WILLIAMS KASTNER™

NORTHWEST INSURANCE LAW

QUARTERLY NEWSLETTER FALL 2017

Williams Kastner has been serving clients in the Pacific Northwest since our Seattle office opened in 1929. With more than 60 attorneys in offices in Washington, Oregon and Alaska and affiliated offices in Shanghai, Beijing, Hong Kong, Kunming and Shenzhen we offer global capabilities and vision with a local sensibility. We are attorneys, paralegals, litigation assistants and support staff dedicated to advancing the business and personal objectives of our clients. We are focused on building bridges—combining wisdom and creativity—both in and out of the courtroom and boardroom.

TABLE OF CONTENTS

2 WASHINGTON FEDERAL JUDGE FINDS INSURER OWES NO COVERAGE IN EXPLODING E-CIGARETTE LAWSUIT
by Naazaneen Hodjat

4 WASHINGTON COURT OF APPEALS REFUSES TO ALLOW PRODUCTION OF POST-LITIGATION COMMUNICATION BETWEEN INSURER AND COVERAGE COUNSEL IN DEFENSE OF UIM CLAIM
by Eliot M. Harris

6 WASHINGTON FEDERAL COURT LIMITS TENANTS' STATUS IN DETERMINING WHETHER LOSS WAS SUBJECT TO POLICY EXCLUSION
by Reshvin Sidhu

WASHINGTON FEDERAL JUDGE FINDS INSURER OWES NO COVERAGE IN EXPLODING E-CIGARETTE LAWSUIT

by Naazaneen Hodjat

On September 14, 2017, Judge Stanley A. Bastian of the United States District Court for the Eastern District of Washington held that an insurer owed no duty to defend an insured for bodily injuries arising from the sale of an e-cigarette that allegedly exploded. Specifically, the Court found that the insurer owed no coverage for the insured's products, including those sustained as a result of third party warnings (or lack thereof), under the policy's products-completed operations hazard exclusion.

In the underlying lawsuit, Marlene Rubertt ("Claimant") brought an action against Lilac City Vapor ("Insured") after an e-cigarette product that she had purchased from the Insured suddenly exploded in her face. In the complaint, the Claimant alleged that the Insured violated Washington's Product Liability Act because the e-cigarette was defective, not reasonably safe in its design, and failed to provide adequate warning and instruction. The Claimant also alleged that the Insured was negligent and breached its duty to use reasonable care in providing information and warning to customers who purchased the product. The Claimant allegedly suffered severe bodily injuries to her mouth and face, and burns to her neck, chest, face, and mouth as a result of the explosion.

The Insured subsequently tendered defense of the underlying lawsuit to Atlantic Casualty Insurance Company ("Insurer"), which agreed to defend the Insured subject to a reservation of rights. The Insurer also initiated a declaratory judgment action against the Insured for a finding of no coverage under the applicable policy. Shortly after filing the coverage action, the Insurer moved for summary judgment.

In *Atlantic Casualty Insurance Company v. Bellinger*, 2017 WL 3996408, the Court held that the Insurer was not obligated to defend or indemnify the Insured because the products-completed operations hazard exclusion barred coverage. While the broad grant of coverage provided under the policy may have initially provided coverage, the Insurer claimed that an exclusion set forth in an endorsement to the policy limited or removed that broad grant of coverage. The Insurer contended that because the Claimant's alleged injuries arose from an e-cigarette product purchased at the Insured's business, and because the injury occurred away from the Insured's premises, coverage was barred by the products-completed operations hazard exclusion. Under the products-completed hazard exclusion, the insurance policy "does not apply to 'bodily injury' or 'property damage' included within the policy's 'products-completed operations hazard.'" The products-completed operations hazard includes all bodily injury that occurs away from premises the Insured owns or rents and arise out of the Insured's product. The Insured's "product" is defined as all goods and products sold or distributed by the Insured. Further, it "explicitly includes warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of [Insured's] product; and (2) The providing of or failure to provide warnings or instructions."

In response, the Insured argued that the term "your product" did not include warranties, representations, warnings, or lack thereof, made by third parties. The Court, however, found this argument unpersuasive and held that the policy unequivocally "exclude[d] coverage for bodily injuries arising from products manufactured, sold, handled, distributed or disposed of by the insured, including those sustained as a result of any warranties, representations, and warnings that were made or not." Therefore, the Court granted the Insurer's motion for summary judgment and held that the Insurer had no duty to defend against the underlying lawsuit.

This holding is significant because it is the first known decision in Washington on liability coverage for exploding e-cigarettes. It is also believed to be one of the first such decisions in the country. Given the increased use of e-cigarettes over the past few years, this decision sets an important precedent for similar cases against retail sellers of e-cigarettes that will likely arise in the future.

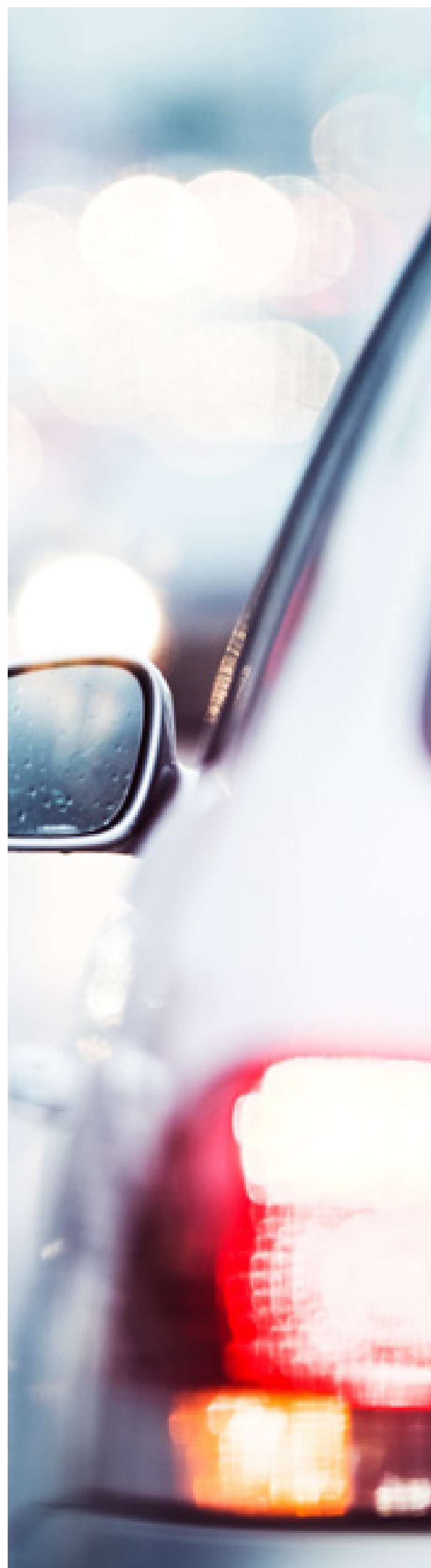
WASHINGTON COURT OF APPEALS REFUSES TO ALLOW PRODUCTION OF POST-LITIGATION COMMUNICATION BETWEEN INSURER AND COVERAGE COUNSEL IN DEFENSE OF UIM CLAIM

by Eliot Harris

Ever since the Washington Supreme Court rendered its decision in *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013), state and federal courts in Washington have grappled with the fallout. One of key questions is when, and to what extent, policyholders are entitled to discovery of communications between insurers and their coverage counsel. This was the backdrop for the most recent decision in Washington on this issue, as found in *Richardson v. Gov't Employees Ins. Co.*, 2017 Wash. App. LEXIS 2310 (Wash. App. Ct., Oct. 3, 2017).

In order to appreciate the *Richardson* decision, a basic understanding of the so-called *Cedell* rule is needed. In *Cedell*, the Washington Supreme Court announced that in first-party insurance cases where bad faith is alleged, Washington Courts should presume that communications between the insurer and its coverage attorney are discoverable. The insurer may overcome this presumption by showing that its attorney was not engaged in "quasi-fiduciary tasks" such as investigating, evaluating, or processing a claim. When coverage counsel is instead counseling the insurer-client about its potential liability, and the attorney's mental impressions are not at issue, the insurer's communications with the attorney remain protected.

While certain federal courts have treated *Cedell*-related issues differently depending on the type of claim involved, no Washington state appellate court has weighed in on this issue. In *Richardson*, Division II of the Washington Court of Appeals found that the type of claim had a significant impact on the applicability of *Cedell* to attorney-client communications. In *Richardson*, the insured had an auto policy with the insurer that provided personal injury protection (PIP) coverage and underinsured motorist (UIM) coverage. After an accident, the insured settled with the at-fault driver for their policy limits and tendered a PIP claim to the insurer. The insurer provided some PIP coverage, but stopped paying for future medical care. After the insured demanded PIP arbitration, the insurer retained coverage counsel. At the arbitration, the insured was awarded her PIP policy limit of $35,000. The following year, she filed a UIM claim,



which was denied under the basis that the underlying settlement with the at-fault driver and her PIP policy limits fully compensated the insured for her injuries. On August 19, 2013, *Richardson* filed suit against the insurer and alleged, among other claims, bad faith relating to the handling of the PIP and UIM claims.

A discovery dispute arose regarding production of the insurer's claim file. The trial court conducted an in camera review of the disputed documents and ordered the disclosure of all documents with no redactions relying on *Cedell*. After production of the documents, the insured deposed the 30(b)(6) corporate representative of the insurer. During the deposition, the insurer's attorney instructed the witness to not answer certain questions regarding post-litigation conduct, i.e. conduct after suit was filed on August 19, 2013. The insured moved to compel answers to questions regarding post-litigation conduct. She also moved to compel a deposition of the coverage attorney that assisted the insurer with the PIP arbitration, and for a copy of her "litigation file," which meant documents, communications, and other information generated by the insurer's attorney after the lawsuit was filed. After the trial court granted the motion to compel, the insurer filed for discretionary review, which was granted.

On Appeal, the *Richardson* Court found that the *Cedell*-rule did not apply to UIM claims, which are treated differently than other claims because "UIM carriers stand in the shoes of the underinsured motorist/tortfeasor to the extent of the carrier's policy limits...and [are] entitled to pursue all the defenses against the UIM claimant that could have been asserted by the tortfeasor." Thus, there is no presumption the insurer waives the attorney-client privilege in a UIM case, and the insured must overcome a higher bar (than set forth in *Cedell*) in order to discover privileged pre-litigation information.

The Court went on to discuss how *Cedell* applied to the insured's claim file, pre-litigation documents and information, and applied to discovery involving why the insurer denied coverage at the time it made such a determination. However, the *Richardson* Court found that case distinguishable from *Cedell*, the issue is whether or not the insurer must produce its litigation file, which it generated after the lawsuit was filed. The Court found "*Cedell* does not suggest that privileged or work product information generated post-litigation is also subject to discovery."

The Court went on to find that the insured should not be allowed access to privileged information between the insurer and its attorney after the insurer denied the UIM claim and after the insured filed suit. The Court found that the litigation file of the insurer's attorney is irrelevant to the UIM claim, which was denied on the basis that the insured had been fully compensated by settlement with the tortfeasor and payment of her PIP policy limits, because the decision to deny the UIM claim forms the basis of the bad faith allegation. All information relating to the denial of the UIM claim would, therefore, be available in the UIM claim file which was produced.

Finally, the Court announced an agreement with federal courts which have held that evidence of an insurer's litigation conduct is rarely admissible because it lacks probative value and has a high risk of prejudice. The Court agreed with the public policy concerns that allowing litigation conduct to serve as evidence of bad faith would undermine an insurer's right to contest questionable claims and to defend itself against such claims, and it would place insurer's counsel in an untenable position if legitimate litigation conduct could be used as evidence of bad faith.

This is a significant decision in Washington because the *Richardson* Court appears to set a bright-line rule that post-litigation communications between an insurer and its attorneys is not discoverable, even under *Cedell*. While it remains to be seen if this decision will be adopted outside of UIM claims, it likely serves as a useful tool to limit aggressive discovery practices targeted at obtaining otherwise privileged and protected documents in bad faith litigation. It will also be interesting to see if the Washington Supreme Court decides to hear this case given that it has been four years since it rendered the *Cedell* decision.

WASHINGTON FEDERAL COURT LIMITS TENANTS' STATUS IN DETERMINING WHETHER LOSS WAS SUBJECT TO POLICY EXCLUSION

by Reshvin Sidhu

In a recent decision handed down by a Federal Court in Western Washington, the Court found that an insurance company could not meet its burden of establishing that an exclusion applied to a homeowner when her home was vandalized by people, whose status as tenants was in dispute, at the time of the loss.

In *Williams v. Foremost Ins. Co. Grand Rapids Mich.*, 2017 U.S. Dist. LEXIS 163614, the Plaintiff/Insured, Tabitha Williams, purchased a home as well as a homeowner's insurance policy from Farmers Insurance to cover the home. Before buying the home, Ms. Williams was aware the home was "occupied" but did not know if the occupants were squatters, illegally occupying the home, or actual tenants. At some point after purchasing the home, Ms. Williams visited the home and learned the occupants were, in fact, not paying rent. As a result, Ms. Williams hired an attorney to begin eviction proceedings because the occupants could not provide proof they had a rental agreement or had paid rent. During the eviction proceedings, the tenants stated in a declaration that they were legal tenants of the previous owner, though the tenants could not provide the Court with evidence that they had a rental agreement with Ms. Williams or paid rent to her.

The occupants stipulated to vacate the house, but after they vacated, Ms. Williams found that someone had left the upstairs bath faucet running and clogged the drain, which caused water to flood the entire home. Additionally, someone damaged the HVAC system by dumping cat litter and sawdust into the vents. Ms. Williams notified her insurer that day, making a claim of vandalism.

In response, the insurer took the position that there was no coverage because vandalism by a tenant was an exclusion in her policy. The policy covers "[v]andalism or malicious mischief, meaning the intentional and willful damage or destruction of property by anyone other than the owner of the property," but explicitly excludes "[a]ny loss caused by, resulting from, contributed to or aggravated by intentional acts of any tenant or any roomers and boarders of your premises."

Ms. Williams filed suit against the insurer and moved for summary judgment for a determination that she was in fact covered for the vandalism damage and that her insurer had breached the policy by denying coverage. Mainly, Ms. Williams argued that her insurer was unable to meet its burden of establishing that an

exclusion applied because there was no evidence that the people who vandalized the home were her tenants at the time of the loss.

The insurer argued that although the claim involved vandalism, the occupants were tenants. First, the insurer argued that the occupants were legally living at the home as tenants because they had a tenancy agreement with the former owner, and under Washington law, they were allowed to legally occupy the home after transfer of ownership. Second, the insurer cited to a Washington State Statute defining tenant as "any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement." Third, the insurer argued that Washington law does not require that occupants have a written or documented rental agreement in order to be considered tenants. Fourth, the insurer argued that the occupants who refused to leave were legally entitled to not less than 60 days to vacate the premises under Washington law; thus, the occupants were continuing their prior tenancy during the 60-day period when Ms. Williams alleged the vandalism occurred. Lastly, the insurer argued that to the extent the occupants were not legal tenants, their ongoing negotiations with Ms. Williams in allowing them to stay at the property until they were ordered to leave, through the stipulation, gave them the status of tenants, roomers, or boarders.

Ms. Williams argued that, even if the court were to take all of her insurer's cited facts as true, if the occupants were tenants of the previous owner, they were only tenants up until the time she purchased the home. Thus, they were not her tenants at the time of the vandalism. She further argued that the average person would not interpret a policy's use of the term "tenant" to include tenants of previous owners, instead. Lastly, she argued that "tenant" was ambiguous because it could be interpreted as only referring to the tenant of the insured. The Court agreed with Ms. Williams and found coverage for the claim.

The Court found that "tenant" could be ambiguous under the circumstances and rejected the insurer's cited definition of "tenant" since there was no evidence that the occupants of Ms. Williams' home were "entitled" to occupy the premises under any rental agreement at the time the vandalism occurred as opposed to having a legal right not to be immediately be evicted. The Court further held that that being a defendant in an eviction proceeding doesn't automatically confer upon a person the status of tenant. The Court noted that Ms. Williams did not enter into a rental agreement with the occupants, and that they never became her tenants. Fourth, the stipulation in allowing the occupants to stay until the date they were ordered to leave may have been an agreement, but the Court noted that in no way did that agreement become a rental agreement.

The Court's ruling is notable because it limited the definition of "tenant" in situations involving subsequent owners of real estate and previous tenancies in determining whether certain policy exclusions apply. Thus, potential purchasers of real estate should beware of existing tenancies and how that may affect their ability to be covered in the event of a loss.

WILLIAMS KASTNER

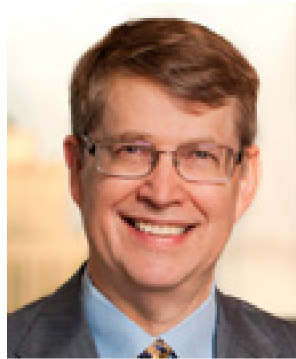
INSURANCE TEAM

For over eighty years Williams Kastner attorneys have represented clients in the insurance industry, including primary and excess insurers, reinsurers, self-insurers, agents, brokers, and insurance pools. Our attorneys have advised clients on regulatory and claim handling issues, and have assisted insurers in countless claims from the claim investigation through trial on cases involving coverage and bad faith claims. Please feel free to contact us if you have any questions regarding insurance law in Washington, Oregon or Alaska.

ELIOT HARRIS

OFFICE
(206) 233-2977

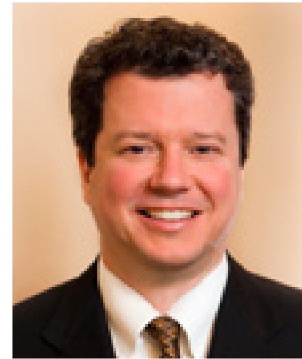
EMAIL
eharris@williamskastner.com



JERRY EDMONDS

OFFICE
(206) 628-6639

EMAIL
jedmonds@williamskastner.com



THOMAS PED

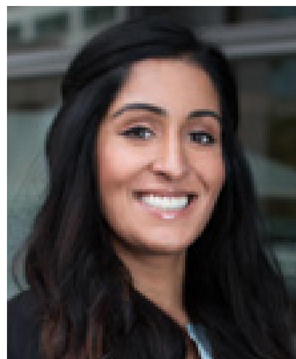
OFFICE
(503) 944-6988

EMAIL
tped@williamskastner.com

MEREDITH DISHAW

OFFICE
(206) 628-6658

EMAIL
mdishaw@williamskastner.com



RESHVIN SIDHU

OFFICE
(206) 233-2877

EMAIL
rsidhu@williamskastner.com

NAAZANEEN HODJAT

OFFICE
(206) 628-5988

EMAIL
nhodjat@williamskastner.com