SMITH FREED & EBERHARD P.C.

WASHINGTON CASE UPDATE

case in point ...

First-Party Insurance Claim Files Presumed to Be Discoverable

From the Desk of Robert S. May: In this case, the Washington Supreme Court created a presumption that the entire first party claim file is discoverable, and therefore not protected by the attorney-client privilege.

Claims Pointer: Where an attorney is hired to investigate, negotiate, or evaluate a claim (including the EUO), the insurer may wish to maintain separate files so as not to comingle the investigative and the liability or coverage evaluation functions.

Bruce Cedell v. Farmers Insurance Co. of Washington, in the Supreme Court of the State of Washington, No. 85366-5, --- P3d ---- (February 21, 2013) (en banc).

In November 2006, a fire broke out at the residence of Farmers' insured Cedell, causing an estimated $70,000 damage to the house and $35,000 damage to the contents. Cedell alleges that Farmers ignored repeated phone calls, that he was forced to file a claim with the Office of the Insurance Commissioner and ultimately, eight months after the fire, hire an attorney to elicit action from Farmers. Farmers hired an attorney to assist in making a coverage determination. Farmers' attorney also took the examination under oath of Cedell and his girlfriend, Ackley. In July 2007, Farmers' attorney sent Cedell a letter stating that the origin of the fire was unknown, yet Farmers might deny coverage based upon a delay in reporting and based on Ackley's and Cedell's inconsistent statements about the fire. The letter extended to Cedell a one-time offer of $30,000 to remain open for ten days. Cedell tried unsuccessfully to contact Farmers during the ten-day period, but Farmers did not return his call.

Cedell filed suit against Farmers and sought discovery of the entire Farmers claim file. Farmers produced a heavily redacted claim file asserting that the redacted information was either not relevant or was privileged. Cedell filed a motion to compel production of the entire file. The trial court ordered production of the claim file and Farmers appealed. The Court of Appeals reversed the trial court and protected the claim file. The Washington Supreme Court reversed the Court of Appeals, ordering the entire file be produced.

The Washington Supreme Court began its analysis from the presumption that, aside from in UIM claims, there is no attorney-client privilege in claims against insurers claiming bad faith in the adjusting process. The insurer is entitled to an in camera review by the court of claimed privileged documents that apply only to the limited function of counseling the insurer on the insurer's potential liability and not related to the claim investigation. The court may protect certain communication and work product related to the insurer's potential liability rather than the quasi-fiduciary task of investigating, evaluating or processing the claim. An example of privileged investigation and advice is assistance in determining whether or not coverage exists under the law. Upon such a showing, the insurance company is entitled to redaction of the attorney's mental impressions, unless those mental impressions are directly at issue in its quasi-fiduciary responsibilities to its insured.

Although Farmers' attorney may have advised Farmers as to the law and strategy, he also performed the functions of investigating, evaluating, negotiating, and processing the claim, including the examination under oath and making the $30,000 offer to settle. These functions are among the activities in which an insurer owes quasi-fiduciary duties to the insured and are therefore subject to discovery.

Contact: Rob May | www.smithfreed.com | email: rmay@smithfreed.com

Ph:503.227.2424 | Fax: 503.227.2535 | 111 SW 5th Ave Ste. 4300 | Portland | OR | 97204