SANDBERG PHOENIX

BAD FAITH BLOG

Washington Insurer Gets to Depose Opposing Insurer's Coverage Counsel

AUTHOR: SANDBERG PHOENIX

Summary: A Washington homeowners association filed suit against Derus Wakefield II, LLC for property damage at a condominium project. Derus tendered the suit to the association's insurer, QBE, which denied the tender for defense at which point Everest agreed to defend under a reservation of rights. It then sued QBE arguing it had a duty to defend under Washington law. The matter was removed to federal court where the district court judge found the action was timely and further found that Everest could depose QBE's coverage attorney in light of the bad faith claims.

Everest sued QBE for common law bad faith, negligence, and violations of Washington's Insurance Fair Conduct Act ("IFCA"). QBE had moved for summary judgment on grounds that the claims were barred by the Washington tort statute of limitations. After finding that the cause of action for third party bad faith accrues on the date that the judgment is entered in the underlying suit, the court found that the bad faith, negligence, and IFCA violation claims were timely.

The Court then examined whether Everest was entitled to take the deposition of QBE's coverage attorney. QBE had filed a motion for protective order contending the testimony of its coverage attorney was protected by the attorney-client privilege and the attorney work product doctrine, whereas, Everest moved to compel the deposition testimony. QBE contended the testimony was privileged because the attorney "acted solely as legal counsel when she provided a legal opinion." On the other hand, Everest contended the testimony was relevant on the issue of whether QBE acted reasonably in denying the tender if, as Everest believed, QBE "in fact relied entirely upon [its attorney's] investigation and opinion to deny coverage." The Court found that QBE's attorney's testimony would be relevant and then turned to the issue of whether the assertion of the attorney-client privilege was appropriate. The Court noted that Everest contended that the attorney-client privilege had been waived when QBE "delegated its quasi-fiduciary obligation to investigate, analyze, and respond to Derus' tender to [its attorney]. Everest contends the Washington Supreme Court's decision in *Cedell v. Farmers Insurance Company of Washington*, 176 Wash.2d 686, 295 P.3d 239 (2013) is controlling authority on this issue."

In *Cedell* the court determined "that when an insured brings a first party bad faith claim against its insurer, attorney-client privilege and work product protection are presumptively not relevant to claims adjustment communications." However, *Cedell* also stated the insurance company could overcome that presumption by: (1) showing its attorney was not engaged "in the quasi-fiduciary task of investigating and evaluating or processing the claim;" (2) submitting to "an in camera review of the claims file, and to the redaction of communications from counsel that reflected the mental impressions of the attorney;" and (3) if privilege protection was warranted the court had to evaluate whether the insured had any claims that would "pierce the attorney-client privilege." *Cedell* distinguished between "attorney communications made while acting in a quasi-fiduciary capacity from those made by an attorney solely providing an opinion to the insurer with respect to whether it may be liable under the terms of the policy." If the insurance company could demonstrate that the attorney was not involved in investigating, evaluating, or processing the claims, it could overcome the presumption by showing that the attorney simply provided a legal opinion whether the insurance company was liable regarding a certain claim. The *Cedell* court had not been "content to allow the insurer to merely assert claims of privilege."

QBE asserted that its coverage attorney's "role was limited to reading the policy and providing an opinion", whereas, Everest alleged that QBE "failed to do any investigation on its own." Recognizing that an insurer in Washington "acts in bad faith if its breach of the duty to defend was unreasonable, frivolous, or unfounded," the Court gave credence to Everest's argument that QBE's coverage attorney was "the only person able to testify on how Derus' claim was handled." If Everest's assertions and beliefs were true, QBE's "delegation of all investigative and claims handling responsibilities to [its coverage attorney] would have the effect of shielding relevant bad faith evidence from discovery…." QBE had failed to provide documents for an in camera inspection which would show that its coverage attorney "was not acting in a quasi-fiduciary capacity." Because the coverage attorney's testimony would be relevant regarding whether QBE had acted reasonably in denying the tender, the Court found that Everest was entitled to take the attorney's deposition.

If Everest asked questions which QBE believed in good faith "seeks to elicit privileged information, it may make the proper objection. In the event that Everest believes, in good faith, that the objection is without merit, the parties may then bring that issue before the Court." The Court denied QBE's Motion for Protective Order and granted Everest's Motion to Compel. In addition, the Court required QBE and its attorneys to "pay the movant's reasonable expenses in making the motion, including attorney's fees" as required by Federal Rule 37(a)(5). The Court declined to award any further sanctions finding that the award it was making "should be sufficient to deter any future discovery abuse."

The *Cedell* opinion, as predicted, is having a major impact on the state and federal courts sitting in the State of Washington. Only time will tell whether, and the extent to which, its holding spreads beyond Washington.

By Anthony L. Martin

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