

## Attorney–Client Privilege in Bad Faith Insurance Claims: The *Cedell* Presumption and a Necessary National Resolution

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### ABSTRACT

Attorney–client privilege is one of the most important aspects of our legal system. It is one of the oldest privileges in American law and is codified both at the national and state level. Applying to both individual persons and corporations, this expanded privilege covers a wide breadth of clients. However, this broad privilege can sometimes become blurred in relationships between the corporation and the individuals it serves. Specifically, insurance companies and those they cover have complex relationships, as the insurer possesses a quasi-fiduciary relationship in relation to the insured. This type of relationship requires that the insurer act in good faith towards its insured, giving equal weight to its own interests as well as the insured’s. When attorneys become involved in the claim-handling process—usually advising insurers about whether to accept or deny a claim—it is often difficult to determine whether the attorney is acting in an investigative capacity, thus merely a factual one, or in contemplation of litigation, thus a privileged and protected one. The separation of these duties is an important determination to make, especially in the event of a bad faith action. When an insured makes a bad faith claim against their insurer, presumably for fraudulently denying their claim, the insured would naturally be entitled to its claim file—the only documentation of its own claim assessment—right? Unfortunately, no uniform answer to that question exists in federal or state law. The insurer will likely claim attorney–client privilege to protect those documents, and the insured will likely seek to either pierce that privilege or to altogether abrogate it. And, to complicate matters further, different jurisdictions

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apply different standards and privilege exceptions in these difficult situations. Due to the fact that a large number of insurance companies are national entities that conduct business across various states, a uniform standard for addressing attorney–client privilege in insurance bad faith actions is paramount. Washington courts have imposed a presumption of no attorney–client privilege in insurance bad faith actions, recognizing the necessity of broad discovery and highlighting the importance of good faith in the often-unequal relationship between an insurer and its insured. It is this presumption that is recommended be nationally recognized by codifying it in either the federal rules, a national act, or adding an exception to the model rules of professional conduct, in order to promote discovery of vital case information and limit unfair practices.

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## INTRODUCTION

Attorney–client privilege has a long standing and important role in the legal system. It is the oldest privilege protecting confidential communications in common law,<sup>1</sup> and has been codified both in the Model Rules of Professional Conduct<sup>2</sup> and statutes in every state.<sup>3</sup> Its purpose is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>4</sup> A lawyer’s ability to be fully informed by the client of the facts and issues of a matter is paramount to providing sound legal advice and advocacy.<sup>5</sup> The hallmark of the attorney–client relationship is trust.<sup>6</sup> The client must be able to “communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter”; the lawyer requires this information to effectively

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1. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (McNaughton rev. ed. 1961)); see also Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070 (1978) (“[R]eported decisions involving the privilege begin in 1654.”).

2. See MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS’N 2018).

3. See Ala. Rules of Prof’l Conduct r. 1.6 (2015); Alaska Rules of Prof’l Conduct r. 1.6 (2017); Ariz. Rules of Prof’l Conduct ER 1.6 (2015); Ark. Rules of Prof’l Conduct r. 1.6 (2014); Cal. Rules of Prof’l Conduct r. 3-100 (2018); Colo. Rules of Prof’l Conduct r. 1.6 (2016); Conn. Rules of Prof’l Conduct r. 1.6 (2014); Del. Rules of Prof’l Conduct r. 1.6 (2013); D.C. Rules of Prof’l Conduct r. 1.6 (2007); Fla. Rules of Prof’l Conduct r. 4-1.6 (2015); Ga. Rules of Prof’l Conduct r. 4-201 (2018); Haw. Ex. Rules of Prof’l Conduct r. 1.6 (2014); Idaho Rules of Prof’l Conduct r. 1.6 (2004); Ill. Rules of Prof’l Conduct r. 1.6 (2016); Ind. Rules of Prof’l Conduct r. 1.6 (2005); Iowa Rules of Prof’l Conduct r. 32:1.6 (2005); Kan. 226 Rules of Prof’l Conduct r. 1.6 (2014); Ky. Rules of Prof’l Conduct r. 3.130 (2009); La. Bar art. 16 Rules of Prof’l Conduct r. 1.6 (2015); Me. Rules of Prof’l Conduct r. 1.6 (2015); Md. Att’y r. 19-301.6 (2016); Mass. S. Ct. r. 3:07 Rules of Prof’l Conduct r. 1.6 (2015); Mich. Rules of Prof’l Conduct r. 1.6 (2019); Minn. Rules of Prof’l Conduct r. 1.6 (2019); Miss. Rules of Prof’l Conduct r. 1.6 (2015); Mo. Bar r. 4-1.6 (2005); Mont. Rules of Prof’l Conduct r. 1.6 (2017); Neb. E.R. Prof’l Conduct § 3-501.6 (2017); Nev. Rules of Prof’l Conduct r. 1.6 (2014); N.H. Rules of Prof’l Conduct r. 1.6 (2016); N.J. Rules of Prof’l Conduct r. 1.6 (2018); N.M. Rules of Prof’l Conduct r. 16-106 (2013); N.Y. Rules of Prof’l Conduct r. 1.6 (2019); N.C. Bar Ch. 2, r. 1.6 (2017); N.D. Rules of Prof’l Conduct r. 1.6 (2016); Ohio Rules of Prof’l Conduct r. 1.6 (2013); Okla. Rules of Prof’l Conduct r. 1.6 (2016); Or. Rules of Prof’l Conduct r. 1.6 (2003); Pa. Rules of Prof’l Conduct r. 1.6 (2018); R.I. S. Ct. Art. V Rules of Prof’l Conduct r. 1.6 (2007); S.C. A. Ct. r. 407 Rules of Prof’l Conduct r. 1.6 (2014); S.D. Rules of Prof’l Conduct App. Ch. 16-18 r. 1.6 (2018); Tenn. S. Ct. r. 8, Rules of Prof’l Conduct r. 1.6 (2017); Tex. Rules of Prof’l Conduct r. 1.05 (1991); Utah Rules of Prof’l Conduct r. 1.6 (2017); Vt. Rules of Prof’l Conduct r. 1.6 (2009); Va. S. Ct. Pt. 6 § 2 Rules of Prof’l Conduct r. 1.6 (2016); Wash. Rules of Prof’l Conduct r. 1.6 (2018); W. Va. Rules of Prof’l Conduct r. 1.6 (2015); Wis. Rules of Prof’l Conduct r. 20:1.6 (2017); Wyo. Rules of Prof’l Conduct r. 1.6 (2014).

4. *Upjohn*, 449 U.S. at 389.

5. See *id.*

6. See MODEL RULES OF PRO. CONDUCT r. 1.6, cmt. 2 (AM. BAR ASS’N 2018) (explaining that with this trust the client is encouraged to “communicate fully and frankly with the lawyer” even in regard to potentially damaging topics, in which the lawyer needs to effectively represent and advise the client).

represent and advise the client.<sup>7</sup> This privilege most importantly “prohibits disclosure of confidential communications.”<sup>8</sup> Not only is this privilege significant within the legal system, it is also widely recognized and referenced in social aspects of society.<sup>9</sup>

The attorney–client privilege generally applies when four elements<sup>10</sup> are present. First, the holder asserting the privilege is seeking or has sought to be a client. Second, the person to which the communication was made is a member of the jurisdiction’s respective bar, and the communication is made pursuant to that person’s role as an attorney. Third, the communication is related to facts the client confidentially communicated to the attorney (i.e., not in the presence of third parties), and for the purpose of securing legal services, an opinion of law, or assistance in a legal proceeding. And fourth, the privilege is claimed and is not waived<sup>11</sup> by the client.<sup>12</sup> If these four elements are met, the privilege will generally apply.

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7. *Id.*

8. MARTIN A. SCHWARTZ, 3 SECTION 1983 LITIGATION: FEDERAL EVIDENCE § 7.05 (5th ed. Supp. 2018).

9. To illustrate how famous this rule is in America’s culture and understanding of the legal system, see the following discussions on how this privilege is conveyed in today’s current news and popular culture and how it is often criticized in its depiction in popular television shows: Jessica Levinson, *How Don Jr.’s Ridiculous Claim About Attorney-Client Privilege Could Actually Work*, NBC NEWS (Dec. 15, 2018), <https://www.nbcnews.com/think/opinion/don-jr-s-ridiculous-claim-about-attorney-client-privilege-could-ncna829986> [<https://perma.cc/84XE-7VZS>]; Kyle Swenson, *Sean Hannity’s Idea of ‘Attorney-Client Privilege’ Was Right out of ‘Breaking Bad.’* WASH. POST (Apr. 17, 2018), [https://www.washingtonpost.com/news/morning-mix/wp/2018/04/17/sean-hannitys-idea-of-attorney-client-privilege-is-right-out-of-breaking-bad-its-also-wrong/?utm\\_term=.e5e4214538b6](https://www.washingtonpost.com/news/morning-mix/wp/2018/04/17/sean-hannitys-idea-of-attorney-client-privilege-is-right-out-of-breaking-bad-its-also-wrong/?utm_term=.e5e4214538b6) [<https://perma.cc/SEX2-UX9T>]; Anna Codrea-Rado, *What Real Lawyers Think About Breaking Bad—and Why It Should Be Taught in Class*, THE GUARDIAN (May 22, 2015), <https://www.theguardian.com/tv-and-radio/2015/may/22/what-real-lawyers-think-about-breaking-bad> [<https://perma.cc/QDT4-VPVV>]; Nicole Bitette, *Attorney-Client Privilege Isn’t All That Saul Goodman Made It Out to Be*, DAILY NEWS (Apr. 10, 2018), <https://www.nydailynews.com/entertainment/tv/don-saul-goodman-advice-attorney-client-privilege-article-1.3926005> [<https://perma.cc/UF4T-RAYD>]; Harry Graff, *Standard of Review: On ‘Suits,’ Attorney-Client Privilege No Longer Exists*, ABOVE THE LAW (Sept. 22, 2016), <https://abovethelaw.com/2016/09/standard-of-review-on-suits-attorney-client-privilege-no-longer-exists/?rf=1> [<https://perma.cc/DQZ3-UQAW>].

10. *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950).

11. Attorney–client privilege may be either express or implied; even if a client did not intend to waive his or her attorney–client privilege, “the client’s failure to take reasonable precautions to preserve the confidentiality of attorney–client communications can result in the destruction of [the client’s] privilege protection.” PAUL R. RICE, ATTORNEY–CLIENT PRIVILEGE IN THE UNITED STATES § 9.22 (2017). *See generally* FED. R. EVID. 502. For more information on implied waiver and jurisdictional tests regarding the required conditions to be met to impliedly waive privilege, see Steven Plitt & Joshua D. Rogers, *The Battle to Define the Scope of Attorney–Client Privilege in the Context of Insurance Company Bad Faith: A Judicial War Zone*, 14 U.N.H. L. REV. 105, 110–14 (2016).

12. *Id.*

The attorney–client privilege extends not only to natural persons but also to corporate clients.<sup>13</sup> In *Upjohn Co. v. United States*, the U.S. Supreme Court rejected the “control group” test, which limited the claim of privilege to officers and agents who were responsible for the company’s actions and extended that privilege to all employees.<sup>14</sup> Thus, this expanded privilege applies to cover all individuals who have pertinent information needed by the attorney to properly advise and represent the corporate client. This Comment will focus on insurance companies as corporate clients who invoke the attorney–client privilege. Generally, no insured–insurer specific privilege exists to protect communications between an insured and its liability or indemnity insurer. Instead, the privilege commonly invoked to protect such communications is the ever-important attorney–client privilege.

Insurance claims, specifically, raise interesting and important questions regarding attorney–client privilege, considering the relationship between the insurer and the insured. In insurance actions, the insurer has a “quasi-fiduciary” relationship with the insured.<sup>15</sup> This quasi-fiduciary relationship requires the insurer to act in good faith towards its insured and “imposes on the insurer ‘a broad obligation of fair dealing . . . and a responsibility to give equal consideration to the insured’s interests.’”<sup>16</sup> Due to this relationship, when an attorney investigates the surrounding facts of a claim, “he or she owes a quasi-fiduciary duty to the insured.”<sup>17</sup> It is often difficult to determine whether the attorney was acting in an investigative capacity in relation to a claim or working in order to provide legal advice to the insurer in contemplation of litigation.

In the investigative and adjustive capacity, the insurer–attorney is performing duties viewed as in furtherance of an ordinary business function and, thus, conducts a factual investigation.<sup>18</sup> However, when an attorney for the insurance company works to obtain coverage for a claim or in preparation for an anticipated lawsuit, the attorney is within the role

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13. See David Simon, *The Attorney–Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 953–54 (1956).

14. *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).

15. A “true fiduciary” relationship would place the insured’s interests above the insurers. Thus, “something less than a fiduciary relationship exists between the insurer and the insured. *Safeco Ins. Co. of Am. v. Butler*, 823 P.2d 499, 504 (1992) (citing *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133 (Wash. 1986)).

16. Ian S. Birk, *The Cedell Presumption: Discovery of the Insurer’s Claim File in Insurance Bad Faith Litigation in Washington*, 49 GONZ. L. REV. 503, 513 (2014) (quoting *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1136 (Wash. 1986)).

17. Dan D. Kohane, Sean Griffin & John R. Ewell, *Invading the Sanctuary Practical Solutions to Fend Off the Attack on the Confidentiality of Insurer–Coverage Counsel Communications*, 11 No. 2 IN-HOUSE DEF. Q. 42 (2016).

18. Susan Page White, *Attitude Adjustment Case Law Makes It Clear That the Attorney-Client Privilege Does Not Attach When an Attorney Acts as A Claims Adjuster*, L.A. LAW. 18–20 (2010).

of legal counsel, representing the insurance company.<sup>19</sup> The separation of these duties is paramount in determining whether any privilege applies in respect to those communications and claim files, especially because the privilege applies solely to the communications between the attorney and the client, and not the actual facts of the matter.<sup>20</sup>

This Comment examines the relationship between the insurer and the insured in bad faith insurance claims regarding waiver of the critical attorney–client privilege and suggests a national framework for handling such waivers. Specifically, this Comment draws from the presumption standard used by Washington state—adopted in *Cedell v. Farmers Insurance Co. of Washington*—to develop a recommendation for a national standard amongst the ever-evolving jurisdictional differences.<sup>21</sup>

Part I of this Comment discusses the background and ultimate application of the *Cedell* presumption in Washington state. Part II then examines Washington’s application of the *Cedell* presumption in relation to relevant privilege statutes, and how Washington courts have applied the presumption since its inception. Part III of this Comment examines states that have applied similar exceptions, and Part IV compares those states with similar exceptions to states refusing to apply any privilege exceptions or very limited ones. Finally, Part V will offer a potential national presumption modeled after *Cedell* to incorporate within the Model Rules of Professional Conduct in order to bring unity across states in this national issue.

## I. BACKGROUND

Attorney–client privilege in the insurance context most often arises in connection with bad faith insurance claims. The Model Unfair Claims Settlement Practices Act (UCSPA),<sup>22</sup>—drafted by the National Association of Insurance Commissioners (NAIC)—which has been adopted in almost every state,<sup>23</sup> identifies what constitutes fair and unfair

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19. *Id.*

20. *See* *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981).

21. *Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239 (Wash. 2013).

22. Unfair Claims Settlement Practices Act (Nat’l Ass’n of Ins. Comm’rs 1997).

23. *Id.* at ST-900-3–ST-300-6. States and territories that have adopted the most recent UCSPA in a substantially similar model include: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Marianas, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. States and territories currently without activity or adoption include: District of Columbia, Guam, Iowa, Mississippi, Nevada, and Virgin Islands.

coverage of claim practices.<sup>24</sup> Under UCSPA, examples of unfair practices include “‘refusing to pay claims without conducting a reasonable investigation’ and ‘not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear.’”<sup>25</sup> Courts view bad faith claims as originating in tort, applying the same principles as used in other tort actions in which the insured must show that an alleged breach of an insurance policy was unreasonable.<sup>26</sup> For example, Washington’s Insurance Fair Conduct Act<sup>27</sup> (IFCA) allows a first-party claimant who alleges an insurer unreasonably denied coverage of its claim to bring an action in court to recover damages actually sustained and attorney’s fees.<sup>28</sup>

#### A. Claimant Status

In bad faith insurance claims, courts treat claimants that are first parties, third parties, and underinsured or uninsured motorists (UIM) differently.<sup>29</sup> A first-party claimant is generally an “individual, corporation, association, partnership, or other legal entity asserting a right to payment as a covered person under an insurance policy” or contract that arises out of a loss covered by the intended policy.<sup>30</sup> A first-party claim weighs heavily on the quasi-fiduciary relationship between the insurer and the insured because the insurer is required to act in good faith and must

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24. UNITED POLICYHOLDERS, ADVOCACY & ACTION PROGRAM, 50 STATE SURVEY OF BAD FAITH LAWS AND REMEDIES (Oct. 23, 2014), <https://www.uphelp.org/sites/default/files/publications/Final%20-%20Bad%20Faith%20Survey.pdf> [<https://perma.cc/2YLK-QULL>].

25. *Id.*

26. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 196 P.3d 664 (Wash. 2008); *see also* WASH. REV. CODE § 48.01.030 (2018).

27. *See* WASH. REV. CODE § 48.30.015 (2007).

28. WASH. REV. CODE § 48.30.015(1) (2007).

29. Although not largely discussed in this Comment, a UIM in Washington state means a motor vehicle which, at the time the accident occurs, has no applicable insurance policy covering it, or the sum of the limits of liability under an insurance policy is less than the damages the covered person is entitled to recover. *See* WASH. REV. CODE § 48.22.030 (1) (2015). In *Cedell*, the court stated that there is a difference between UIM claims and first party claims: “[I]n the UIM context, the UIM insurer steps into the shoes of the tortfeasor and may defend as the tortfeasor would defend . . . the insurance company is entitled to counsel’s advice in strategizing the same defenses that the tortfeasor could have asserted. *Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239, 245 (Wash. 2013). In the context of a UIM case, “parties contract directly with UIM insurers to provide an additional layer of compensation where the at-fault party has insufficient coverage . . . provid[ing] a second later of excess insurance coverage that ‘floats’ on top of the recovery from other sources for the injured party.” *Hoff v. Safeco Ins. Co. of Ill.*, 449 P.3d 667, 674 (Wash. Ct. App. 2019), *review denied*, 458 P.3d 790 (2020) (citing *Fisher v. Allstate Ins. Co.*, 961 P.2d 350 (1998)). *See Escalante v. Sentry Ins.*, 743 P.2d 832, 842–43 (Wash. Ct. App. 1987) for a case analysis of attorney–client privilege in UIM cases, or *Hoff*, 449 P.3d 667 for a more recent analysis.

30. WASH. REV. CODE § 48.30.015(4).

deal fairly with the insured, giving the claimant equal consideration between the insured's interests and its own.<sup>31</sup>

A third-party claimant is any claimant “or other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract of the insurer.”<sup>32</sup> Unlike a first-party claimant, in most states, including Washington, a third-party claimant cannot bring an action against the insurer of an insured.<sup>33</sup>

The differences between first- and third-party claims—or claimants—are important regarding the extent of the applicable attorney–client privilege. Jurisdictional differences can impact whether the claiming party may directly bring a suit against a defendant's insurer.<sup>34</sup> For the purposes of the insured–insurer relationship and applicable claims, this Comment will focus on first-party bad faith claims and the requisite privileges afforded therein.

### B. Pre-Cedell Presumption

In *Tank v. State Farm & Casualty Co.*, the Washington Supreme Court held that, because a quasi-fiduciary relationship exists between an insurer and the insured, an insurer “has an enhanced obligation to its insured as part of its duty of good faith.”<sup>35</sup> In order to fulfill this enhanced obligation, the insurance company must meet four criteria:

First, the [insurance] company must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries. Second, it must retain competent defense counsel for the insured. Both retained defense counsel and the insurer must understand that only the insured is the client. Third, the company has the responsibility for fully informing the insured not only of the reservation of rights defense itself but of all developments relevant to his policy coverage and the progress of his lawsuit. Information regarding progress of the lawsuit includes disclosure of all settlement

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31. See *Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239 (Wash. 2013); *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 983 P.2d 1129, 1132 (Wash. Ct. App. 1999).

32. WASH. ADMIN. CODE § 284-30-320(14) (2007).

33. *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1140 (Wash. 1986); see Ian S. Birk, *The Cedell Presumption: Discovery of the Insurer's Claim File in Insurance Bad Faith Litigation in Washington*, 49 GONZ. L. REV. 503 (2014).

34. For example, the claimant's status as first-party, third-party, or UIM can affect to what extent the insured deals directly with the insurer regarding the claim file.

35. *Tank*, 715 P.2d at 1136. As noted in the Introduction, a quasi-fiduciary relationship requires the insurer to act in good faith towards its insured and imposes an obligation of fair dealing and responsibility to give equal consideration to not only the insurer's interests but also to the insured's interest. *Safeco Ins. Co. of Am. v. Butler*, 823 P.2d 499, 504 (1992); see *supra* text accompanying note 15.



offers made by the company. Finally, an insurance company must refrain from engaging in *any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk.*<sup>36</sup>

The *Tank* court recognized this enhanced duty as particular to insurance claims.<sup>37</sup> The court reasoned that the fiduciary relationship was important because of the contractual relationship between the insurer and the insured, the “high stakes involved for both parties,” and the “elevated level of trust” that undergirds the “insureds’ dependence on their insurers.”<sup>38</sup>

A year after *Tank*, the Washington State Court of Appeals addressed bad faith insurance claims in *Escalante v. Sentry Insurance*. The court in *Escalante* addressed the appellant’s contention that an exception to attorney–client privilege exists in bad faith litigation, looking to how other jurisdictions utilize an exception.<sup>39</sup> The court drew from cases such as *United Services Automobile Association v. Werley*, in which the Supreme Court of Alaska applied an exception to attorney–client privilege where “privilege cannot be used to protect a client in the perpetration of a crime or other evil enterprise.”<sup>40</sup> This is generally referred to as the “fraud” or “civil fraud” exception.<sup>41</sup> In *Werley*, the insured brought a bad faith claim against its insurer alleging the insurer wrongly refused to compensate him, and without cause to do so, for a loss covered under his insurance policy.<sup>42</sup> The court reasoned that once the insured presents a prima facie showing of fraud within the attorney–client relationship, “the other party may not then claim the privilege as a bar to discovery of relevant communications and documents.”<sup>43</sup>

*Escalante* also relied on *Caldwell v. District Court in and for City and County of Denver*, in which the Supreme Court of Colorado similarly declared that an exception to attorney–client privilege applies to civil fraud.<sup>44</sup> The *Caldwell* court applied this exception to requests for

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36. *Tank*, 715 P.2d at 1137 (emphasis added).

37. *Id.*

38. *Id.* at 1136.

39. See *Escalante v. Sentry Ins.*, 743 P.2d 832, 842–43 (Wash. Ct. App. 1987), *overruled on other grounds* by *Ellwein v. Hartford Acc. and Indem. Co.*, 15 P.3d 640 (Wash. 2001).

40. *United Servs. Auto. Ass’n v. Werley*, 526 P.2d 28, 31 (Alaska 1974).

41. See *id.*; *Escalante v. Sentry Ins.*, 743 P.2d 832, 842–43 (Wash. Ct. App. 1987).

42. *United Servs. Auto. Ass’n v. Werley*, 526 P.2d 28, 33 (Alaska 1974).

43. *Id.* at 32–33.

44. See *Caldwell v. Dist. Ct. In & For City & Cnty. of Denver*, 644 P.2d 26 (1982). The court also included a discussion that attorney–client privilege may be overcome by a showing of a foundation in fact for civil fraud; accomplished after an *in camera* inspection of the documents at issue. Cf. *United Servs. Auto. Ass’n v. Werley*, 526 P.2d 28b (Alaska 1974) (declaring only a prima facie showing is required to overcome the privilege).

production of communications and assessments between the defendants (including the insurer) and their attorneys.<sup>45</sup>

Almost a decade after *Escalante*, a Washington court again addressed bad faith insurance claims, adopting another jurisdiction's reasoning regarding privileges in insurance actions. The court in *Barry v. USAA* examined two cases from Montana, holding that typically within the insured-insurer relationship, the attorney is brought in and "paid by the carrier to defend the insured and therefore operates on behalf of two clients."<sup>46</sup> The court further stated that "it 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."<sup>47</sup> The court tied this rationale into the overall theme of good faith and fair dealing with respect to the processing of an insured's claim. An alleged act of fraud or bad faith undermines the good faith duty and should entitle an insured to all communications made in those actions. In drawing from other states, Washington began to develop its foundation for privileges, or the lack thereof, in bad faith insurance claims, seeming to point in the direction of no privilege.

## II. THE *CEDELL* PRESUMPTION

After looking to other jurisdictions to build a framework for privilege issues within bad faith insurance claims, Washington laid out its own privilege exception in a landmark case. In *Cedell v. Farmers Insurance Company of Washington*, the Washington Supreme Court again addressed the issue of bad faith insurance claims and exceptions to an attorney-client privilege. Cedell (the insured) alleged that Farmers (its insurer) acted in bad faith when it failed to provide coverage for a "likely" accidental house fire.<sup>48</sup> After Farmers' adjuster and estimator assessed the damage to be over \$50,000, Farmers hired an attorney to assist in making the coverage determination.<sup>49</sup> The attorney sent a letter to Cedell stating that Farmers might deny coverage, and offered a one-time \$30,000 offer—which expired in ten days.<sup>50</sup> After Cedell brought an action for bad faith (amongst

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45. See *Caldwell v. Dist. Ct. In & For City & Cnty. of Denver*, 644 P.2d 26 (1982).

46. *Barry v. USAA*, 989 P.2d 1172, 1175 (Wash. Ct. App. 1999) (citing *Baker v. CNA Ins. Co.*, 123 F.R.D. 322 (D. Mont. 1988); *Silva v. Fire Ins. Exch.*, 112 F.R.D. 699 (D. Mont. 1986)).

47. *Id.* at 1176–75; see also *Silva v. Fire Ins. Exch.*, 112 F.R.D. 699 (D. Mont. 1986) (explaining work product and attorney-client privilege cannot be invoked to the insurance company's benefit where the only issue is whether the company breached its duty of good faith with respect to the insurer's claim).

48. *Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239, 242–43 (Wash. 2013).

49. *Id.* at 242.

50. *Id.*

other things), Farmers produced in discovery a “heavily redacted claims file, asserting that the redacted information was not relevant or was privileged.”<sup>51</sup> Cedell moved to compel the production of the redacted documents citing previous Washington cases holding that privilege in bad faith litigation is limited and “does not apply to the insurer’s benefit.”<sup>52</sup> In response, Farmers sought a protective order to prevent the discovery, claiming that the sought-after documents were privileged communications between the attorney and the client (Farmers).<sup>53</sup>

The trial court judge—after conducting an *in camera* review of the documents and legal conclusions regarding the cause of the fire—ordered Farmers to provide all redacted documents to Cedell, reasoning that first-party bad faith claims include a heightened duty to the insured and that the insured is entitled to discovery of the claim files without the opposing party’s claims for attorney–client privilege.<sup>54</sup> The Court of Appeals conducted an interlocutory review and reversed, holding that the lower court “impliedly found that a showing that the insurer used the attorney to further a bad faith denial of the claim was not sufficient grounds to pierce the attorney–client privilege.”<sup>55</sup>

After accepting review, the Washington Supreme Court addressed the issue of discovery in bad faith insurance claims. In its initial reasoning, the court noted the importance of access to an insured’s claim file to seek the very evidence that would support a claim for bad faith.<sup>56</sup> Going further, the court explained that

[i]mplicit 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.<sup>57</sup>

The court balanced the needs of Farmers and Cedell by recognizing the broad purposes of discovery in order for parties to gain access to all the necessary and relevant information to narrow the issues, and the

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51. *Id.*

52. *Id.* at 242–43; see *Soter v. Cowles Publ’g Co.*, 130 P.3d 840 (2006), *aff’d*, 174 P.3d 60 (2007) (discussing discoverable work product exceptions including bad faith claims).

53. *Cedell*, 295 P.3d at 243.

54. *Id.* The judge also relied on *Barry v. USAA*, 989 P.2d 1172, 1175 (Wash. Ct. App. 1999), regarding *in camera* review of bad faith insurance claim documents at issue. *Id.*

55. *Cedell*, 295 P.3d at 243.

56. *Id.* at 245.

57. *Id.*

purposes of attorney–client privilege to disclose all relevant facts to an attorney without fear of disclosure.<sup>58</sup>

In order to protect and balance these principles, the court ultimately adopted the reasoning from *Barry* and announced that Washington “start[s] from the presumption that there is no attorney–client privilege relevant between the insured and the insurer in the claims adjusting process and that the attorney–client and work product privileges are generally not relevant.”<sup>59</sup> The court then outlined that an insurer may overcome this presumption of discoverability with a “showing that its attorney was not engaged in the quasi-fiduciary tasks of investigating and evaluating or processing the claim” but instead was engaged in providing legal counsel for the insurer’s own liability.<sup>60</sup> Thus, if an attorney is actually acting in a legal capacity for the insurer and not the insured, that is, acting in a non-investigative role, the presumption may be overcome.

The *Cedell* court based this conclusion on the quasi-fiduciary relationship between the insurer and first-party claimants.<sup>61</sup> If an insurer claims attorney–client privilege in order to withhold portions of an insured’s claim file, the insurer bears the burden of proof of “demonstrating factually” the role of counsel with regard to liability not investigation.<sup>62</sup> This presumption sets forth an overall rule regarding the applicability and use of attorney–client privilege in Washington state. This new standard, although derived from previous caselaw, required that all insurance bad faith claims receive the same analysis to determine whether such privilege will apply.

#### A. Post-Cedell Application

In the years following *Cedell*, Washington courts have applied the presumption in bad faith insurance actions, both expanding and clarifying it. This section will discuss the different ways in which Washington courts have (1) expanded the presumption to third parties taking over insureds’ claims and (2) clarified the limitations on expansion to different parties’ statuses. In addition, this section will address the statutory support surrounding *Cedell* as well as the policy rationale for it.

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58. *Id.*

59. *Id.* at 246; see *Barry v. USAA*, 989 P.2d 1172, 1175 (Wash. Ct. App. 1999) (stating that typically in the insurer–insured relationship the attorney is engaged and paid by the carrier to defend the insured and thus operates on behalf of both of them).

60. *Cedell*, 295 P.3d at 246.

61. *Id.* at 245; Birk, *supra* note 16, at 517. The *Cedell* presumption specifically focuses on first-party claimants due to the different duties regarding a third-party or uninsured motorist claimant. See discussion *supra* Part A and *supra* note 29.

62. Birk, *supra* note 16, at 517 (citing *Cedell*, 295 P.3d at 246).

## 1. State Farm Fire &amp; Casualty Co. v. Justus

In *State Farm Fire & Casualty Co. v. Justus*, the claimant, Robert Justus, was on William and Donna Morgan's property in a pickup truck with the Morgans' allegedly stolen pipes in the back. As Justus drove away, Morgan fired nine shots at the pickup, causing the truck to hit a tree.<sup>63</sup> Two years later,<sup>64</sup> Justus sued the Morgans; in the suit, State Farm—the Morgans' insurer—agreed to defend the Morgans.<sup>65</sup> Eventually, Justus and the Morgans entered into a settlement that included “an assignment by the Morgans of all their claims against State Farm to Justus.”<sup>66</sup> Subsequently, Justus sued State Farm on behalf of the Morgans, claiming that State Farm had acted in bad faith and violated IFCA through the assignment of extra-contractual claims.<sup>67</sup> While litigating the extra-contractual claims, Justus moved to compel State Farm to produce the claim file for the incident. In response, State Farm asserted the attorney–client privilege protection because the claim file was under the Morgans,' as the insureds, privilege.<sup>68</sup>

The *Justus* court recognized the importance of the insured's need for access to a claim file to discover the necessary facts to support a bad faith claim as found in *Cedell*.<sup>69</sup> However, *Justus* can be distinguished from *Cedell* in that State Farm was asserting the Morgans' privilege of the claim file, not its own attorney–client privilege.<sup>70</sup> The court ultimately extended the *Cedell* presumption “to requests for production of a claim file by a third party who has been assigned a first party insured's claims” and remanded the case to the trial court for an *in camera* review to determine if the claim file contained any material protected solely under the Morgans' very specific attorney–client privilege.<sup>71</sup>

The *Justus* court's ruling extends the first-party claimant's importance in regard to attorney–client privileges—or the lack thereof—in bad faith insurance claims to third party assignees. It further signifies

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63. *State Farm Fire & Cas. Co. v. Justus*, 398 P.3d 1258, 1261–62 (Wash. Ct. App. 2017).

64. *Id.* The two-year time period is significant because Justus sued the Morgans two years after the incident, which was after the expiration of the “intentional injury” statute of limitations. *Id.* at 1260. Justus thus alleged a claim of negligent wrongful detention. *Id.* at 1262.

65. *Id.* at 1262. State Farm agreed to defend the Morgans but reserved its rights to challenge insurance coverage for any judgments entered against the Morgans.

66. *Id.*

67. *Id.*

68. *Id.* at 1262–63.

69. *Id.* at 1268; *Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239 (Wash. 2013).

70. *State Farm Fire & Cas. Co. v. Justus*, 398 P.3d 1258, 1269 (Wash. Ct. App. 2017). An *in camera* review was required in order for the trial judge to determine if there was any privileged information relating to the Morgans specifically, not to their overall claim file with State Farm regarding the incident and determinations therein.

71. *Id.* at 1269–70.

Washington courts' views on the significance of disclosure of claim files in bad faith insurance claims. This extension of the *Cedell* presumption takes the presumption a step further into the realm of limiting attorney–client privileges. *Cedell* ultimately adds additional avenues around any attorney–client privilege between insureds and insurers by allowing assigned third parties access to a first-party's claim file. By extending the presumption in this way, it expands the overall importance of broad discovery rules in order to sufficiently gain all the necessary facts for a claim and emphasizes that importance by allowing otherwise outside parties access if assigned the insured's rights. Although always dependent upon the type of relationship and communications made—the quasi-fiduciary relationship of insured and insurer and whether any communications made within the claim file were made due to an adverse position based upon potential litigation—the presumption seems to open more doors into the claim file than close them.

## 2. Leahy v. State Farm Auto Insurance

In a more recent case involving attorney–client privilege limitations in insurance bad faith actions, Washington seems to take a step back and set a boundary on how far its presumption extends. In *Leahy v. State Farm Auto Insurance*, Shannon Leahy's car was struck, and she suffered injuries to her back and neck—an accident in which she was ultimately fault-free.<sup>72</sup> Leahy had both personal injury protection (PIP) and UIM insurance with State Farm.<sup>73</sup> State Farm subsequently denied coverage for some of her injuries, then later offered waivers of certain small amounts of its PIP subrogation rights.<sup>74</sup> After a jury trial over whether her insurance should have covered the injuries she suffered—in which the jury ruled in favor of Leahy—Leahy amended her complaint to include extracontractual claims against State Farm, alleging bad faith insurance practices and violations of both the IFCA and Consumer Protection Act (CPA).<sup>75</sup> Leahy served State Farm with a discovery request for the entire unredacted claim file.<sup>76</sup> In response, State Farm provided the claim file with significant portions redacted.<sup>77</sup> The trial court concluded that certain portions of the UIM claim file were protected by attorney–client privilege.<sup>78</sup>

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72. *Leahy v. State Farm Mut. Auto. Ins. Co.*, 418 P.3d 175, 178–79 (Wash. Ct. App. 2018).

73. *Id.* at 179.

74. *Id.* at 179–80.

75. *Id.* at 180. For relevant statutes outlining the Consumer Protection Act, see WASH. REV. CODE § 19.86, Unfair Business Practices–Consumer Protection (2018).

76. *Leahy*, 418 P.3d at 181.

77. *Id.*

78. *Id.*

The Court of Appeals, in determining whether the communications were privileged, compared the facts of the case to *Cedell*. In doing so, it noted the important distinction that *Leahy* involved a UIM claim, not a first-party claim.<sup>79</sup> In a UIM case, “the insured must overcome a higher bar before it can discover privileged information.”<sup>80</sup> The court explained that one way to overcome the heightened bar is by a showing that a fraud was planned at the time the privileged communication was made and that the communication was made in furtherance of the fraudulent activity.<sup>81</sup>

The *Leahy* court seems to slightly close the wide-open door from the *Cedell* presumption by keeping the difference in party position an important aspect of the analysis. Although the Washington Court of Appeals in *Justus* allows an assigned third-party access to a claim file, the court in *Leahy* keeps the barriers to access up on UIM claimants. However, the court does recognize an avenue around the attorney–client privilege if the UIM claimant can satisfy a heightened bar.<sup>82</sup> This suggests that even though a UIM claimant is considered differently, the court still recognizes the importance of broad discovery and limiting a blanket privilege. In some respects, it is arguable whether this heightened privilege is fair, as it would be more difficult to show planning of a fraudulent denial of coverage or fraudulent activity without having access to the claim file. Thus, if a UIM claimant could already show fraud to begin with, it would defeat the purpose of gaining access to the claim file. However, this position is understandable due to the status of the UIM claimant as essentially stepping into the shoes of the tortfeasor and the insurer’s necessity of counsel’s advice in strategizing defenses for such a claim.<sup>83</sup>

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79. *Id.* at 181–82; *Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239, 239 (Wash. 2013). For a discussion on UIM party status, see *supra* note 29 and accompanying text.

80. *Leahy*, 418 P.3d at 181 (quoting *Cedell*, 295 P.3d at 239).

81. *Leahy*, 418 P.3d at 182 (quoting *Barry v. USAA*, 989 P.2d 1172, 1175 (Wash. Ct. App. 1999)). The court then asserts the two-step process for establishing fraud in *Escalante*: First, a determination of “factual showing adequate to support a good faith belief by a reasonable person that wrong conduct . . . sufficient to evoke the fraud exception occurred”; and second, an *in camera* review of the documents shows sufficient foundation in fact of change. *Cedell*, 295 P.3d at 245; see *Escalante v. Sentry Ins.*, 743 P.2d 832 (Wash. Ct. App. 1987) (articulating the two-step process).

82. *Leahy*, 418 P.3d at 181–82.

83. See *supra* note 29 and accompanying discussion on UIM claimants. In a more recent case, *Hoff v. Safeco Ins. Co. of Ill.*, 449 P.3d 667 (Wash. Ct. App. 2019), *review denied*, 458 P.3d 790 (Wash. 2020), the plaintiff made a UIM claim against Safeco, the insurer. Hoff, the insured, tried to rely on *Leahy* to argue that the court had discretion to subject privileged materials to *in camera* review in order to determine whether a factual foundation for civil fraud exists. *Hoff*, 449 P.3d at 675. However, the court noted that Hoff was attempting to seek information regarding litigation strategies of Safeco (i.e., decisions in removing the case to federal court); Hoff was not seeking information regarding valuations like in *Leahy*. *Id.* The court once again emphasized the restrictions on the presumption in UIM cases. Specifically, in UIM claims a presumption of attorney–client waiver does not exist; instead, the classic work-product privileges apply. Since a UIM insurer “steps into the shoes” of the at-fault insurer and defends as the prior insurer would, the privilege may only be pierced through

*B. Cedell and Statutory Authority*

The laws in Washington surrounding attorney–client privilege are codified in both the state’s rules of evidence and the Revised Code of Washington (RCW). However, although the presumption adopted in *Cedell* is now established in Washington’s common law, is not yet codified. Washington’s rules of evidence first recognize attorney–client privilege,<sup>84</sup> then further identify specific instances of waivers or limitations.<sup>85</sup> These two rules are fairly common as they are modeled almost identically after the Federal Rules of Evidence.<sup>86</sup> Although these rules are important in the discussion surrounding attorney–client privilege in bad faith claims, the interesting part of the discussion arises from the Washington statute codifying who is disqualified from privileged communications or, more accurately, the statute’s lack of specificity therein.

Washington, unlike some other jurisdictions,<sup>87</sup> has somewhat broad exceptions in its privilege statute.<sup>88</sup> The statute details that an attorney or counselor cannot, without consent of the client, be examined as to any communication made by the client or to any legal advice discussed in the course of legal employment.<sup>89</sup> The relevant code does not lay out explicit exceptions to the attorney–client privilege other than those modeled after the federal rules in Rule 502.<sup>90</sup>

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the crime-fraud exception by a “factual showing adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the fraud exception has occurred.” *Id.* at 674–75 (quoting *Cedell*, 295 P.3d at 245).

84. WASH. R. EVID. 501.

85. WASH. R. EVID. 502.

86. *Compare id.*, with FED. R. EVID. 501–02.

87. Hawaii’s rules of evidence include a list of specific exceptions from attorney–client privilege, such as no privilege for joint clients, preventing crime or fraud, furtherance of crime or fraud, and breach of duty by lawyer or client. HAW. R. EVID. § 626-1, r. 503(d)(1)–(7). Idaho’s rules of evidence also lay out explicit exceptions to attorney–client privilege. IDAHO R. EVID. 502(d)(1)–(6).

88. *Cf.* WASH. REV. CODE § 5.60.060(2) (2016) (discussing the types of relationships, including privileged communication but without explicit exceptions thereto).

89. *Id.*

90. *Compare* WASH. REV. CODE § 5.60.060(2) (2016) and WASH. R. EVID. 502, with FED. R. EVID. 502. Although this Comment does not discuss the implications of the work product doctrine, it is interesting to note that WASH. CT. C.R. 26(b)(4) states that documents prepared in anticipation of litigation are discoverable only upon a showing that the party seeking discovery has a substantial need, however, documents produced in the ordinary course of business are not immune. *See Escalante v. Sentry Ins.*, 743 P.2d 832, 842–43 (Wash. Ct. App. 1987). Work product rules, when dealing with insurance claims of this nature, are significant because a possible explanation behind the insured’s position in obtaining the insured’s claim file is substantial need since he or she would not otherwise be able to obtain the necessary information needed to prove elements of a bad faith action by any other means. Further, since normally the claim file is produced in the ordinary course of business when the insurer is investigating the claim, it can be viewed as not immune to the work product doctrine under such rules.



Considering Washington's reliance on common-law privilege interpretations and not on uniquely codified rules, the court in *Cedell* adopted the presumption "that there is no attorney[–]client privilege relevant between the insured and the insurer in the claims adjusting process, and that the attorney[–]client and work product privileges are generally not relevant."<sup>91</sup> Ian Birk, in his article discussing the *Cedell* presumption, explained that the presumption is consistent with the general laws of attorney–client privilege, finding that in *Cedell*, the attorney's role was not solely limited to providing legal counsel.<sup>92</sup> After all, the business of an insurance company, once a potential claim exists, is to determine the applicability of their contract to the fact pattern involved—in essence, to make legal determinations of whether the claim is covered under the contract and how much is properly owed.

In Washington, an insurer's duties are codified under R.C.W. Title 48, highlighting a strong acknowledgement of public interest:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.<sup>93</sup>

The above statute, coupled with Washington's privilege statute and the *Cedell* presumption, make Washington's interpretation of attorney–client privilege in bad faith insurance claims a logical and easily discernable method to understand the complex issues arising from the claim file documents and discovery in bad faith insurance claims. The Washington State Supreme Court recognizes that denying an insured access to their respective claim file would prevent the insured from gaining the necessary evidence for a bad faith claim. Thus, if the insured is unable to acquire such evidence, it would prevent the insurer from being held accountable for its bad faith actions.<sup>94</sup>

### III. EXTRA JURISDICTIONAL INSURANCE CLAIM PRIVILEGES

Since many insurance companies operate across multiple states, it is important to discuss how other jurisdictions apply similar or contrasting opinions to *Cedell*. The sections below detail how different states deal with

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91. *Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239, 246 (Wash. 2013) (citing *Barry v. USAA*, 989 P.2d 1172, 1175–76 (Wash. Ct. App. 1999)); see also Birk, *supra* note 16.

92. Birk, *supra* note 16.

93. WASH. REV. CODE § 48.01.030 (1995).

94. See *Cedell*, 295 P.3d 239; 35 DAVID K. DEWOLF & MATTHEW ALBRECHT, WASH. PRACTICE, WASHINGTON INSURANCE LAW AND LITIGATION § 26:19 (2019–2020 ed.).

attorney–client privilege in bad faith insurance claims. As discussed previously, all jurisdictions nationwide have some form of codified attorney–client privilege; however, as examined through the cases below, some of those statutes and their explicit requirements can distinctly affect how the courts look at attorney–client privilege in bad faith insurance actions.

### A. Paralleling and Adopting the *Cedell* Presumption

#### 1. Idaho

The first instance of a presumption similar to *Cedell* in Idaho occurred in *Stewart Title Guaranty Co. v. Credit Suisse*. Credit Suisse, the insured, requested documents related to Stewart Title’s investigation of lien claims and decisions relating to coverage, defense, and settlement of the claims.<sup>95</sup> The court stated that the documents requested fell into two categories: (1) “internal documents,” which included Stewart Title’s evaluation of the lien claims; and (2) “outside documents,” which included documents prepared by the various attorneys working for Stewart Title.<sup>96</sup> The trial court looked to Washington’s *Cedell* presumption, noting “that the insured is entitled ‘to broad discovery, including, presumptively, the entire claims file.’”<sup>97</sup> The court also looked to Idaho’s privilege rules on “joint client” exceptions and determined that they aligned with the opinion adopted in *Cedell*.<sup>98</sup> Idaho Rule of Evidence 502(d) states

there is no privilege under this rule . . . [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.<sup>99</sup>

Drawing from a leading treatise, the court used its reasoning in interpreting the joint-client exception as designed to apply to first-party bad faith actions between an insurer and insured.<sup>100</sup> In conclusion, the court found

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95. *Stewart Title Guar. Co. v. Credit Suisse*, No. 1:11-CV-227-BLW, 2013 WL 1385264, at \*3 (D. Idaho Apr. 3, 2013).

96. *Id.*

97. *Id.* (quoting *Cedell*, 295 P.3d at 247).

98. *Id.* at \*5; see also IDAHO R. EVID. 502(d)(5); cf. *Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915, 921 (9th Cir. 2009) (holding that where a state’s supreme court has not addressed an issue, the court must determine what result the state would reach based on other court opinions, statutes, and treatises).

99. IDAHO R. EVID. 502(d).

100. *Id.* at 502(d)(5); 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5505 (1986) (discussing a proposed—although never adopted—FED. R. EVID. 503(d)(5)). The treatise accredits the joint-client exception as the most common use of the joint-

that Idaho's codified exception aligned with *Cedell*, and found that the insured was entitled to the entire claim file, without limitation by the attorney–client privilege.<sup>101</sup> The trial court in Idaho derived its version and rationale of the *Cedell* presumption from an explicit codified exception to attorney–client privilege. This justification is interesting due to the differences from Washington's codified privilege statutes that do not explicitly lay out such exceptions. The Idaho court seemed to agree with the basic premise of broad discovery rules but backed it up by interpreting the joint-client exception to support this presumption. In some ways, it is arguable that, by the court both drawing from *Cedell* and using its own codified privilege laws, it was seeking to create an important rule with which it would be difficult to disagree.

An Idaho trial court again applied the *Cedell* presumption approximately six months later in *Hilborn v. Metropolitan*.<sup>102</sup> In that case, the trial court judge also agreed with Washington's explanation of the presumption. The court relied on the reasoning in both *Cedell* and *Stewart Title*, looking to whether the attorney in question was working in an investigative capacity or providing legal advice on coverage.<sup>103</sup> The court ultimately presumed that Metropolitan (the insurer), must turn over the entire claim file, unless it could show that any documents within the file related to the attorney providing legal counsel to its potential liability.<sup>104</sup> The trial court seemed to be reasserting the importance of discovering a claim file within an insurance bad faith claim, only implementing the privilege when there is sufficient evidence that the attorney was only providing legal counsel relating to liability, not simply coverage.

The Supreme Court of Idaho in *Cedillo v. Farmers Insurance* declined to rule on a discovery issue in a bad faith insurance claim. However, Chief Justice Burdick addressed the topic in his dissent, stating that when the insurer's attorney—who was not specifically hired to provide advice to the insurer—investigates a disputed claim, the “attorney is viewed as simultaneously representing the insured while investigating

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client privilege in common law. It further details the “common interest” between the insurer and the insured in communications made regarding the defense of the insured. However, that common interest only extends so far. Once the communications extend beyond the claim file and onto divergent interests, such as claims of bad faith or coverage disputes, those specific types of communications are no longer within the exception. This reasoning adheres to the *Cedell* presumption because it allows for an insured to have access to the claim file and any communications made during the claim process, only limiting that once adverse action is taken.

101. *Stewart Title Guar. Co. v. Credit Suisse*, No. 1:11-CV-227-BLW, 2013 WL 1385264, at \*5 (D. Idaho Apr. 3, 2013).

102. *Hilborn v. Metro. Grp. Prop. & Cas. Ins. Co.*, No. 2:12-CV-00636-BLW, 2013 WL 6055215, at \*3 (D. Idaho Nov. 15, 2013).

103. *Id.*

104. *Id.*

the claim.”<sup>105</sup> Further, this situation cues the presumption of discoverability which entitles the insured to the full claim file.<sup>106</sup> Chief Justice Burdick ultimately declared his strong disagreement by stating “[the insurer] nevertheless gets judgement in its favor despite its incredible discovery abuses.”<sup>107</sup>

As discussed briefly in *Stewart Title*, Idaho’s codified privilege laws lay out specific exceptions to attorney–client privilege, unlike Washington’s seemingly broader privilege laws.<sup>108</sup> Idaho’s privilege rules include an explicit exception for “joint clients.”<sup>109</sup> Under this exception, communication relates to joint clients when there is a “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.”<sup>110</sup>

The courts in *Stewart Title* and *Hilborn* interpreted the insurer–insured relationship as that of joint clients when the insurer’s attorney was engaged in the quasi-fiduciary tasks of investigating and evaluating the claim, not providing legal counsel.<sup>111</sup> Although the Idaho courts agree and apply *Cedell*’s reasoning, I find it more impactful that the courts located the presumption as part of its codified laws of exceptions to privilege. I would argue that, by linking the presumption to a specific codified exception, the Idaho courts signal the importance of blocking a blanket privilege over claim files involved in bad faith insurance claims.

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105. *Cedillo v. Farmers Ins. Co.*, 408 P.3d 886, 896 (Idaho 2017) (Burdick, C.J., dissenting).

106. *Id.* (quoting *Hilborn v. Metro. Grp. Prop. & Cas. Ins. Co.*, No. 2:12-cv-00636-BLW, 2013 WL 6055215, at \*3–4 (D. Idaho Nov. 15, 2013)).

107. *Id.* at 899. In this case, the insurer, Farmers, conceded that its attorney was not hired to provide coverage advice, but was only involved in routine claim handling and investigative work. Thus, Farmers’ attorney was not acting in a privileged, legal capacity and should not have been able to assert attorney–client privilege. This dissent furthers the view that even though the court declined to rule on this issue in the majority opinion, there is strong backing for a presumption of no attorney–client privilege due to the importance of the dual-fiduciary and joint representation that occurs in a claim coupled with a bad faith allegation, raising serious needs for discoverability that the insurer must meet the burden in overcoming. *See id.* at 893–99.

108. *See supra* Part II.B. for a discussion on the differences in statutes regarding Washington’s seemingly broader privilege laws compared to those of states like Idaho and Hawaii, which lists explicit exceptions.

109. IDAHO R. EVID. 502(d)(5).

110. *Id.*

111. *See Stewart Title Guar. Co. v. Credit Suisse*, No. 1:11-CV-227-BLW, 2013 WL 1385264, at \*5 (D. Idaho Apr. 3, 2013); *Hilborn v. Metro. Grp. Prop. & Cas. Ins. Co.*, No. 2:12-cv-00636-BLW, 2013 WL 6055215 (D. Idaho Nov. 15, 2013); *see also* WRIGHT & GRAHAM, *supra* note 100 (explaining one of the most common uses the joint client exception is in suits between the insurer and insured).

## 2. Alaska

Alaska addressed a bad faith exception to attorney–client privilege in *Central Construction Co. v. Home Indemnity Co.*,<sup>112</sup> where a construction company asserted its insurer was acting in bad faith by denying coverage to two deceased workers. The court held that “services sought by a client from an attorney in aid of any crime or a *bad faith breach* of a duty are not protected by the attorney–client privilege.”<sup>113</sup> This case signified Alaska’s agreement to the fraud exception to bad faith insurance claims and hinted that the state would follow, if it were not already implicitly following, the *Cedell* presumption.

More recently, a trial court in Alaska in fact did restrict the attorney–client privilege in bad faith claims by drawing from *Cedell*. In *Heynen v. Allstate Insurance Co.*, the court noted authorities from other jurisdictions like Washington, finding that “protected material in insurance claims files is discoverable,” and held that the insured’s communications protected by attorney–client privilege could be discoverable to the extent they “fall under the crime-fraud exception.”<sup>114</sup>

Alaska also has express exceptions to attorney client privileges.<sup>115</sup> However, Alaska differs from Idaho by not using a “joint-client” exception; instead, Alaska uses the “furtherance of crime or fraud” exception to bypass attorney–client privilege in bad faith insurance claims.<sup>116</sup> Again, absent an established common law presumption, the use of an explicit codified exception enhances the significance of the restriction on attorney–client privilege for bad faith insurance claims. Alaska, while using a different codified exception than Idaho, still achieves the same goal of limiting the blanket-privilege insurance that companies try to assert.

## 3. Illinois

Illinois has a “common interest” exception to attorney–client privilege. “If the insurer and insured shared a common interest in the underlying litigation, then the insured is entitled to an *in camera* inspection of the claim file in the declaratory judgement action.”<sup>117</sup> The exception is

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112. *Central Constr. Co. v. Home Indem. Co.*, 794 P.2d 595, 598 (Alaska 1990).

113. *Id.* (emphasis added).

114. *Heynen v. Allstate Ins. Co.*, No. 1:11-cv-00010-TMB, 2013 WL 12171613 (D. Alaska Dec. 10, 2013); *see also Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239 (Wash. 2013).

115. *See* ALASKA R. EVID. 503(d)(1), (5).

116. *Id.*; *see also* IDAHO R. EVID. 502(d)(5).

117. Dan D. Kohane, Sean Griffin & John R. Ewell, *Invading the Sanctuary Practical Solutions to Fend off the Attack on Confidentiality on Insurer Coverage Counsel Communications*, 11 No. 2 IN-HOUSE DEF. Q. 42 (2016). *See* *Waste Mgmt., Inc. v. Int’l Surplus Lines Ins. Co.*, 579 N.E.2d 322 (Ill. 1991); *see also* ILL. R. EVID. 502.

similar to Idaho's joint client exception and the proposed Federal Rule of Evidence 503(d).<sup>118</sup>

In *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, an Illinois court reasoned that in that state, there is a strong policy of encouraging disclosure and ascertaining the “truth which is essential to the proper disposition of a lawsuit.”<sup>119</sup> The court also relied on the common interest doctrine by looking at both the insurer's and the insured's interests in settling or litigating the claims; further that the attorney in some capacity has provided joint or simultaneous representation.<sup>120</sup> This common interest analysis mirrors the joint client exception because each party retains similar underlying interests in respect to coverage and settling the claims. This allows an insured access to the claim file because the attorney, under a common interest in the claim, represents the insured and the insurer as to coverage. Allowing an *in camera* review limits the presumption of no attorney–client privilege—as seen under the *Cedell* presumption—but still signifies the importance of the discovery by allowing insureds an avenue to defeat the blanket shield.

#### 4. Ohio

Ohio, early on, established the importance of discovery of an insured's claim file in bad faith litigation. Similar to *Cedell*—although decided significantly prior—the Ohio Supreme Court held that “in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney–client communications related to the issue of coverage that were created prior to the denial of coverage.”<sup>121</sup> The court went so far as to note that “claims file materials that show an insurer's lack of good faith in denying coverage are unworthy of protection.”<sup>122</sup> Ohio's holding and rationale seems to align

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118. See WRIGHT & GRAHAM, *supra* note 100.

119. *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 190 (Ill. 1991). The court also discussed the argument regarding a “cooperation clause” within the insurance policy in which the primary purpose is to protect the insurer's interests and prevent collusion. *Id.* The court explained that the cooperation clause imposed a broad duty of cooperation without limitation or qualification and would require disclosure of “communication[s] [insured] had with defense counsel representing them on a claim for which insurers had the ultimate duty to satisfy.” *Id.* at 192.

120. *Id.* at 194.

121. *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154, 158 (Ohio 2001).

122. *Id.* (emphasis added). Note that Ohio's statutory provisions regarding attorney–client privilege also do not explicitly lay out an exception for bad faith claims brought by an insured. See OHIO R. EVID. 501. However, Ohio does contain a rather specific statute concerning testimony of attorneys pertaining to privileged communications. See OHIO REV. CODE § 2317.02(A)(2) (2016). The testimonial privilege established under this division does not apply concerning either of the following:

(2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an *in camera* inspection by

with the court in *Cedell*, highlighting the importance of the “discovery of meritorious claims” and not “conceal[ing] unwarranted practices.”<sup>123</sup>

Although the supreme court applied this broad discovery, the court reasoned that this is because the claims files generally do not contain work product (things prepared in anticipation for litigation).<sup>124</sup> So even though the insured is entitled to the insurer’s claim file, it is not entitled to communications relating to the bad faith litigation itself. Thus, when insurers make the decision to deny coverage, no work product for litigation has yet commenced.<sup>125</sup> The court again confirms the importance of broad discovery relating to the insured’s decisions in initially denying a claim, as that is the very crux of any bad faith action.

### 5. Florida

Interestingly, on the outset it seemed as if Florida courts fully rejected the presumption of no attorney–client privilege in insurance bad faith claims, however, in a closer analysis, it seems Florida actually falls on the side of a presumption.<sup>126</sup> Florida caselaw distinguishes between what is discoverable in first-party bad faith claims regarding work product and attorney–client communications. In *Allstate Indemnity Co. v. Ruiz*, the insured brought a bad faith action against its insurer, Allstate, after she was involved in an accident in a vehicle that Allstate accidentally deleted from her policy.<sup>127</sup> Within the bad faith action, the insured requested that the trial court compel production of documents, including Allstate’s claim and investigative file regarding the insurer’s claim.<sup>128</sup> Allstate subsequently claimed work product and attorney–client privilege, and attempted to argue that “because the problem and dispute associated with coverage was immediately apparent when it refused to make proper payment . . . litigation was anticipated at all pertinent times associated with

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a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney’s aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima-facie showing of bad faith, fraud, or criminal misconduct by the client.

*Id.*

123. *Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239, 245 (Wash. 2013).

124. *Boone*, 744 N.E.2d at 158.

125. This point was more recently examined and affirmed in *Goodrich Corp. v. Com. Union Ins. Co.*, 2008-Ohio-3200, ¶ 139 (Ohio Ct. App. 2008). The court noted that although *Boone* allowed for the discovery of claims files by the insured, it does not extend to work product or materials outside of those files. *Id.*

126. Florida’s attorney–client privilege statute does not contain an express exception for bad faith claims. *See* FLA. STAT. § 90.502 (2020).

127. *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1123 (Fla. 2005).

128. *Id.* A month after the commencement of the bad faith action, Allstate admitted its obligation for coverage and its obligation to provide benefits to the insured. *Id.* The insured, however, continued its bad faith claim in the denial of her claim. *Id.*

each of the [insured's] discovery requests . . . and, therefore, none of the material was subject to disclosure."<sup>129</sup> Thus, this case focused on whether the claim files—referred to as the work product—were discoverable. Ultimately, the Florida Supreme Court held that

all materials, including documents, memoranda, and letters, contained in the underlying claim and related litigation file material that was created up to and including the date of resolution of the underlying disputed matter and pertain in any way to coverage, benefits, liability, or damages, should also be produced in a first-party bad faith action.<sup>130</sup>

The court highlighted, just as did *Cedell* and other cases discussed above, that the underlying claim materials are the exact evidence needed to show that an insurer engaged in bad faith; thus, those documents are treated differently in insurer bad faith claims and discoverable, as those materials are vital to advance such an action.<sup>131</sup>

Where Florida seems to differ from other states can be seen in *Genovese v. Provident Life & Accident Insurance Co.*, a later case which specifically addresses attorney–client communication privilege and whether privileged material is discoverable in bad faith claims. In *Genovese*, an insured sought discovery of the insurer's claim file and all correspondence between the attorneys for the insurer and the insurer's agents.<sup>132</sup> The insurer argued that the decision in *Ruiz* did not extend to discovery of documents protected by attorney–client privilege.<sup>133</sup> The Supreme Court of Florida responded by distinguishing between the attorney–client privilege and work product, explaining that the work product, or claim file, was discoverable under *Ruiz* as those materials are required for a showing of bad faith; however, the attorney–client privilege, unlike the work product doctrine, “is not concerned with the litigation needs of the opposing party.”<sup>134</sup> Therefore, work product in first-party claims is also discoverable under *Ruiz*; the court noted, however, that the exception does not apply to attorney–client *communications*.<sup>135</sup> Importantly, though, this holding involves a specific situation in which such communications are discoverable “where an insurer has hired an attorney to both investigate the underlying claim and render legal

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129. *Id.*

130. *Id.* at 1129–30.

131. *Id.* at 1128–29.

132. *Genovese v. Provident Life & Accident Ins. Co.*, 74 So. 3d 1064, 1068 (Fla. 2011), *as revised on denial of reh'g*, (Nov. 10, 2011).

133. *Id.*

134. *Id.*

135. *Id.*



advice.”<sup>136</sup> So, this opinion does in fact parallel Washington’s presumption as it relates to the quasi-fiduciary relationship an attorney may play in the claim determination. If an attorney acts in an investigative capacity in regard to the claim determination, those communications would not be considered privileged communications.<sup>137</sup>

## 6. Montana

Although Montana seemingly addressed the importance of discovering an insured’s claim file when faced with the insurer asserting attorney–client privilege, in more recent years Montana seems to have narrowed its application. In *Bergeson v. National Surety Corp.*, the court stated that the “pivotal inquiry is the manner in which the insurance company processed the claim.”<sup>138</sup> Going further, the court explains that

[g]iven the need for complete discovery to be afforded to all parties to the action, the interest of justice would best be served by bifurcating the bad faith claims from the remainder of the case and determining the liability issue first. Following resolution of the underlying policy claim, plaintiff shall have access to the entire claims file for inspection and copying, and the case shall proceed on the issue of National’s bad faith.<sup>139</sup>

Montana, similar to Washington, does not have an explicit exception to attorney–client privileges as Idaho or Alaska do; however, it is similar and even referenced by *Cedell* as being vested in common law that there is a presumption the insured is entitled to the entire claim file of the insurer.<sup>140</sup>

After *Bergeson*, however, Montana seemed to tailor back its analysis of attorney–client privilege in bad faith claims. In 1993, Montana’s Supreme Court found that the attorney–client privilege applied to a specific type of first-party bad faith action.<sup>141</sup> In this case, the court noted that the insurer and the insured were on adverse sides on the outset of the underlying case because the insurer “stepped into the shoes of the unidentified third party motorist when it denied [the insured’s] coverage

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136. *Id.*

137. The Florida Supreme Court notes that in these types of situations, the trial court should conduct an *in camera* review to determine whether the materials sought are protected in the true sense of attorney–client privilege, or whether they constitute investigative communications in preparation of materials that would be discoverable under *Ruiz*. *Id.* at 1068.

138. *Bergeson v. Nat’l Surety Corp.*, 112 F.R.D. 692, 697 (D. Mont. 1986).

139. *Id.*

140. *See id.*; MONT. R. EVID. 502; *see also Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239, 247 (Wash. 2013).

141. *Palmer by Diacon v. Farmers Ins. Exch.*, 861 P.2d 895 (1993).

under [their] uninsured motorist policy.”<sup>142</sup> Thus, this case presented a unique first-party-UIM type case where the insurer’s attorneys were not acting in the dual representation or quasi-fiduciary relationship as explained in *Cedell*.<sup>143</sup> “The attorneys who represented [the insurer] in the uninsured motorist case have not represented [the insured], therefore the dual representation reasoning does not apply in this case.”<sup>144</sup>

Montana applies a similar presumption to that of *Cedell*—even before it was explicitly set out in *Cedell*—without a specific codified exception to attorney–client privilege, but it also expresses its limitations. The necessity of complete discovery, however, seems to be the underlying theme across all of the discussed cases. Given that a claim of fraud within the insured’s claim file has been made, it repeatedly seems that courts are affording the most weight to the fact that, if allowed to assert a blanket privilege, the insured parties would be at a distinct disadvantage, since only the insurer truly knows what it did and why it did it.

### B. Distinguishing or Rejecting *Cedell*

Jurisdictional differences exist on how far asserting attorney–client privilege in bad faith insurance claims will succeed. Some jurisdictions have altogether rejected the *Cedell* presumption and some have refined or modified the presumption in their own ways. Highlighting the differences amongst jurisdictions plays a vital part in establishing why a uniform standard is necessary, and why some citizens are vulnerable to a higher privilege application in some states than in others.

#### 1. Hawaii

Hawaii has directly rejected the *Cedell* presumption. In *Anastasi v. Fidelity National Title Insurance Co.*,<sup>145</sup> the court stated that an assertion of a bad faith claim does not nullify an attorney–client privilege; the rule adopted in *Cedell* is inconsistent with the privilege as codified in Hawaii.

As codified in Hawaii, nothing in the general terms states that there is a waiver of attorney–client privilege with respect to a bad faith claim. Additionally, bad faith is not one of the seven explicit exceptions to attorney–client privilege laid out in the Hawaii Rules of Evidence § 626-1, Rule 503.<sup>146</sup> Although Hawaii does not explicitly codify an exception

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142. *Id.* at 905–06.

143. *Id.* at 906. *Palmer*, however, seems to align with the UIM limitations set out by *Cedell* and other Washington courts. *Id.*

144. *Id.*

145. *Anastasi v. Fid. Nat'l Title Ins. Co.*, 341 P.3d 1200 (Haw. Ct. App. 2014), *aff'd in part vacated in part*, 366 P.3d 160 (2016).

146. HAW. R. EVID. § 626-1, r. 503.

for attorney–client privilege, it has an explicit exception for “joint clients” which is similar to Idaho’s exception although applied a critically different manner.

Although this type of exception to the attorney–client privilege has been both examined in common law and used through codified exceptions, the court in *Anastasi* directly stated that attorney–client privilege is codified in much more detail than in Washington, and that “nothing within the general terms of HRE Rule 503 suggest that the attorney–client privilege is inapplicable when a bad faith claim is asserted.”<sup>147</sup> Hawaii differs from states which have adopted and parallel *Cedell* in that it looks to the exact language of the codified rules and states simply that if there was an exception it would have been codified explicitly.<sup>148</sup>

## 2. West Virginia

West Virginia differs in the application of an exception to the attorney–client privilege in bad faith claims in that it discusses specific types of documents within an insured’s claim file.<sup>149</sup> In *State ex rel. Montpelier U.S. Insurance Co v. Bloom*, the insurer challenged the disclosure of coverage opinion letters.<sup>150</sup> It was recognized “that an insurance company’s retention of legal counsel to interpret the policy, investigate the details surrounding the damage, and to determine whether the insurance company is bound for all or some of the damage, is a classic example of a client seeking legal advice from an attorney.”<sup>151</sup> The court ultimately found that disclosure of opinion letters was prevented by attorney–client privilege because the legal counsel for the insurer was performing work of determining policy language, deciphering judicial decisions relating to the matter, and reviewing other applicable laws that would obligate the insurer to recognize the claims filed.<sup>152</sup>

The results of having stricter, more precise situations and documents threaded out of this complicated privilege problem seem effective; however, I do not agree with the decision here. There is a common theme within this problem: the overall importance of discovery in bad faith claims. Opinion letters regarding coverage are often sought out to analyze the facts and interpret the insurance contract to ensure coverage decisions

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147. *Anastasi*, 341 P.3d at 1216–17; see also HAW. R. EVID. § 626-1, r. 503.

148. *Anastasi*, 341 P.3d at 1216–17; HAW. R. EVID. § 626-1, r. 503.

149. Similar to Washington though, West Virginia’s views on attorney–client privilege in bad faith claims are rooted in common law, as there are no explicit exceptions codified in its rules of evidence—like those of Idaho and Hawaii. See W. VA. R. EVID. 502.

150. *State ex rel. Montpelier U.S. Ins. Co. v. Bloom*, 757 S.E.2d 788, 794 (W. Va. 2014).

151. *Id.* at 795 (quoting *Hartford Fin. Servs. Grp., Inc. v. Lake Cnty. Park & Rec. Bd.*, 717 N.E.2d 1232, 1236 (Ind. App. 1999)); see also Kohane, Griffin & Ewell, *supra* note 17, at 42.

152. *Bloom*, 757 S.E.2d at 798.

are given the appropriate time and inquiry.<sup>153</sup> In a hypothetical thought, it would seem that if an attorney's opinion letter either advised something from which the insurance company directly deterred—such as bad faith or fraud—or advised insufficient coverage, that very document would be the crux of the claim. Although trying to decipher and weed out specific situations would help to promote a more understandable standard, simply writing off an opinion letter seems too extreme. Instead, I would recommend treating opinion letters as not explicitly shielded under attorney–client privilege of the insured, but instead, subject to an *in camera* review when asserting a bad faith claim. This would better ensure the insurance company did fulfill, or did not fulfill, its obligations to the claim file and would allow for a neutral party to decide whether the privilege is in fact being in its true sense or as an improper blanket cover.

#### CONCLUSION

The attorney–client privilege, in any respect or area of practice, is always seen as one of the most essential and important facets of legal representation. As seen in this Comment, many different areas exist where upholding the privilege can become tricky and applied in diverse ways. Insurance bad faith claims specifically create difficult scenarios in deciding whether a privilege applies, as the legal representative is working both for the insurer in investigating the claim and, in turn, for the insured in a quasi-fiduciary relationship.<sup>154</sup>

Insurance companies range from purely domestic—covering only insureds within a limited jurisdiction—to nationwide—covering insureds across the county—to global—operating to cover insureds across the world. The cross-jurisdictional functions of insurance companies make a uniform law surrounding privileges in bad faith actions desirable. Larger insurance corporations have the ability to, and do, provide coverage across all fifty states.<sup>155</sup> By creating different legal standards around attorney–client privilege throughout the nation, it makes national insurance operations both a blessing and a curse. On one end, the insurance providers

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153. Michael S. Quinn & L. Kimberly Steele, *Insurance Coverage Opinions*, 36 S. TEX. L. REV. 479, 485 (1995).

154. Birk, *supra* note 33, at 513 (relying on *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1136 (Wash. 1986)).

155. State Farm was ranked the No. 1 writer of property and casualty insurance by premiums written, the No. 1 writer of homeowner's insurance by direct premiums written, and the No. 1 writers of private passenger auto insurance by direct premiums in 2017. See *Facts + Statistics: Insurance Company Rankings*, INS. INFO. INST., <https://www.iii.org/fact-statistic/facts-statistics-insurance-company-rankings> [https://perma.cc/VC9P-PQEC]. State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company are licensed to provide insurance in all fifty states. See *State Farm Terms of Use for statefarm.com*, STATE FARM, <https://www.statefarm.com/customer-care/disclosures/terms-of-use> [https://perma.cc/YZ6Z-9BW7].

need to apply different standards across different states and need to rely on different privileges. However, on the other hand, the insurance providers are provided greater latitude and privileges in some states over others. It seems necessary to create a uniform standard to ensure that all individuals, regardless of jurisdiction, are afforded the same rights and opportunities for their claim files as, most of the time, these insurance providers are the same repeat players (as seen in the cases presented herein, the insurers are under all but a handful of names).

Washington's *Cedell* presumption should become a model for a uniform view on attorney–client privileges in insurance bad faith claims as it embraces the importance of broad discovery and affords the often less-experienced insured the ability to bring to light an insurer's bad faith denials. I recommend that one of the following three possible avenues be implemented to formalize the presumption articulated in *Cedell*: (1) a codified federal rule of evidence—either an additional provision or advisory comment—documenting the presumption found in *Cedell*; (2) an additional provision to the Unfair Claims Settlement Practices Act (UCSPA) implementing the presumption for bad faith claims; or (3) an ABA formal opinion or additional comment to the Rules of Professional Conduct.

#### *A. Proposed Codified Federal Rule of Evidence*

First, a codified federal rule of evidence would likely have the greatest impact; almost all of the states mentioned in this Comment, and around the country, have their respective rules of evidence pertaining to attorney–client privilege modeled after the Federal Rules of Evidence. A leading treatise interpreted a proposed Federal Rule of Evidence—although never adopted—that was identical to Idaho's joint-client exception.<sup>156</sup> This treatise comments on the common interest relationship between the insured and insurers with respect to legal counsel on the insured's claim file.<sup>157</sup> Reviving and codifying the rejected Rule 503(d)(5) would cement the presumptions that deal with the vexing problems that come about when attorneys represent more than one client on a single issue.<sup>158</sup> The *Cedell* presumption of no attorney–client privilege with respect to the claim file would go into effect as a joint client relationship where the attorney investigating the claim is simultaneously representing the insurer and insured in their quasi-fiduciary relationship.

For example, the proposed Federal Rule of Evidence 503(d)(5) stated an explicit exception to attorney–client privilege:

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156. See WRIGHT & GRAHAM, *supra* note 100; IDAHO R. EVID. 502(d).

157. WRIGHT & GRAHAM, *supra* note 100.

158. *Id.*

(5) Joint clients. As to a communication relevant to a matter of common interest between 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 any of the clients.<sup>159</sup>

This proposed rule encourages each state to adopt an explicit joint-client exception. The proposed rule adequately lays out the nature of a bad faith insurance claim by highlighting that the insured and the insurer share a joint-client relationship under the theory of the quasi-fiduciary relationship. When a bad faith claim arises between the now joint clients, it would enable the insured to access their claim file which includes the communications, documents, and relevant facts created out of the common interests between the two.

#### *B. Proposed Provisions to UCSPA*

Alternatively, an additional provision to the UCSPA would likely encourage application of the presumption to a majority of insurance companies and create an industry wide standard. Because the UCSPA is adopted in some form and extent in almost every state, insurance companies would be uniformly advised and aware of the presumption of no attorney–client privilege with respect to the insured’s claim file and courts would then be able to rely on the industry-wide standard.<sup>160</sup> For example, a potential provision to the UCSPA could state: *An insurer that engages in any unfair claims practices, as defined in Section 4,<sup>161</sup> is denied the protection of attorney–client privilege with respect to the particular claim file of the insured who asserts such violation, unless the insurer can prove certain communications made, and notes within the claim file were made in obtaining legal advice in preparation for a potential defense, in which case a court may determine the specific portions to be redacted under a legitimate attorney–client privilege.*

Further clarification may be needed, as has been done in some of the cases cited above, as to the timing of the files; if the communications were made in an investigative capacity prior to or at the final determination of denial or other decision in bad faith, such communications are deemed as part of the investigative capacity and thus, are discoverable.

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159. 56 FED. R. EVID. 183, Proposed FED. R. EVID 503(d)(5) (not enacted).

160. UNITED POLICYHOLDERS, ADVOCACY & ACTION PROGRAM, 50 STATE SURVEY OF BAD FAITH LAWS AND REMEDIES (Oct. 23, 2014), <https://www.uphelp.org/sites/default/files/publications/Final%20-%20Bad%20Faith%20Survey.pdf> [https://perma.cc/7PJ4-B89Y].

161. UNFAIR CLAIMS SETTLEMENT PRACTICES ACT § 4 (NAT’L ASS’N OF INS. COMM’RS 1997), <https://content.naic.org/sites/default/files/inline-files/MDL-900.pdf> [https://perma.cc/TSH6-JX99].

*C. Proposed Provision to Rules of Professional Conduct*

Lastly, an additional provision to the Rules of Professional Conduct (RPC) would gain recognition by courts but also would be open to interpretation and application at the state level. By introducing this presumption into RPC 1.6 (confidentiality), either by laying out a specific provision for bad faith claims or by introducing the topic into a comment to the RPC, it would allow courts to rely on a recommended standard and allow courts to better uniformly apply the presumption—or encourage those who do not already.<sup>162</sup> In any event, perhaps a comment to the RPCs would affect the vast application of privileges in insurance bad faith actions. This proposed addition would impose a national recommendation to a national area of business. Because all fifty states have a similar confidentiality rules to those of the American Bar Associations,<sup>163</sup> imposing a presumption in this manner would similarly have a national effect, not only on the future case law but also on the attorneys placed in this quasi-fiduciary relationship themselves.

Insurance companies are large corporations, often operating across various jurisdictions and, unfortunately, are currently without a uniform rule on privileges between themselves and their insureds. As discussed in this Comment, insureds are at a severe disadvantage in cases of bad faith claims due to the control of claim files by the insurance company, claim files which are essential to presenting a claim of bad faith. Washington's presumption encourages insurance companies to implement practices that protect both the insurer's interest—having the legal counsel specifically designate their duties between investigative and representative—and the insured's interest—allowing the insured access to the very evidence of bad faith.<sup>164</sup> The importance in incorporating this presumption across every state is paramount. If the different applications across jurisdictions continue, the legal industry will continue to be stuck without guidance in an area of the utmost importance, an area in which individuals depend on in times of need, but yet, are often left wrongfully denied coverage with no way of discovering the very documents to make their case.

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162. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2018)

163. *See supra* notes 2–3.

164. *See Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239 (Wash. 2013).