

How Calif. Video Recording Ruling May Affect Insured Exams

By **John Edson and Preston Bennett** (March 13, 2024)

When confronted with a suspicious claim, insurers frequently request that an insured answer questions about the claim in an examination under oath, or EUO.[1]

Policy provisions requiring insureds to submit to an EUO as a condition precedent to coverage are standard and have been consistently upheld as valid.[2]

Historically, the courts have focused on an insured's failure to comply with the EUO requirement — such as by failing to appear or refusing to answer relevant questions — and the consequences of that failure.[3] The insured's rights at an EUO are enumerated by statute.[4]

But now, a decision from the California Court of Appeal, First Appellate District, creates ambiguity and potential future disputes by expanding the insured's right to videotape the EUO, perhaps beyond what the California Legislature intended, without clear boundaries.

In *Myasnyankin v. Nationwide Mutual Insurance Co.*,[5] the court held on Jan. 30 that an insured can videotape the EUO in its entirety, including the person taking the EUO, as well as anyone else present during the proceeding, unless they are appearing remotely with their camera turned off.

In so holding, the court opened the door for gamesmanship because it (1) did not require the insured to use a professional videographer, (2) did not definitively rule whether the insured was permitted to record before or after the proceeding, or during breaks, and (3) created other potential issues, discussed below.

Background Facts and Procedural History

After water damaged his home, Vladimir Myasnyankin submitted a claim under his homeowners insurance policy with Nationwide Mutual. Under the policy's terms, Nationwide asked Myasnyankin to submit to an EUO. Myasnyankin sought to video record the entire proceeding, including Nationwide's attorney and claims adjusters.

In support, he cited Insurance Code Section 2071.1(a)(4), which states that an insured "may record the examination proceedings in their entirety." Nationwide asserted that Section 2071.1(a)(4) permitted Myasnyankin to video record only himself, refused to proceed with the EUO and threatened to deny Myasnyankin's claim.

Myasnyankin then sued Nationwide, seeking a declaration of his rights under Section 2071.1(a)(4). Nationwide filed a demurrer, arguing that neither the policy nor Section 2071.1 gave Myasnyankin the right to video record all participants at his EUO. The Alameda County Superior Court overruled the demurrer.

The trial court interpreted the phrase "record the examination proceedings in their entirety" to include "video recording of the persons asking the questions, the person answering the



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questions, and any other aspect of the proceedings." At the trial court's suggestion, the parties entered a stipulated judgment in favor of Myasnyankin.

Nationwide then appealed that judgment. Nationwide and Myasnyankin agreed that Section 2071.1(a)(4) granted insureds the right to make an audio or video recording, but disputed who could be recorded on video.

Court of Appeal Decision

Presented with this issue of first impression, the California Court of Appeal, First Appellate District, examined the language of the statute and its legislative history. Based on the dictionary definition of "entirety," the court interpreted Section 2071.1(a)(4)'s language to mean that "an insured may record every element and part of the examination proceeding," which the court found includes the insurer's representatives attending the EUO.

The court also noted that "examination proceeding" was a broad term. The court found that the Legislature's use of that particular word in one subdivision of the same statute, but a different word in another subdivision, indicated that its use of those different words was intentional.

The Legislature used the term "testimony" in Subdivision (a)(5) but "examination proceeding" in Subdivision (a)(4).[6]

According to the Myasnyankin court, this suggested that "the Legislature intended the term 'examination proceedings' to include more than just the insured's responses to questions." Relatedly, the court pointed out that a statute governing depositions expressly limited recording rights to "testimony" as opposed to the deposition proceeding in its entirety.[7]

In addition, the court examined the legislative history and found that the Legislature's purpose in enacting Section 2071.1 was to provide "basic due process rights" and consumer protections for insureds during the claim process, including the right to record an EUO. However, the court acknowledged that the legislative history did "not explicitly address" whether Section 2071.1(a)(4) encompassed the right to video record the insurer's representatives.

Against this backdrop, the court indicated that the statute's "unequivocal intent" was to protect insureds from "harassment in EUO proceedings," and this purpose was served by granting insureds the right to video record all participants. On this point, the court appeared to be concerned with allowing the insured to capture the nonverbal conduct of the insurer's representatives, such as "eye-rolls or glares," which it noted could be intimidating and would not be captured on a transcript or audio recording.

With respect to the logistics of the video recording, the court did not require the insured to hire a professional videographer. Rather, it held that the insured could record the proceeding with a smartphone, which "can be placed on a tripod or otherwise propped up and left to record the insurer's representatives, without the need for a person standing by."

In addition, the court rejected Nationwide's argument that video recording an insurer's representatives who are not questioning the witness was unreasonable. Instead, the only instance in which the court disallowed an insured from video recording an insurance company's participating adjusters is when the EUO is conducted via teleconference, the adjusters appear remotely and their cameras are turned off. The court ruled that a "remote viewer whose camera is turned off or who is otherwise not visible on the teleconferencing

platform ... is not part of the proceedings for purposes of section 2071.1(a)(4)."

Notably, the parties did not brief, and the court did not resolve, whether "the right to record extends beyond the questions and answers of the examination to encompass all discussions and exchanges from, presumably, the moment the participants enter the room or join the videoconference until the moment they leave."

Nonetheless, the court noted that "it may be reasonable to construe the statute to include such a temporal completeness."

Therefore, whether the insured has the right to videotape off-the-record discussions between counsel and/or the insurer's adjusters during breaks is not entirely clear and may give rise to future disputes.

Anticipated Effects and Consequences of the Myasnyankin Ruling

Myasnyankin has changed the rules of the road for EUOs and potentially opened Pandora's box for future disputes.

The decision might have a chilling effect on adjuster participation in EUOs. It might also encourage policyholders attorneys to engage in obstructive or harassing conduct.

As an initial matter, because an adjuster is not actively questioning the witness, and is simply observing, the very act of video recording the adjuster with a smartphone during an EUO is itself arguably provocative. Moreover, a public adjuster or lawyer representing the insured might try to video record confidential conversations between the insurer's representatives before the proceeding, during breaks or after the proceeding.

Relatedly, an insured's free rein to record all participants at any time during the proceeding might discourage frank and amicable discussions between the insured's and insurer's counsel off the record. This could inhibit counsel from reaching informal agreements that could possibly expedite resolution of the claim.

In addition, without the requirement to use a professional videographer, an insured's attorney might try to change the lighting, angle, framing or quality of the video recording to make the insurer's representatives appear in an unfavorable light.

Myasnyankin also opens the door for potentially problematic behavior in other realms of an insurer's claim investigation. Conceivably, policyholders counsel could take the position that he or she can video record an insurer's representatives at any time, not only during breaks at an EUO, but at a host of other routine meetings during the claim, such as vehicle or site inspections or recorded statements.

Although it is an open question, it's doubtful that Myasnyankin would apply in those other situations because the Court of Appeal's rationale was limited solely to EUOs.

Indeed, the decision was based on an analysis of Section 2071.1, a statute that explicitly says "[t]his section applies to an examination of an insured under oath." Thus, it is particularly doubtful that the decision could apply to recorded statements taken by insurers, most of which are over the phone (not in person) and none of which are under oath.

To the extent an insured tries to video record an adjuster during vehicle or site inspections, it is unclear how this might interact with California's two-party consent laws.[8]

If an insured's attorney tries to extrapolate Myasnyankin's rationale beyond its limited scope to other areas, and improperly insists on video recording every aspect of the claim to the point that the insurer is unable to complete its investigation, such conduct might give rise to cooperation clause issues.

Finally, in a normal discovery dispute during litigation, one party can seek relief from the court to resolve the issue. But EUO disputes typically arise before any lawsuit has been filed.

An insurance company would then be left with the choice of either acceding to the insured's demands or denying the claim for noncooperation. If it denies the claim for noncooperation, the insurance company would not know how the issue will be resolved until a lawsuit is filed. This creates unwelcome risks for insurance companies.

In response to the above possibilities, some insurers might be tempted to accelerate the current trend to conduct all EUOs remotely. However, doing so would only preclude insureds from videotaping off-the-record discussions and events — because presumably the insurer's representatives would turn their audio and cameras off during such breaks, and would engage in off-the-record conversations on private phone lines.

The Court of Appeal did not prohibit insureds from video recording the insurer's nonquestioning representatives who attend remotely unless their cameras are turned off.

In addition, remote EUOs may be less effective in some cases.

For example, in a claim where the insurer is trying to reconstruct the events of a car accident or other auto incident, it is often beneficial to have the insured create diagrams or drawings, which is most effectively accomplished in person. On top of that, live EUOs offer several other benefits because they (1) can help prevent clandestine coaching of the insured by someone standing just out of frame, and (2) allow the insurer to better evaluate the insured's credibility.

There is no one-size-fits-all solution to the possible implications arising from the ruling in Myasnyankin, but there are a few pointers insurers should bear in mind.

Even if an EUO is held in person, it may be advisable for company representatives who will not be questioning the witness to appear remotely with their cameras turned off. And all insurer representatives should treat the proceeding with the same professionalism of a formal deposition.

Finally, if the insurer receives advance notice that the insured plans to video record the EUO, the insurer should ensure that it makes appropriate arrangements to have its own video recording of the EUO.

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[1] Croskey et al., Cal. Prac. Guide: Ins. Litigation, ¶ 6:289.3 (The Rutter Group 2023).

[2] Hickman v. London Assur. Corp., 184 Cal. 524, 529 (1920).

[3] See, e.g., Brizuela v. CalFarm Ins. Co., 116 Cal. App. 4th 578, 590 (2004); California Fair Plan Ass'n v. Superior Court, 115 Cal. App. 4th 158, 161–163 (2004); Abdelhamid v. Fire Ins. Exch., 182 Cal. App. 4th 990, 1001-05 (2010).

[4] Ins. Code § 2071.1.

[5] Myasnyankin v. Nationwide Mut. Ins. Co., 99 Cal. App. 5th 283, 317 Cal. Rptr. 3d 744 (2024).

[6] Compare Ins. Code § 2071.1(a)(5) ("An insured may make sworn corrections to the transcript so it accurately reflects the testimony under oath.") (*italics added*) with id. § 2071.1(a)(4) ("The insured may be represented by counsel and may record the examination proceedings in their entirety.") (*same*).

[7] 317 Cal. Rptr. 3d at 748 (citing Code Civ. Proc. § 2025.330(c) (party noticing deposition "*may ... record the testimony by audio or video technology*") (*italics added*)).

[8] See Cal. Pen. Code § 632.