Selected Issues Arising in Coverage and Bad Faith Litigation

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Avoiding Bad Faith: The Duty to Settle

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The Duty to Settle

"The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so."

Boston Old Colony Ins. Co. v. Gutierrez,
386 So. 2d 783, 785 (Fla. 1980)

The Duty to Settle

"It is well established that an insurer having exclusive control over the investigation and settlement of a claim may be held liable to its insured *for an amount in excess of its policy limits* if as a result of bad faith it fails to effect a settlement within the policy limits."

State Auto. Ins. Co. of Columbus, Ohio v. Rowland,
427 S.W.2d 30, 33 (Tenn. 1968)
(emphasis added)

Navigating The Duty to Settle

- When does the duty to settle arise?
- What are the insurer's settlement obligations:
  - With respect to a demand?
  - When there are covered and uncovered claims?
  - When there are multiple insureds or claimants?
  - With respect to excess insurers?

When Does the Duty to Settle Arise?

HYPOTHETICAL

- Liability of insured not in dispute
- Policy limit $100,000
- Significant Damages
- Insurer soon recognizes likelihood of an excess judgment
- Insurer does not communicate its conclusion to insured
- Plaintiff requests insurer to disclose its policy limits
- Insurer does not open settlement negotiations with plaintiff
- Trial results in excess judgment of $5.9 million

Was the Duty to Settle Triggered?

When Does the Duty to Settle Arise?

- Does Duty Arise in the Absence of a Settlement Demand?

Insurer's duty is triggered "where the claimant has conveyed to the insurer *an interest in settlement*, and the insurer has rejected or ignored the opportunity to negotiate a settlement."

Reid v. Mercury Ins. Co., 162 Cal. Rptr. 3d 894, 903 (2d Dist. 2013), as modified on denial of reh'g (Nov. 6, 2013), review denied (Jan. 21, 2014) (emphasis added)

When Does the Duty to Settle Arise?

- Does Duty Arise in the Absence of a Settlement Demand?

"[A]n insurer's settlement duty is not activated until a settlement demand within policy limits is made, and the terms of the demand are such that an ordinarily prudent insurer would accept it."

Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 77 S.W.3d 253, 262 (Tex. 2002)

When Does the Duty to Settle Arise?

HYPOTHETICAL

- Liability of insured not in dispute
- Policy limit $100,000
- Significant damages
- Insurer soon recognizes likelihood of an excess judgment
- Insurer does not communicate its conclusion to insured
- Plaintiff requests insurer to disclose its policy limits
- Plaintiff thereafter demands $500,000
- Insurer rejects demand
- Trial results in excess judgment of $5.9 million

Was the Duty to Settle Triggered?

When Does the Duty to Settle Arise?

- No Duty Arises When Demand is Outside of Limits:

"[W]e question the wisdom of a rule that would require the insurer to bid against itself in the absence of a commitment by the claimant that the case can be settled within policy limits."

Am. Physicians Ins. Exch. v. Garcia,
876 S.W.2d 842, 851 (Tex. 1994)

When Does the Duty to Settle Arise?

- Duty Triggered Even Where Demand Exceeds Limits:

"[T]o hold as a matter of law that an insurance company cannot be guilty of bad faith unless it has received an offer of settlement within the policy limits could most certainly lead to inequitable results."

State Auto. Ins. Co. of Columbus, Ohio v. Rowland, 427 S.W.2d 30, 35 (Tenn. 1968)

When Does the Duty to Settle Arise?

HYPOTHETICAL

- Liability of insured not in dispute
- Policy limit $100,000
- Significant damages
- Only claims are for intentional conduct of insured
- Insurer soon recognizes likelihood of an excess judgment
- Plaintiff demands $100,000
- Insurer believes all claims excluded by intentional acts exclusion

Was the Duty to Settle Triggered?

When Does the Duty to Settle Arise?

- Duty to Settle Only Applies to Covered Claims:

"[W]e hold that to trigger an insurer's statutory duty to reasonably attempt settlement of a third-party claim against its insured, the policy must cover the claim and the insured's liability to the third party must be reasonably clear."

Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 77 S.W.3d 253, 261 (Tex. 2002)

When Does the Duty to Settle Arise?

- Cannot Avoid Duty Where Coverage is Merely Doubtful:

"Whether there are 'questions' about coverage . . . is not the equivalent of establishing as a matter of law that there is no coverage for the claim."

Am. W. Home Ins. Co. v. Tristar Convenience Stores, Inc., No. H-10-3191, 2011 WL 2412678, at *4 (S.D. Tex. June 2, 2011)

What are the Insurer's Obligations?

STANDARD OF CONDUCT

- **"Equality of Consideration" Standard**

  McKinley v. Guar. Nat'l Ins. Co.,
  144 Idaho 247 (Idaho 2007)

- **"Negligence" Standard**

  Robinson v. State Farm Fire & Cas. Co.,
  583 So. 2d 1063 (Fla. Dist. Ct. App. 5th Dist. 1991)

- **"Disregard the Policy Limits" Standard**

  Transport Ins. Co. v. Post Express Co.,
  138 F.3d 1189 (7th Cir. 1998)

What are the Insurer's Obligations?

EVALUATION CRITERIA

- **Is demand within policy limits?**

  Asermely v. Allstate Ins. Co.,
  728 A.2d 461 (R.I. 1999)

- **How strong is the evidence against the insured?**

  Travelers Indem. Co. of Illinois v. Royal Oak Enters. Inc.,
  429 F. Supp. 2d 1265 (M.D. Fla. 2004), aff'd 171 F.Appx. 831 (11th Cir. 2006)

- **Is there substantial likelihood of an excess verdict?**

  Highlands Ins. Co. v. Continental Cas. Co.,
  64 F.3d 514 (9th Cir. 1995).

What are the Insurer's Obligations?

HYPOTHETICAL

- Liability of insured not in dispute
- Policy limit $100,000
- Significant damages
- Claims are for intentional and negligent conduct of insured
- Insurer soon recognizes likelihood of an excess judgment
- Plaintiff demands $100,000
- Insurer believes most claims excluded by intentional acts exclusion

Can the Insurer Consider the Coverage Issue?

What are the Insurer's Obligations?

- Insurer May Not Consider Coverage Issues:

"[I]n determining whether a settlement offer is reasonable, an insurer may not consider the issue of coverage."

"[T]he only permissible consideration . . . [is] whether . . . the ultimate judgment is likely to exceed the amount of the settlement offer."

Blue Ridge Ins. Co. v. Jacobsen,
25 Cal. 4th 489, 498 (2001) (citation omitted)

What are the Insurer's Obligations?

- Insurer May Consider Coverage Issues in Good Faith:

"Whether an insurer who rejects an offer to settle within policy limits because of a coverage question shall be liable for some measure of damages . . . depends upon whether the insurer acted in bad faith in determining that a coverage question existed."

Mowry v. Badger State Mut. Cas. Co.,
385 N.W.2d 171, 180 (Wis. 1986)

What are the Insurer's Obligations?

HYPOTHETICAL

- Liability of insured not in dispute
- Policy limit $100,000
- Insurer soon recognizes likelihood of an excess judgment
- Plaintiff demands $100,000
- Insurer believes all claims excluded by intentional acts exclusion
- Insurer initiates declaratory judgment action
- Rejects demand
- Excess judgment for $5.9 million
- DJ results in a finding of coverage

Is Insurer Responsible for Excess Judgment?

What are the Insurer's Obligations?

Majority Rule

- An insurer's reasonable but mistaken doubts about coverage do not excuse failure to settle where the settlement offer is reasonable.

  Am. W. Home Ins. Co. v. Tristar Convenience Stores, Inc., No. H-10-3191, 2011 WL 2412678 (S.D. Tex. June 2, 2011)

  Blue Ridge Ins. Co. v. Jacobsen, 25 Cal. 4th 489 (2001)

What are the Insurer's Obligations?

Minority Rule

- Insurer's reasonable but mistaken doubts about coverage may excuse failure to settle even where settlement offer is reasonable.

Mowry v. Badger State Mut. Cas. Co.,
129 Wis. 2d 496 (1986)

What are the Insurer's Obligations?

HYPOTHETICAL

- Liability of insured not in dispute
- Policy limit $100,000
- Insurer soon recognizes likelihood of an excess judgment
- Plaintiff demands $100,000
- Insurer believes all claims excluded by intentional acts exclusion
- Insurer initiates declaratory judgment action
- Insurer pays settlement
- DJ results in a finding of no coverage

Is Insurer Entitled to Reimbursement?

What are the Insurer's Obligations?

- Policy must provide for reimbursement:

"We conclude that [the insurer] cannot sustain its claim for reimbursement. We observe first that the policies at issue do not contain a provision for reimbursement to [the insurer] of any settlement paid by it."

Med. Malpractice Joint Underwriting Ass'n of Massachusetts v. Goldberg, 425 Mass. 46, 57 (1997).

What are the Insurer's Obligations?

- Policy need not provide for reimbursement:

"[I]f an insurer could not unilaterally reserve its right to later assert noncoverage of any settled claim, it would have no practical avenue of recourse other than to settle and forgo reimbursement"

Blue Ridge Ins. Co. v. Jacobsen, 25 Cal. 4th 489, 502 (2001)

What are the Insurer's Obligations?

- **Insurer's Options Where Coverage Doubtful:**
  - Reserve Reimbursement Rights
  - Seek written agreement with insured;
  - File Declaratory Judgment Action:
    - Seek an order authorizing insurer to accept settlement offer subject to reimbursement by insured upon finding no coverage; or
    - Tell the insured to either pay settlement itself or assume defense.

What are the Insurer's Obligations?

HYPOTHETICAL

- Liability of named insured and additional insured not in dispute
- Policy limit $100,000
- Insurer soon recognizes likelihood of an excess judgment
- Plaintiff thereafter demands $100,000
- Plaintiff will not release the additional insured
- Insurer pays $100,000
- Only named insured released
- Trial results in judgment of $5.9 million against additional insured

Is the Insurer Liable for the Excess Judgment?

What are the Insurer's Obligations?

- If an insurer settles on behalf of one insured and not the other, does it face extra-contractual liability?
  - Insurer can settle for only one insured, but must try to settle for all insureds.

    Contreras v. U.S. Sec. Ins. Co.,
    927 So. 2d 16 (Fla. Dist. Ct. App. 2006)

  - Insurer cannot pay policy limits settlement for one insured and leave the other exposed.

    Smoral v. Hanover Ins. Co.,
    37 A.D. 2d 23 (N.Y. App. Div. 1971)

What are the Insurer's Obligations?

HYPOTHETICAL

- Liability of insured not in dispute
- Policy limit $100,000
- Insurer fails to recognize likelihood of an excess judgment
- Plaintiff demands $100,000
- Insurer rejects demand
- Judgment for $5.9 million
- Excess insurer pays the excess judgment
- Excess insurer sues Primary for failure to settle

Is Excess insurer entitled to recover from Primary Insurer?

What are the Insurer's Obligations?

- Does Primary Insurer Owe Duties to Excess Insurer?

"Under New York law, the insurer's duty to act in good faith is also owed directly to any excess insurers."

Schwartz v. Twin City Fire Ins. Co.,
492 F. Supp. 2d 308, 329 (S.D.N.Y. 2007)

"[T]he primary carrier does not owe a direct duty to the excess carrier to act in good faith to defend and settle a claim."

Commercial Union Ins. Co. v. Med. Protective Co.,
393 N.W.2d 479, 486 (Mich. 1986)

Duty to Settle

- Know the Law
- Recognize that Duty May be Triggered Early
- Evaluate as though Insurer Bears the Entire Risk
- Always Keep Insured Informed
- Be Especially Cautious Where:
  - Demand Within Limits
  - Likelihood of an Excess Judgment

Preserving Privileges in Coverage and Bad Faith Litigation

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Navigating Privileges In Coverage and Bad Faith Litigation

"To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim."

Bibeault v. Hanover Ins. Co.,
417 A.2d 313, 319 (R.I. 1980) (citations omitted)

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The Attorney-Client Privilege

"The party asserting the privilege 'must provide sufficient information for the court to reasonably conclude that the communication at issue: (1) concerned the seeking of legal advice; (2) was between a client and an attorney; (3) was related to legal matters; and (4) is at the client's instance permanently protected.'"

Bank Hapoalim, B.M. v. Am. Home Assur. Co.,
No. 92-3561, 1993 WL 37506, at *2 (S.D.N.Y. Feb. 8, 1993)
(citation omitted)

Attorney Work Product

- Is the document prepared in “anticipation of litigation”? Fed. R. Civ. P. 26(b)(3).

- Ordinary Work Product:
  - Relevant
  - Substantial need
  - Cannot obtain substantial equivalent by other means.

- Opinion Work Product:
  - “[O]pinion work product enjoys nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.” *Connecticut Indem. Co. v. Carrier Haulers, Inc*., 197 F.R.D. 564, 570 (W.D.N.C. 2000) (citation omitted)

When Does the Work Product Protection Attach?

- Does it attach when an insurer denies coverage?

"In general, an insurer's *decision to decline* [coverage] is the point at which the ordinary course of business ends and the anticipation of litigation begins."

Bank Hapoalim, B.M. v. Am. Home Assur. Co.,
No. 92-3561, 1993 WL 37506, at *4 (S.D.N.Y. Feb. 8, 1993)
(emphasis added)

When Does the Work Product Protection Attach?

- Does it attach when an insurer denies coverage?

"While the court agrees that often the date an insurer anticipates litigation is the *date that it denies coverage,* …. 'the question of whether the documents are work product often depends on whether the insurer can point to a definite shift from acting in its ordinary course of business to acting in anticipation of litigation.'"

OneBeacon Ins. Co. v. T. Wade Welch & Assocs.,
No. H-21-3061, 2013 WL 6002166, at *5 (S.D. Tex. Nov. 12, 2013) (citation omitted) (emphasis added)

When Does the Work Product Protection Attach?

- Does it attach when outside counsel is retained on a claim?

"[T]he date counsel is retained by an insurance carrier will not, by itself, suffice to establish that it had made a firm decision to disclaim on that date …."

Landmark Ins. Co. v. Beau Rivage Rest., Inc.,
509 N.Y.S.2d 819, 823 (App. Div. 2nd Dept. 1986).

Waiving the Privilege: What Constitutes Waiver?

- Asserting the advice-of-counsel defense:

"The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication."

Rhone-Poulenc Rorer Inc. v. Home Indem. Co.,
32 F.3d 851, 853 (3rd Cir. 1994)

"**Aetna is not saying that their conduct was reasonable *because their counsel opined so*, but rather that their conduct was reasonable because the facts indicated that no valid claim existed."**

Aetna Cas. & Sur. Co. v. Super. Ct.,
153 Cal. App. 3d 467, 475 (1984) (emphasis in original)

Waiving the Privilege: What Constitutes Waiver?

- Does denial of bad faith constitute a waiver?

"To waive the attorney-client privilege by voluntarily injecting an issue in the case, a defendant must do more than merely deny a plaintiff's [bad faith] allegations. The holder must inject new factual or legal issue into the case."

Chicago Meat Processors v. Mid-Century Ins. Co.,
No. 95-C-4277, 1996 WL 172148 (N.D. Ill. Apr. 10, 1996)

Waiving the Privilege: What Constitutes Waiver?

- Can an insurer waive the attorney-client privilege even when it does not assert the advice-of-counsel defense?
  - *Tackett v. State Farm Fire & Cas. Co.*, 653 A.2d 254 (Del. 1995):
    - Insured alleged bad faith in delayed payment of benefits.
    - Insurer's interrogatory answer: reasonable justification for non-payment based on "reasonable and orderly pattern of claims handling."
    - Held: Insurer's "factual representations which implicitly rely upon legal advice for justification" will waive the privilege.

Waiving the Privilege: What Constitutes Waiver?

- Can an insurer waive the privilege even when it expressly denies that it relied on the advice of counsel?
  - *State Farm Mut. Auto Ins. Co. v. Lee*, 13 P.3d 1169 (Ariz. 2000):
    - Class action for failure to inform UM/UIM claimants when they could stack coverage.
    - Insurer admitted employees sought and received advice from counsel, but denied that it intended to show good faith by asserting the "advice of counsel" defense.
    - Offered testimony to show subjective good faith belief, as well as objective "reasonableness."

Waiving the Privilege: What Constitutes Waiver?

Trial Court

"*While not expressly setting forth the advice of counsel defense*, … Defendants' position … was made after having its counsel review the applicable statutes and developing cases and advise the corporate decision makers. *Thus, the advice of counsel was a part of the basis for Defendants' position that was taken*."

Supreme Court

Insurer had injected advice of counsel and "disavowel of express reliance on the privileged communications is not enough to prevent a finding of waiver."

State Farm Mut. Auto Ins. Co. v. Lee,
13 P.3d 1169, 1172-73, 1177 (Ariz. 2000).

Tips for Avoiding Waiver

- **Know the applicable law regarding waiver**
- **Avoid the deposition trap**
- **Avoid injecting subjective intent or state of mind of claims examiners**
- **When possible, stick to *objective* reasonableness**
- **Assert the advice-of-counsel defense as a last resort**

Attorney Acts As Claims Adjustor

"[T]o the extent an attorney acts as a claims adjustor, claims process supervisor, or claims investigation monitor, and not as a legal advisor, the attorney-client privilege does not apply. "

First Aviation Servs., Inc. v. Gulf Ins. Co,
205 F.R.D. 65, 69 (D. Conn. 2001) (citation omitted)

Attorney Acts As Claims Adjustor

- Legal or Business Purpose: What is the test?
  - "Dominant Purpose" Standard
    - "[T]he court's inquiry is focused on whether the communication is designed to meet problems which can fairly be characterized as predominantly legal."

Spiniello v. Hartford Fire Ins. Co.,
No. 07-cv-2689, 2008 WL 2775643, at *2 (D.N.J. July 14, 2008)

    - This "test not only looks to the dominant purpose for the communication, but also to the dominant purpose of the attorney's work."

2,022 Ranch, L.L.C., v. Super. Ct.,
113 Cal. App. 4th 1377, 1390-91 (2004)

Attorney Acts As Claims Adjustor

- If outside counsel conducts a factual investigation related to coverage advice are the communications privileged?

"The relevant question is not whether [the attorney] was retained to conduct an investigation, but rather, whether this investigation was 'related to the rendition of legal services.' If it was, and it clearly was here, then '[t]he privilege is not waived.'"

In Re Allen, 106 F.3d 582, 603 (4th Cir. 1997) (citation omitted)

Attorney Acts As Claims Adjustor

- If outside counsel conducts factual investigation related to coverage advice are the communications privileged?
  - *Genovese v. Provident Life & Accident Ins. Co.,* 74 So. 3d 1064 (Fla. 2011):
    - Upheld the attorney-client privilege in a first party bad faith case.
    - Recognized that outside counsel may investigate facts *and* give legal advice, and suggested an *in camera* inspection in those circumstances.
  - *But see Allstate Indemn. Co. v. Ruiz*, 899 So.2d 1121 (Fla. 2005) (materials in underlying claim and litigation files relating to coverage, benefits, liability and damages are not protected work product in first-party bad faith actions).

Tips for Preserving the Privilege

- Define and document the role of outside counsel
- Make sure dominant purpose is for legal advice
- Limit outside counsel's role in communicating with insured
- Be selective on who is copied on emails
- Think twice about delegating claims function to outside counsel

“Common Interest” Exception

- Does the exception apply when counsel does not represent both the insured and insurer?

“[T]he [common interest] doctrine may properly be applied where the attorney, though neither retained by nor in direct communication with the insurer, acts for the mutual benefit of both the insured and the insurer. It is the commonality of interests which creates the exception, not the conduct of the litigation.”

Waste Mgmt., Inc. v. Int’l Surplus Lines,
579 N.E. 2d 322, 329 (Ill. 1991) (citation omitted)

"Common Interest" Exception

- Does it apply to communications between an insurer and coverage counsel?
  - *Western States Ins. Co. v. O'Hara,* 828 N.E.2d 842, 848-49 (Ill. App. Ct. 4th Dist. 2005) (insured entitled to insurer's communications with coverage counsel retained to advise insurer on settlement of underlying claim).
  - *Ill. Emcasco Ins. Co. v. Nationwide Mut. Ins. Co*., 913 N.E.2d 1102, 1108 (Ill. App. Ct. 2009) ("The *Waste Management* court preserved the privilege for coverage issues, despite the fact that discovery was directed at counsel directly involved throughout the underlying litigation.")
  - *West Side Salvage, Inc. v. RSUI Idem. Co., No. 3:13-00363,* 2013 WL 6169927 (S.D. Ill. Nov. 25, 2013) (coverage communications discoverable where counsel primarily hired to defend insurer's interest in underlying action; insurer "should have retained separate, independent coverage counsel to discuss the coverage issues….")

Crime-Fraud Exception

- Do allegations of bad faith trigger the crime-fraud exception to the attorney-client privilege?

"[A] prima facie showing of bad faith does not trigger the crime fraud exception …."

Freedom Trust v. Chubb Grp. Of Ins. Co.,
38 F. Supp. 2d 1170 (C.D. Cal. 1999)

Crime-Fraud Exception

- Do allegations of bad faith trigger the crime-fraud exception to the attorney-client privilege?

"[A]n insured who makes an allegation of bad faith … is entitled to an *in camera* review of privileged materials when the insured has established … probable cause to believe that (1) the insurer acted in bad faith and (2) the insurer sought the advice of its attorneys in order to conceal or facilitate its bad-faith conduct."

Hutchison v. Farm Family Cas. Ins. Co.,
867 A.2d 1, 7 (Conn. 2005)

Crime-Fraud Exception

- Do allegations of bad faith trigger the crime-fraud exception to the attorney-client privilege?

"[t]he attorney may be compelled to testify, subject to an *in camera* inspection … if the party seeking disclosure of the communications has made a *prima facie* showing of bad faith, fraud, or criminal misconduct by the client."

Ohio Rev. Code Ann. § 2317.02 (emphasis added)

The *Cedell* Presumption

- *Cedell v. Farmers Ins. Co. of Washington*, 295 P.3d 239 (Wash. 2013):
  - First-party claim
  - Insurer hired attorney "to assist in making a coverage determination"
  - Attorney offered time-limited settlement
  - Trial Court: crime-fraud exception waived privilege
  - Court of Appeals: a "factual showing of bad faith" insufficient to trigger *in camera* review.

The *Cedell* Presumption

Presumption of Discoverability:

"[I]t is a well-established principle in bad faith actions brought by an insured against an insurer under the terms of an insurance contract that communications between the insurer and the attorney are not privileged with respect to the insured," entitling the insured to access the insurer's claims file.

Cedell, 295 P.3d at 245 (citation omitted)

Cedell: Overcoming the Presumption

- First: The insurer may seek *in camera* review and show that attorney was only providing counsel "as to its own potential liability" and not "investigating and evaluating and processing the claim."
- Second: Even if the insurer makes such a showing,
  - the insured may seek a second *in camera* review by showing that "**a reasonable person would have a reasonable belief that an act of bad faith tantamount to civil fraud has occurred.**"
  - After review, if there is "a foundation to permit a claim of bad faith to proceed, the attorney-client privilege shall be deemed to be waived."

Cedell, 295 P.3d at 246-47

The Expansion of *Cedell*

- *California Cas. Ins. Co. v. Omeros Corp*., No. C12-287, 2013 WL 1561963 (W.D. Wash. Apr. 12, 2013) (applied *Cedell* in third-party context).
- *Ten Talents v. Ohio Sec. Ins. Co*., No. C12-6849, 2013 WL 3155379, at *1 (W.D. Wash. Jun. 20, 2013) (foundation for bad faith claim to proceed and insurer's claim that its "conduct was reasonable" implicates the "advice of counsel").
- *Philadelphia Indem. Ins. Co. v. Olympia Early Learning Ctr.*, No. C12-5759, 2013 WL 3338503, at *4 (W.D. Wash. July 2, 2013) (one *in camera* review; requiring acts "tantamount to civil fraud" rather than "foundation for bad faith").
- *Palmer v. Sentinel Ins. Co*., No. C12-5444, 2013 WL 3819925 (W.D. Wash. July 23, 2013) (privilege waived where attorney has mixed responsibilities, even if separate files maintained).

The Expansion (or Limiting?) of *Cedell*

- *MKB Constructors v. American Zurich Ins. Co.,* No. C13-0611, 2014 WL 2526901, at *4 (W.D. Wash. May 27, 2014):
  - *Cedell*: “the opinion creates rather than alleviates confusion about what must be produced, and under what circumstances.” (quotations omitted)
  - *Erie* Doctrine: *in camera* inspection is not required.
  - *Cedell* is “inapplicable when an insurer withholds documents under the work product doctrine in federal court.”

Cedell: The New Trend?

Idaho:

- *Stewart Title Guar. Co. v. Credit Suisse*, No. 1:11-cv-227, 2013 WL 1385264 (D. Idaho Apr. 3, 2013)
- *Hilborn v. Metro. Grp. Prop. & Cas. Ins. Co.,* 2013 WL 6055215 (D. Idaho Nov. 15, 2013)

Louisiana:

- *Shaw Group, Inc. v. Zurich Am. Ins. Co., No. 12-257, 2014 WL 17840571* (M.D. La. May 5, 2014)

Post-*Cedell*: Tips for Preserving Privileges

- Know the law likely to apply
- Retain separate, independent coverage counsel
- Consider maintaining separate files
  - Claims investigation
  - Coverage advice
- Use adjustors, not outside attorneys, for claim investigations
- Consider removal to federal court

Thank you

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