The Effect of *Cedell v. Farmers* on Claim Communication in Washington Matters
By: Megge Van Valkenburg

Generally, confidential communications with an insurer's outside counsel are privileged by the attorney-client privilege.[1] If those communications concern matters in which litigation is anticipated, they may also protected by the work-product rule.[2] This simple scheme was upended in *Cedell v. Farmers Ins. Co. of Wash.*[3], when the court held that an attorney's communications with his client/insurance company were not protected because the attorney was acting in a claim-handling capacity. The *Cedell* case arose out of an insurer's use of an attorney "to assist in making a coverage determination," including taking the insured's statement under oath and extending a settlement offer on behalf of the insurer.

In the subsequent bad faith action, the insurer tried to shield the production of its communications with the attorney. The court held that, during the claims-handling process, "the attorney-client and work product privileges are generally not relevant." However, the insurer can "overcome the presumption of discoverability" by showing that the attorney was providing the insurer with coverage advice. If the insurer asserts the attorney-client privilege on this basis, *Cedell* instructs the trial court to review the insurer's file *in camera* (by the judge alone) to determine whether the attorney was providing legal advice or was engaged in a claim handling role. The communications may be protected from disclosure if the court finds they were legal advice. However, if a bad faith claim is asserted, the court will further review the privileged documents to determine "if a reasonable person would have a reasonable belief that an act of bad faith has occurred." If the court determines that "there is a foundation to permit a claim of bad faith to proceed," the court will deem the attorney-client privilege to be waived.

Importantly, the United States District Court for the Western District of Washington (which encompasses the western half of the state, including Seattle and Tacoma) has made clear that "neither a mere allegation or claim of bad faith, nor an honest disagreement as to coverage between the insurer and insured, suffices to waive attorney-client privilege."[4]

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[1] The attorney-client privilege protects "confidential disclosures made by a client to an attorney in order to obtain legal advice, as well as an attorney's advice in response to such disclosures." *In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir. 1992).

[2] The work product rule provides a qualified protection for "documents and tangible things" prepared in anticipation of litigation. *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1494 (9th Cir. 1989).

[3] 176 Wn.2d 686, 295 P.3d 239 (2013).

[4] *Stay@Home Design LLC v. Foremost Ins. Co. Grand Rapids, Michigan*, 2017 WL 1101369, at *3 (W.D. Wn. 2017) ("*Stay@Home Design*"); *Taladay v. Metro. Grp. Prop. & Cas. Ins. Co.*, 2015 WL 12030116, at *5 (W.D. Wn. 2015) ("Thus, an insured's allegation of bad faith conduct alone, even where sufficiently supported by the record to establish a prima

In sum, *Cedell* requires an insurer to disclose documents pertaining to its "quasi-fiduciary" duties—that is, its investigative and claim-handling functions – subject to potential protection under the state or federal work product rule, if the communications were prepared in anticipation of litigation.[5] As described by one court:

> Where acting as a "de facto claims handler," an attorney's communications likely will not be privileged. *Anderson*, 2014 U.S. Dist. LEXIS 118400 at *6, 2014 WL 4187205. However, where "clearly acting as coverage counsel and advising the insurer of its potential for liability, the communications will likely be privileged." *Id.* at *7. "[A]s a general matter, there will likely be no privilege for a lawyer investigating facts to reach a coverage decision, but there likely will be a privilege for a lawyer giving an insurer strictly legal advice about potential liability that could result from a coverage decision or some other course of action." *Id.* at *7-11 (privilege did not apply to communications relating to claims handling, such as conducting an EUO, making factual assessments and determinations, or being the direct point of contact with the insured, but insurer overcame *Cedell* presumption where documents revealed communications involving only coverage or other legal advice).[6]

However, "[i]f the insured asserts that the insurer has engaged 'in an act of bad faith tantamount to civil fraud' and makes 'a showing that a reasonable person would have a reasonable belief that an act of bad faith has occurred' or that 'an insurer [has] engage[d] in bad faith in attempt to defeat a meritorious claim,' then the insurer will be deemed to have

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facie case, does not suffice to make out a claim for waiver of the attorney-client privilege based on the civil fraud exception. Something more than a claim of bad faith is required." *MKB Constructors v. Am. Zurich Ins. Co.*, 2014 WL 2526901, at *5 (W.D. Wn. 2014) ("Thus, an insured's allegation of bad faith conduct alone, even where sufficiently supported by the record to establish a prima facie case, does not suffice to make out a claim for waiver of the attorney-client privilege based on the civil fraud exception. Something more than a claim of bad faith is required."); *but see Meier v. Travelers Home & Marine Ins. Co.*, 2016 WL 4447050, at *2 (W.D. Wn. 2016) (stating that the attorney client privilege is waived "[i]f the insured is able to make a colorable showing that the insurer attempted in bad faith to defeat a meritorious claim for coverage.")

[5] In *Philadelphia Indem. Ins. Co. v. Olympia Early Learning Ctr.*, 2013 WL 3338503, at *3 (W.D. Wn. 2013), the federal district court noted that *Cedell* should be read to acknowledge that the state work product rule may still protect documents from disclosure, even if the attorney-client privilege has been waived. Federal courts apply the federal work product rule and have stated that *Cedell* does not govern analysis of documents under the federal rule. *Stay@Home Design* at *2 (and cases cited therein).

[6] *Stay@Home Design* at *5.

waived the attorney-client privilege."[7] Documents may still be subject to the work product rule and protected from discovery if the rule applies.

In the years since *Cedell* was decided, the courts have applied it – unevenly – in other context. Recently, the Washington State Court of Appeals held that *Cedell* applied to requests for production of a claim file by a third party who had been assigned the insured's bad faith claim.[8] Several judges of the United States District Court for the Western District of Washington have also applied *Cedell* to such cases.[9] Although, at least one federal judge has rejected the application of *Cedell* in the context of third-party liability insurance.[10]

Generally, federal courts have construed *Cedell* more narrowly, relying on their authority to determine their own procedures for applying state substantive law. So, for example, in *Stay@Home Design*, the federal court ruled that it did not have to abide by the *Cedell in camera* review process to determine whether the attorney-client privilege protected documents from discovery: "The court may alternatively adopt an equally or more appropriate procedure or mechanism, such as through review of a 'privilege log, affidavit, declaration, or in any other manner permissible in federal court.'"[11] State courts appear more ready to review claim files *in camera* and determine which documents are privileged and which are not only after such page by page review.[12]

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[7] *MKB Constructors, supra,* at *7, citing *Cedell*, 176 Wn.2d at 700.

[8] *See State Farm Fire & Cas. Co. v. Justus*, 199 Wn. App. 435, 398 P.3d 1258, 1269 (2017).

[9] *See Hawthorne v. Mid-Continent Cas. Co.*, 2017 WL 2363740, at *1 (W.D. Wn. 2017) and *Philadelphia Indem. Ins. Co. v. Olympia Early Learning Ctr.*, 2013 WL 12121083, at *1 (W.D. Wn.) (process outlined in *Cedell* applies even if claim was made under a liability policy).

[10] *Ro v. Everest Indem. Ins. Co.*, 2017 WL 368349, at *1 (W.D. Wn. 2017) ("The *Cedell* presumption that the attorney-client privilege does not apply as between an insurer and its insured reflects the quasi-fiduciary duties owed in the first-party insurance context.") Nonetheless, the court used *in camera* review to assess the insurer's claim of privilege.

[11] *Stay@Home Design*, 2017 WL 1101369 at *3, quoting *MKB Constructors, supra,* at *7. In *Stay@Home Design*, the court indicated a willingness to rely on the representations made in the privilege log, if supported by affidavits or declarations, but because such affidavits or declarations were not submitted, the court required *in camera* review of all withheld documents.

[12] *See Ross v. Geico General Ins. Co.*, 2015 WL 10891192 (Wn. Super. 2015) ("[I]f either party asserts that any written material which is sought in discovery is privileged or otherwise not discoverable, the objecting party shall provide the documents to the court for *in camera* review. The Court will review the documents and rule on the objections."). Under *Cedell*, an insurer that makes a "showing" that its attorney was not engaged in "the quasi-fiduciary tasks of investigating and evaluating or processing the claim" is "entitled to an *in camera* review

As a practical matter, we recommend our clients assume that any claim investigation will not be privileged, even if conducted by an attorney. Starting from this assumption, the best chance of preserving the privileged status of communications with counsel is to keep them segregated from the investigative file. Because the need for this segregation of privileged communications can occur before a coverage determination has been made, it will likely need to be done before a decision has been made to "split the file" for other purposes.

Note that communications from coverage counsel can overlap with the investigation and handling of the claim. It is not uncommon for attorneys to investigate facts and take EUOs as part of their examination of the scope of coverage. In such case, the attorney should provide separate communications to the insurer: one with "just the facts" and another, identified as a privileged communication, with the attorney's mental impressions of the facts and his or her legal analysis.

While not a guarantee, the segregation of privileged communication can support a later argument that, notwithstanding the existence of a single file, the communications should remain privileged and their discovery should not be ordered. Indeed, our office has had success with offering attorney-client privileged communications – clearly marked as such and segregated by the claim handler from the general claim file – for *in camera* review. The courts were willing to find that the privilege had not been waived and refused to compel disclosure of the privileged documents. But, segregation of the attorney's legal analysis may not be enough to protect those communications from production if the attorney also performed investigative or claim-related functions.[13] It is safest to assume that communications with attorneys who have performed claim-handling functions, such as taking EUOs and communicating with witnesses, will – at the least - be subject to *in camera* review should a lawsuit be brought by the insured and – perhaps – not be protected from production to the insured.

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of the claims file." *Cedell, supra,* at 699. It is not clear, however, if the court must conduct *in camera* review of documents before concluding the privilege applies.

[13] *See Linder v. Great N. Ins. Co.,* 2016 WL 740261, at *2 (W.D. Wn. 2016) ("[Attorney] Thenell investigated, evaluated, and assisted with the processing of Linder's claim. Great Northern must produce its Thenell Law communications.").

It is important to remember that the *Cedell* analysis of attorney client privilege is triggered only in connection with documents concerning the handling of the insured's claim for coverage. It should not come into play with respect to communications and documents generated in connection with any coverage litigation involving the insurer ***if*** a separate file is maintained for that litigation.[14]

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[14] *Meier v. Travelers, supra,* at *n 4 (although court acknowledged that the *Cedell* presumption applies only in the context of claims adjustment, it held that, because the insurer did not open a new file for the coverage litigation, the entire, comingled file was subject to discovery).