



## **Attorney-Client Privilege Analyzed by Idaho Federal Court in Insurance Company's Bad Faith Case**

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In an opinion issued April 3, 2013, the Idaho federal district court held that when an attorney participates in the investigation of a claim and provides coverage advice, the facts gathered by the attorney may be discoverable in a bad faith lawsuit brought by the insured. However, the attorney's mental impressions and advice communicated to the carrier should remain privileged.

The fact pattern of *Stewart Title Guar. Co. v. Credit Suisse, Cayman Islands Branch* may be familiar to many insurance carriers. The insured was sued by a third party, and the insurance company accepted the tender of defense and hired attorneys to defend the insured. The insurance company also hired attorneys to investigate the subject of the lawsuit, and to provide coverage advice on the underlying lawsuit.

Following its investigation, the carrier filed a lawsuit in the Idaho federal district court seeking a declaratory judgment that it owed no duty to defend the insured. In response, the insured filed a counterclaim, asserting that the carrier "fraudulently and/or in bad faith, directed and controlled the defense and settlement of the [underlying claim]." The insured then filed a motion to compel production of communications between the carrier and its coverage counsel. The carrier objected, claiming that the communications are protected by the attorney-client privilege and the work product doctrine.

The court relied on the recent Washington Supreme Court case, *Cedell v. Farmers Insurance Co. of Washington*, 295 P.3d 239 (Wash. Sup. Ct.). We previously discussed the *Cedell* case [here](#).

There is no Idaho Supreme Court decision addressing the issues faced by *Cedell*. As a result, the court based its analysis on how it thought the Idaho Supreme Court might analyze the issue. After reviewing Idaho's joint client exception to the attorney-client privilege, the court concluded that if the Idaho Supreme Court were faced with the facts of this case, it would apply the holding in *Cedell*. Under Idaho's joint client exception, there is no attorney-client privilege "[a]s to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients." Here, the coverage counsel worked alongside the retained defense counsel in investigating the underlying claims. Thus, the court held: "Under *Cedell's* analysis, [the insured] is presumptively entitled to [the carrier's] entire claims file. [The carrier] may overcome this presumption by identifying—in camera—documents and/or communications where [coverage counsel] was not engaged in the quasi-fiduciary tasks of investigating and evaluating the claim. Upon such a showing, [the carrier] is entitled to the redaction of communications from [coverage counsel] that reflected the mental impressions of [coverage counsel] to [the carrier], unless those mental impressions are directly at issue in their quasi-fiduciary responsibilities to [the insured]."

In ordering the production of documents the carrier contended were protected by the attorney-client privilege, the court stated "[a]ll documents dealing with the factual investigation of the lien claims are discoverable. Documents that discuss both coverage and factual matters are similarly discoverable, although their coverage discussion is subject to redaction if it has nothing to do with the bad faith claim." The court directed the carrier to submit for in camera review only those documents where coverage issues are discussed. The court also ordered production of documents the carrier argued were protected by the work product doctrine,



because opinion work product may be discovered when mental impressions are at issue and the need for the material is compelling. Based on that exception to the work product doctrine, the court stated that "[i]n a bad faith insurance claim settlement case, the strategy, mental impressions and opinion of [the insurer's] agents concerning the handling of the claim are directly at issue."

An important lesson for carriers is that when counsel provide mixed services of investigation and coverage analysis, carriers should set up and maintain separate files: one for communication of legal advice from counsel and one for the factual investigation, including correspondence from counsel related to any investigation undertaken by counsel. Separate files may not protect from disclosure all coverage communications, but it should help the court identify and protect those "that have no relevance to [the insured's] bad faith claims."