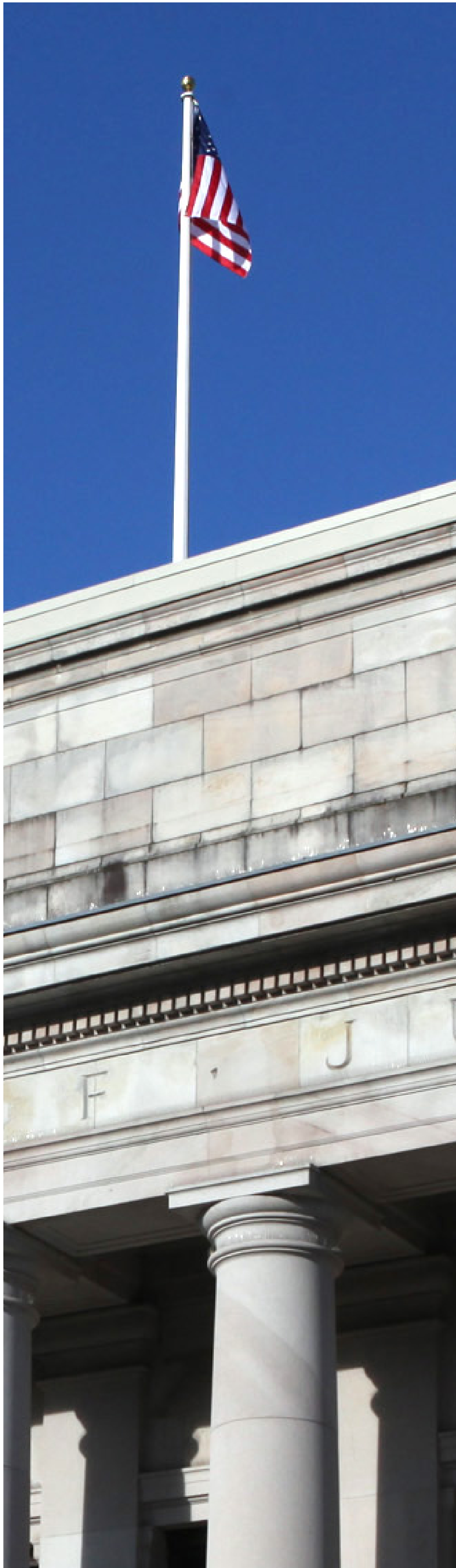


WASHINGTON FEDERAL COURT CLARIFIES DISCOVERY OF ATTORNEY-CLIENT COMMUNICATIONS BETWEEN INSURERS AND COVERAGE COUNSEL UNDER CEDELL

by Eliot M. Harris

Very few developments in Washington insurance law have received more attention over the past five years than the Washington Supreme Court's ruling in *Cedell v. Farmers Ins. Co.*, 176 Wn.2d. 686, 295 P.2d 239 (2013). On February 25, 2016, Judge Ronald B. Leighton in the Federal District Court for the Western District of Washington entered an order in *Linder v. Great Northern Ins. Co.*, 2016 U.S. Dist. LEXIS 23289, in which the Court granted in part and denied in part a motion for protective order filed by an insurer regarding certain documents and communications between lawyers for the insurer and their client under *Cedell*.

The *Linder* case involved a claim for water loss at the insured's home in Kalama, Washington. Before production of certain correspondence between the lawyers and the insurer, counsel for the insurer redacted and withheld five categories of documents that it claimed were protected from discovery. The Court conducted an *in camera* review of the documents to determine if any of the documents were properly withheld as attorney client-privilege and/or work product. The Court stated the general principle announced in *Cedell* that Washington Court presume that communications between insurer and its attorney are discoverable, but the insurer may overcome this presumption by showing that its attorney is not engaged "quasi-fiduciary tasks" such as investigating, evaluating, or processing a claim. When the insurer is instead counseling the client about its potential liability, and the attorney's mental impressions are not at issue, the insurer's communications with the attorney are protected. Under *Cedell,* the policy holder may overcome the privilege if it makes a showing that "a reasonable person would have a reasonable belief that an act of bad faith tantamount to civil fraud has occurred."

In the *Linder* case, the Court held that the communications between the attorneys at one of the four law firms that communicated with the insurer must be produced under *Cedell* because they were performing "quasi-fiduciary tasks." However, communications between the other three law firms and the insurer need not be produced because they were not performing such tasks and there was no showing that the civil fraud exception applied. The Court also found that certain legal invoices and billing statements that contained privileged descriptions of its legal work revealed the motive of the client, litigation strategy, and/or the specific nature of the services provided such as researching particular areas of law. The Court found that these documents were protected under the attorney-client privilege citing to *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127, 109 (9th Cir.) (1992).

While the Court in *Linder* did not announce a new development in the law following *Cedell*, it is important for insurers operating in Washington to recognize how Washington Courts are interpreting and applying *Cedell* in various contexts.

WASHINGTON SUPREME COURT FINDS THAT UIM POLICY COVERS INJURIES CAUSED BY DRIVE-BY SHOOTING CONSTITUTE "ACCIDENT ARISING OUT OF OWNERSHIP, USE OR OPERATION OF A MOTOR VEHICLE"

by Eliot M. Harris

On January 14, 2016, the Washington State Supreme Court rendered an important decision on when an injury "arises out of" the use of a vehicle for the purpose of uninsured motorist ("UIM") coverage.

In *Kroeber v. GEICO Insurance Co.*, a woman was shot outside a bar by the driver of an uninsured vehicle, and sought UIM coverage from her automobile insurer. The woman's insurer, GEICO, provided coverage for damages that the insured was legally entitled to recover from the owner or operator of an uninsured motor vehicle due to bodily injury sustained and caused by an accident, provided that the liability of the owner or operator of an uninsured motor vehicle arises out of the ownership, maintenance or use of the uninsured motor vehicle. GEICO denied the claim because the woman's injuries did not "arise out of" the use of the uninsured motorist's truck, and she sued for coverage.

Prior Washington courts had found that the phrase "arising out of" in a UIM policy does not mean proximate cause, but indicates a lesser standard of causation having some relationship to or connection with the use, maintenance or ownership of the uninsured vehicle. The *Kroeber* court concluded that existing case law did not establish that the vehicle or an attachment to it need be the direct cause of the injury, but that the injury must have a causal relationship to the condition of the vehicle, a permanent attachment thereto, or some aspect of its operation. Thus, the court found, the phrase "arising out of" should be broadly construed to mean a mere causal connection between the injury and the use of the vehicle. The court distinguished situations where the vehicle serves as the "mere situs" of the accident, and noted that the distinction and determination for when the use of a vehicle causes the injury versus when it is the mere situs of the injury is a factual determination to be made by the trial court.

Kroeber is significant because it opens the potential for UIM coverage for injuries that are not directly caused by the vehicle, but are the independent actions of the operator of the vehicle at the time of the incident.

WASHINGTON FEDERAL COURT OPENS DOOR FOR OTHERWISE TIME-BARRED BAD FAITH CLAIM UNDER WASHINGTON'S CONSUMER PROTECTION ACT

by Eliot M. Harris

On February 23, 2016, Judge Stanley A. Bastian for the United States District Court for the Eastern District of Washington rendered a potentially important decision on how insurance bad faith claims that may otherwise be time barred by the three-year statute of limitations may survive under Washington's four-year statute of limitations for Consumer Protection Act (CPA) claims.

In *Taylor v. Allstate Ins. Group and Allstate Prop. and Cas. Ins. Co.*, 2016 U.S. Dist. LEXIS 22065, the Court had previously granted the insurers' motion for summary judgment dismissing the policyholder's contractual-based claims because the lawsuit was not filed until after the one-year suit limitation provision in the insurance contract. On the insurer's subsequent motion for dismissal of the remaining extra-contractual claims, the Court granted the insurer's motion for summary judgment regarding the insurer's claims under the Insurance Fair Conduct Act (IFCA) and insurance bad faith, both of which have three-year statute of limitations. Citing to *Moratti ex rel. Tarutis v. Famers Ins. Co. of Wash.*, 162 Wn. App. 495, 502 (2011), the Court found that the insured submitted no evidence of conduct that violated IFCA or constituted insurance bad faith that occurred within three years prior to the filing of the lawsuit.

However, the Court found that the insured had submitted evidence pertinent to possible CPA violations within the four-year statute of limitations. The Court also found that because a bad faith claim could be predicated on a CPA claim under *Salois v. Mut. of Omaha Ins. Co.*, 90 Wn.2d. 355, 359 (1978), the insured may be able to pursue the insurance bad faith claim despite the fact that it would be otherwise barred by the three-year statute of limitations.

The Court stopped short of ruling that the bad faith claims in that case could survive while finding that "ruling on the merits of those issues is beyond the scope of this order." However, this is a significant ruling as it could allow policyholders to boot-strap bad faith claims that would otherwise be barred by the three-year statute of limitations to CPA claims that may survive a statute of limitations defense.

IN A QUESTION OF FIRST IMPRESSION, ALASKA SUPREME COURT FINDS THAT INSURERS CANNOT SEEK REIMBURSEMENT OF DEFENSE COSTS EVEN WHEN POLICY ALLOWS IT AND INSURER RESERVED RIGHTS TO LATER SEEK REIMBURSEMENT

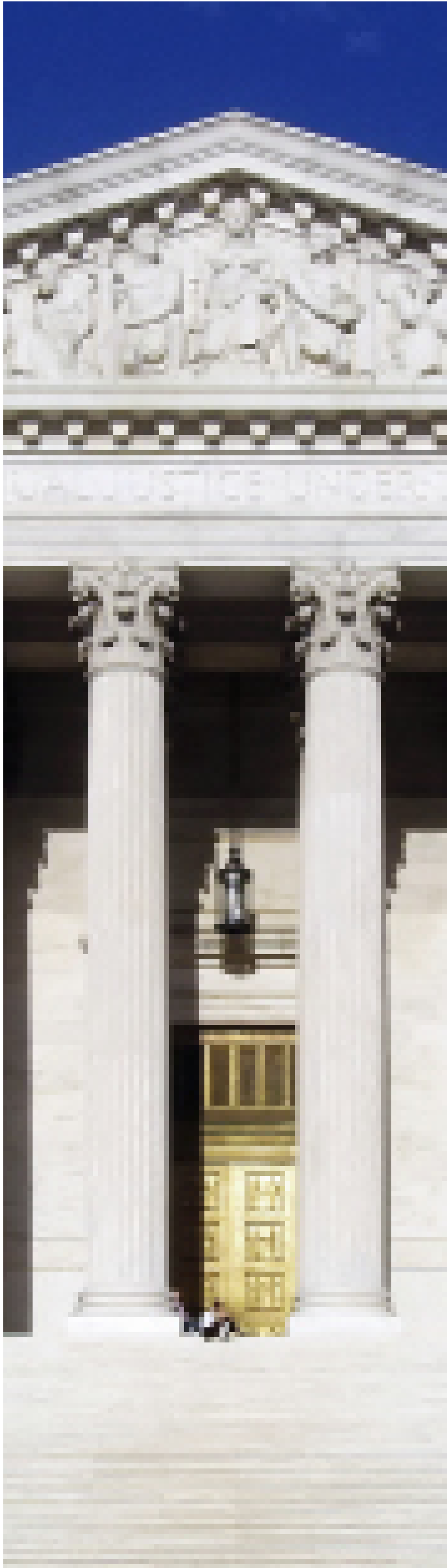
by Eliot M. Harris

On March 25, 2016, the Alaska Supreme Court weighed in on whether insurers can seek reimbursement of defense costs from its insureds. On certified questions posed by the Ninth Circuit, the Court found that state law prohibits the enforcement of an insurance policy that requires an insured to reimburse its insurer for defense costs if coverage is later denied or if it is later determined that there is no coverage for the claim. The court specifically stated that "[e]ven if coverage is ultimately denied, and even if it were later determined that there was no possibility of coverage, that denial has no retroactive effect on the duty to defend."

The case arises out of a dispute between a law firm and its insurance provider over fees stemming from the firm's involvement in civil and criminal litigation related to alleged possession and transportation of illegal rocket launchers by its former client. It was alleged that the law firm had unlawfully conveyed funds from a trust account to its client's executive, who was being investigated for criminal charges. The insurer agreed to defend the law firm under a reservation of rights, and sought declaratory judgment that it had no obligation to defend the law firm based on the policy's exclusion for misappropriation of trust account funds. The insurer argued that the law firm had agreed to a policy that allows reimbursement, and reiterated the possibility that it would seek reimbursement in its reservation of rights letter. Recognizing this case as one of first impression in Alaska, the Court found that Alaska law precludes insurers from obtaining a reimbursement of fees assumed under a reservation of rights.

Under Alaska law, an insured has a right to demand an unconditional defense when an insurer seeks to defend under a reservation of rights. *Continental Insurance Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281 (Alaska 1980). Upon such a demand by the insured, the insurer has three options: (1) affirm the policy and defend unconditionally; (2) repudiate the policy and withdraw from the defense; or (3) offer its insured the right to retain independent counsel to conduct his [or her] defense, and agree to pay all the necessary costs of that defense. Alaska later enacted a statute, AS 21.96.100, which provided certain requirements regarding independent counsel for an insured; however, the statute was silent on whether an insurer could seek reimbursement of attorney's fees. Interpreting the statute, the Alaska Supreme Court held that "the determinative event giving rise to the insurer's duty to pay independent counsel is not the often-difficult determination as to the possibility or impossibility of coverage, but the objective act of the insurer taken when reserving its position as to coverage." The Court rejected the insurer's argument that an insurer can "fulfill its statutory obligations by paying fees and costs, while explicitly reserving the right to recoup money for those payments should the claims turn out to be uncovered claims under the policy."

This decision is significant for any insurer operating in Alaska as it is now clear that an insurer will not be able to seek reimbursement of defense costs when defending an insured in Alaska under a reservation of rights. This decision increases the importance of an insurer's decision at the outset of the claim in whether to defend under a reservation of rights and incur defense costs or deny the claim and seek declaratory judgment on its rights and obligations under the policy.



IT'S MORE OF A GUIDELINE THAN A CODE: WASHINGTON FEDERAL COURT DISMISSES BAD FAITH CLAIMS AGAINST INSURER THAT ENFORCED ITS LITIGATION MANAGEMENT GUIDELINES AGAINST DEFENSE COUNSEL

by Eliot M. Harris

On March 26, 2016, Judge Barbara J. Rothstein for the United States District Court for the Western District of Washington entered summary judgment for an insurer on the insured's claims of bad faith and violation of Washington's Insurance Fair Conduct Act (IFCA) and Consumer Protection Act (CPA). In *Evanston Ins. Co. v. Clartre, Inc.*, 2016 U.S. DIST. LEXIS 37248, Evanston agreed to provide a defense to the insured under a reservation of rights and agreed to allow defense counsel chosen by the insured to continue to represent the insured in the underlying lawsuit. However, Evanston insisted that the insured's defense counsel agree to comply with Evanston's litigation management guidelines. The insured agreed to follow these guidelines.

However, the insured subsequently filed counterclaims against Evanston for bad faith and violation of IFCA and the CPA when Evanston insisted on compliance with the guidelines and rejected certain defense costs that did not comply with the guidelines. Significantly, the insured never raised an issue as to the reasonableness of the guidelines, but instead argued that Evanston had unreasonably denied reimbursement of certain defense costs pursuant to the guidelines. The Court noted that Evanston had paid over $1.4 million in defense costs for the underlying case and had refused to pay less than $50,000 of the total billed defense costs.

The Court rejected these claims in that since there were no contentions that the guidelines were unreasonable, and facts showed that Evanston reasonably applied its guidelines, there was no evidence to support any of the insureds' extra contractual claims against Evanston. Specifically, the court found that Evanston's deductions for excess time spent on tasks, duplication of efforts by partners and associates, and determining whether research on specific topics in excess of a certain amount time were reasonable. The court also noted that Evanston's refusal to pay certain defense costs absent additional information were reasonable and that once additional information was provided by the insured, Evanston appropriately paid for such defense costs. The court found that Evanston's willingness to provide additional reimbursement upon receipt of further evidence from the insured as to these defense costs further supported the reasonable application of the guidelines by Evanston. It also showed that Evanston was not "engaging in any action that which would demonstrate a greater concern for the insurers monetary interests than for the insureds financial risk."

This case is significant because it shows that an insurer may implement litigation management guidelines and honor its duty to act in good faith provided that the litigation guidelines are reasonable and that they are applied in a reasonable manner by the insurer for retained defense counsel for its insured.

Eliot M. Harris is of counsel in the Seattle office of Williams Kastner.

Eliot's practice focuses on commercial litigation with an emphasis on insurance coverage, including general liability coverage, trademark and intellectual property coverage, construction defect coverage, and professional liability coverage. He has successfully represented insurers in Washington, Oregon, California, and Arizona courts. He has tried multiple cases to verdict, including cases involving bad faith and punitive damages against insurers. Eliot also has experience defending lawsuits involving catastrophic personal injuries, environmental toxic tort, intellectual property and product liability.

ADMITTED TO BAR

Washington, Oregon

United States Court of Appeals
for the Ninth Circuit

United State District Court,
Western District of Washington

United State District Court,
Eastern District of Washington

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