to incriminate himself. He is, however, bound by the provisions to which he stipulated when he signed the insurance agreement." *Id.* at 947-48.

Courts have also held that an insurer is not obligated to delay conducting an EUO until the criminal charges against the insured have been resolved. For example, in *Saucier v. U.S. Fidelity & Guaranty Company*, 765 F. Supp. 334 (S.D. Miss. 1991), the insured filed a declaratory judgment action against her insurer in connection with a fire loss. *Id.* at 334-35. The insured sought a declaration that she was not required to submit to an EUO until such time as the arson charges against her relating to the fire were resolved. *Id.* at 335. In granting summary judgment in favor of the defendant insurer, the court held that "a policy is rendered void where an insured either fails to submit to an examination under oath or refuses to answer material questions during an examination under oath." *Id.* at 336. Citing *Hickman*, the court held that the plaintiff's failure to submit to an EUO was not legally excused, as "the unfortunate fact of Saucier's indictment did not work to relieve her of her contractual obligations" to cooperate with her insurer's investigation. *Id.*; see also *Mello v. Hingham Mut. Fire Ins. Co.*, 656 N.E.2d 1247, 1249-51 (Mass. 1995) (same).

Thus, as the New Jersey Superior Court has noted, "The weight of authority would seem to be that the Fifth Amendment privilege cannot be invoked in the context of a contractual examination under oath to avoid answering material questions." *State Farm Indem. Co. v. Warrington*, 350 N.J. Super. 379, 384 (App. Div. 2002).

#### **The Insured's Silence Can and Will Be Used Against Him**

The EUO can be one of the most useful tools in insurance lawyer's and investigator's arsenal. It can allow the insurer to quickly and directly ascertain facts regarding the claimed loss, including whether the claimed loss is potentially excluded from coverage. When an insured refuses to give an EUO based on his invocation of his rights under the Fifth Amendment, it is incumbent on the insurer to take steps to preserve a coverage defense and/or the basis for a denial of coverage even in the face of the insured's refusal to testify. In order to do so, counsel for the insurer would be wise to take the following steps based on the lessons of the cases discussed above:

1. *Advise the insured early and often of his duty to cooperate and the consequences of his silence.* Emphasize to the insured from the outset that he has a duty to give an EUO, and that the failure to do so, even if based on the Fifth Amendment privilege, may void coverage. This warning should be repeated on the record if the refusal to testify occurs during the EUO.
2. *Make reasonable efforts to secure the EUO.* Diligence in attempting to obtain the information necessary to ascertain coverage will work to the benefit of the insurer if the insurer subsequently invokes the insured's lack of cooperation as a defense.
3. *Pending criminal charges should not delay the insurer's investigation.* The insurer need not wait to obtain the EUO until any pending criminal charges against the insured related to the subject loss are resolved. As the insurer has an obligation under Pennsylvania law to promptly investigate and handle claims, it should not delay its investigation for a potentially lengthy period of time in order to allow the insured to protect his own interests.
4. *Ask questions that are direct and material to the loss.* Under Pennsylvania law, the insured's failure to cooperate with his insurer pursuant to the terms of his policy

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may void coverage if this failure to cooperate resulted in “substantial prejudice” to the insurer. *See, e.g., Bogatin*, 2000 U.S. Dist. LEXIS 8632, at \*79; *Aetna*, 771 F. Supp. at 707. In order to show prejudice, the party conducting the EUO should therefore ask all questions material and necessary to the insurer’s determination of coverage—even if the response to each is an assertion of the right to remain silent—in order to make a complete record

of the insured’s non-cooperation. Indeed, the insurer or its counsel would be wise to draw out this assertion of privilege as to the ultimate questions bearing on coverage, such as “Did you intentionally hit the pedestrian?”; “Did you deliberately drive your car into the building?”; “Did you intentionally set your house on fire?”; or “Did you deliberately flood your basement?”

### Conclusion

The Fifth Amendment privilege against self-incrimination does not trump an

insured’s contractual duty under his insurance policy to cooperate with his insurer’s investigation of a claim. Although the insured may properly invoke his Fifth Amendment privilege to avoid answering questions during an EUO that might incriminate him, this constitutional protection does not prevent adverse consequences for the insured for his failure to testify, including a denial of coverage. Simply put, the insured’s silence during an EUO can, and likely will, be used against him by his insurer.

