2015 CLM Annual Conference
Palm Desert

BAD FAITH - Institutional Bad Faith: Are You Insulated?

Update on the Status of the Attorney-Client Privilege

Presenters: Bradley Aiken, *Edison, McDowell & Hetherington LLP*
Jim Davis, *Partners Claim Services*
Melissa White, *Cozen O'Connor*
Kelly Wilcove, *Assurant Specialty Property*
Michelle Wilkerson, *Direct Energy*

An insurer hires an attorney. Correspondence is exchanged between the insurer and the attorney. Legal advice is given and strategy is discussed. Litigation commences and the policyholder demands discovery. Does the insurer have to produce correspondence with its attorney? The answer is … it depends.

More and more states are addressing whether an insurer has the right to withhold documents under the attorney-client privilege. Courts most often express concern about whether an insurer could prevent a policyholder from evaluating conduct during investigation by hiring an attorney to do an adjuster's job. Courts focus on the nature of the communications (whether the attorney was acting as an attorney or as an adjuster) and whether a claim of bad faith is being asserted.

The following is a selection of some recent courts' rulings (as this topic is being addressed in courts throughout the country, be sure to search for the latest information):

WASHINGTON – presumption of no attorney-client privilege in bad faith disputes

Cedell v. Farmers Ins. Co. of Washington, 176 Wn.2d 686, 295 P.3d 239 (2013):

> "Implicit in an insurance company's [handling] of [a] claim is litigation or the threat of litigation that involves the advice of counsel. To permit a blanket privilege in insurance bad faith claims because of the participation of lawyers hired or employed by insurers would unreasonably obstruct discovery of meritorious claims and conceal unwarranted practices."
>
> Therefore, "in first party insurance claims by insureds claiming bad faith in the handling and processing of claims, other than [underinsured motorist] claims,

> there is a presumption of no attorney-client privilege. However, the insurer may assert an attorney-client privilege upon a showing *in camera* that the attorney was providing counsel to the insurer and not engaged in a quasi-fiduciary function."

Carolina Cas. Ins. Co. v. Omeros Corp., 2013 WL 1561963 (W.D. Wash. April 12, 2013) (applying *Cedell* to third party claims under Washington law).

IDAHO – not yet addressed by Idaho appellate courts
Federal District Court has presumed no attorney-client privilege in bad faith disputes

Stewart Title Guar. Co. v. Credit Suisse, Cayman Islands Branch, No. 1:11–CV–227–BLW, 2013 WL 1385264, at *4–6 (D. Idaho Apr. 3, 2013) (B. Lynn Winmill, J.) (a bad faith lawsuit arising from a third-party claim under a title insurance policy, expressing a belief that the Idaho Supreme Court would agree with the *Cedell* Washington standard).

Hilborn v. Metro. Grp. Prop. & Cas. Ins. Co., No. 2:12-CV-00636-BLW, 2013 WL 6055215, at *2 (D. Idaho Nov. 15, 2013) (B. Lynn Winmill, J.) (applying *Cedell* under Idaho law).

NEW YORK – adopting presumption that claims-handling activities are not privileged in coverage disputes, even where bad faith is not alleged

National Union v. TransCanada, 119 A.D.3d 492 (N.Y. App. Div., July 31, 2014) (coverage action arising from first-party business interruption loss with no allegations of bad faith, trial court remarked that coverage opinions constitute "ordinary course" claims-handling activities that are not privileged because they are not made primarily for the purpose of furnishing legal advice; affirmed on appeal).

HAWAII – attorney-client privilege is the same in bad faith disputes as in other contexts

Anastasi v. Fid. Nat. Title Ins. Co., No. 30557, 2014 WL 7451097, at *15 (Haw. Ct. App. Dec. 30, 2014):

> "The rule adopted in *Cedell* is inconsistent with the privilege as codified in Hawai'i. … Bad faith claims, like other types of claims alleging corporate or company misconduct, can present a challenging context in which to determine whether the attorney-client privilege applies. Nonetheless, an insurer such as Fidelity can no doubt come within the definition of a "client" under HRE Rule 503(a)(1), and the purpose underlying the attorney-client privilege applies when a confidential communication is made between persons covered by HRE Rule 503 for the purpose of facilitating the rendition of legal services to an insurer. There is nothing in HRE Rule 503 to suggest that the privilege does not apply merely because a bad faith claim has been asserted. We thus do not accept [the policyholder's] contention that his bad faith claim against [the insurer] nullifies any attorney-client privilege that would otherwise apply."

COZEN O'CONNOR
Melissa O'Loughlin White
999 Third Avenue, Suite 1900 | Seattle, WA 98104
P: 206-373-7240; mwhite@cozen.com