CARLTON FIELDS

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

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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 adjustor 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

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