

Washington Supreme Court Makes it Dangerous to Involve Lawyers in Claims Handling

March 04, 2013

March 4, 2013-- The Supreme Court of Washington, in a 5-4 decision, resolved two issues in ways that will limit insurers' right to invoke the attorney-client privilege "in the claims adjusting process." **First**, the court established a **presumption** that the privilege **does not protect** communications about claims from subsequent disclosure in a first-party bad faith suit. Under this ruling, the privilege could still apply where it did before--to communications in which the attorney provides "counsel as to [the insurer's] own potential liability." But insurers will now have to make an **affirmative showing** (sometimes by *in camera* review) that the lawyer was acting in this way, rather than functioning as a claims adjuster by investigating or processing the claim. **Second**, the court ruled that the "fraud exception" to the attorney-client privilege does **not** require a showing of "actual fraud": For purposes of the exception, a bad faith attempt to defeat a meritorious insurance claim is "tantamount to civil fraud." Consequently, even where an insurer has rebutted the new presumption and established that the privilege applies, its attorney-client communications **must be disclosed**, if "a reasonable person would have a reasonable belief" that "an act of bad faith . . . has occurred." The trial court will make this determination in an *in camera* review. In future bad faith cases, therefore, Washington courts will be making important determinations about the **merits of the underlying claim** whenever issues of privilege arise, and they will do so in a way that gives a significant advantage to insured plaintiffs.

Authored By



John C. Pitblado

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.