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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MKB CONSTRUCTORS,

Plaintiff,

v.

AMERICAN ZURICH INSURANCE
COMPANY,

Defendant.

CASE NO. C13-0611JLR

ORDER

I. INTRODUCTION

Before the court is Plaintiffs MKB Constructor’s (“MKB”) third motion to compel the production of documents related to David Edsey and withheld by Defendant American Zurich Insurance Company (“Zurich”) on grounds of attorney-client privilege and/or the work product doctrine. (Mot. (Dkt. # 79).) The court has reviewed the motion, all submissions filed in support of the motion and in opposition thereto, the

1 balance of the record, and the applicable law. Being fully advised, the court GRANTS in
2 part and DENIES in part MKB's motion.

3 II. BACKGROUND

4 This case concerns an insurance coverage dispute involving a "Builders Risk"
5 policy. MKB contracted with the Lower Yukon School District ("LYSD") for a project,
6 which included "the procurement, delivery and placement of gravel fill" for a new
7 building pad and driveway upon which a school building would be built. (Am. Compl.
8 (Dkt. # 35) ¶ 6.) The project had a final completion date of September 15, 2012. (*See*
9 5/23/14 Videa Decl. (Dkt. # 62) Ex. F.) Defendant American Zurich Insurance Company
10 ("American Zurich") issued a "Builders Risk" policy to MKB for the period June 15,
11 2012, to October 31, 2012. (Am. Compl. ¶ 8.) Following a dispute concerning the
12 amount of gravel fill required for the project and an alleged earth movement or settlement
13 problem with the building pad, LYSD terminated its contract with MKB. (*Id.* ¶ 18.)
14 MKB notified American Zurich (*see id.* ¶¶ 16, 18), but American Zurich ultimately
15 denied MKB's claim (*id.* ¶ 20). This lawsuit ensued.

16 MKB initially sued American Zurich for breach of contract. (Compl. (Dkt # 1)
17 ¶ 20.) MKB subsequently amended its complaint to bring additional claims for violation
18 of Washington's Insurance Fair Conduct Act, RCW 48.30.015, breach of the duty of
19 good faith and fair dealing, and violation of Washington's Consumer Protection Act,
20 RCW 19.86. (*See generally* Am. Compl.) After MKB filed its amended complaint
21 alleging that Zurich had breached its duty of good faith and fair dealing (commonly
22 referred to as a "bad faith" claim), MKB asserted that Zurich could no longer withhold

1 | certain documents that were otherwise responsive to its discovery requests based on
2 | assertions of attorney-client privilege and the work product doctrine. (See 3/27/13 Mot.
3 | (Dkt. # 42).)

4 | Presently before the court is MKB's third motion seeking production of
5 | documents related to Zurich's communications with its legal counsel, David Edsey,
6 | which Zurich has withheld on grounds of attorney-client privilege and the work product
7 | doctrine. (See Mot.) MKB has based all three of its discovery motions on *Cedell v.*
8 | *Farmers Insurance Company of Washington*, 295 P.3d 239 (Wash. 2013), which is a
9 | recent Washington Supreme Court case that significantly altered application of both the
10 | privilege and the doctrine in the context of first-party bad faith insurance disputes in
11 | Washington State. (See generally 3/27/13 Mot.; 5/23/14 Mot. (Dkt. # 55); Mot.)

12 | On May 27, 2014, the court issued an order concerning MKB's first motion to
13 | compel that extensively addressed the applicability of the various substantive and
14 | procedural aspects of *Cedell* in federal district court. *MKB Constructors v. Am. Zurich*
15 | *Ins. Co.*, No. C13-0611JLR, 2014 WL 2526901, at *5-9 (W.D. Wash. May 27, 2014).
16 | The court also ordered Zurich to produce an amended privilege log, *id.* at *10-11, and
17 | struck MKB's second motion to compel because the issues it raised were overlapping
18 | with its first motion and subject to the court's rulings therein, *id.* at *11 n.13. The court,
19 | however, provided MKB with the opportunity to file a renewed motion to compel if
20 | disputed issues remained following Zurich's production of its amended privilege log. *Id.*

21 | MKB has now filed its renewed motion to compel. (See Mot.) Based on Zurich's
22 | amended privilege log and discovery conferences with opposing counsel, MKB has

1 narrowed its motion to documents on Zurich’s amended log that were authored before
2 Zurich’s March 26, 2013, letter denying MKB’s claim and reference communications
3 with Mr. Edsey. (See Mot. at 2.) Based on *Cedell*, MKB asserts two grounds for the
4 production of these documents related to Mr. Edsey despite Zurich’s assertion of the
5 attorney-client privilege. First, MKB argues that Zurich’s communications with Mr.
6 Edsey are discoverable under *Cedell* because Mr. Edsey participated in quasi-fiduciary
7 tasks such as investigating and processing MKB’s claim.¹ (See Mot. at 2, 5-6, 8-11;
8 Reply (Dkt. # 86) at 2, 5-6.) Second, MKB argues that Zurich’s communications with
9 Mr. Edsey are discoverable based on the civil fraud exception described in *Cedell*.²
10 (Mot. at 11-13.) The court sets forth the facts relevant to these arguments below.³

14 ¹ Under *Cedell*, there is a presumption that there is no attorney-client privilege between
15 an insured and the insurer in the claims adjusting process unless the insurer can show that the
16 attorney was not engaged in the quasi-fiduciary tasks, such as investigating or processing the
claim, but instead was providing the insurer counsel as to the insurer’s own liability. *Cedell*, 295
P.3d at 246.

17 ² In arguing that the attorney-client privilege should be pierced based on the civil fraud
18 exception found in *Cedell*, the parties essentially present the court with the evidence they have
19 amassed to date on both sides of the “bad faith” issue. (See generally Mot.; Resp. (Dkt. # 82).)
As a result, in order to sort out this discovery dispute under *Cedell*, the court is faced with
20 evaluating evidence concerning MKB’s “bad faith” claim that would ordinarily be considered at
trial by the jury.

21 ³ In addition to the attorney-client privilege, Zurich also asserts the federal work product
22 doctrine with respect to a smaller subset of documents related to Mr. Edsey. In its motion, MKB
asserts a “compelling need” for Zurich’s pre-denial communications with Mr. Edsey despite
Zurich’s assertion of work product. (See Mot. at 13-15 (citing *Holmgren v. State Farm Mut.*
Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir. 1992).)

1 **A. Evidence Concerning Mr. Edsey’s Performance of Quasi-Fiduciary Tasks**

2 MKB makes three factual arguments concerning Mr. Edsey’s alleged performance
3 of “the quasi-fiduciary tasks of investigating and evaluating or processing the claim.”
4 *See Cedell*, 295 P.3d at 246. First, MKB argues that Mr. Edsey investigated MKB’s
5 claim by participating in “roundtable” discussions or conference calls with Richard Dugo,
6 the Zurich claims adjuster handling MKB’s claim, and Steve Kennedy, Mr. Dugo’s
7 supervisor, several times prior to Zurich’s formal denial of MKB’s claim on March 26,
8 2013. (Mot. at 8-9 (citing 5/23/14 Mullinex Decl. (Dkt. # 56) Ex. 1 (“Dugo Dep.”) at
9 70:19-20; 71:17; 160:5-11; 204:3-11).)

10 Zurich responds that participating in discussions with claims adjusters about the
11 investigation is not the same as engaging in the task of investigating the claim. (Resp.
12 (Dkt. # 82) at 2, 9-10.) There is no evidence that Mr. Edsey took sworn statements,
13 conducted any interviews, or had any contact with MKB. Indeed, Mr. Edsey testified that
14 Mr. Dugo and Mr. Kennedy “were responsible for the investigation, evaluation and
15 processing of [MKB’s] claim,” and “made the decisions regarding the claim.” (Edsey
16 Decl. (Dkt. # 83) ¶ 3.) He further testified that he “did not take an examination under
17 oath or do any other investigation on the claim,” and “did not make any claim decisions.”
18 (*Id.* ¶ 4.) Mr. Edsey testified that his role was limited to “in-house coverage counsel”
19 who “Mr. Dugo consulted for advice on . . . Zurich’s coverage liability for MKB’s
20 claim.” (*Id.*) Indeed, Mr. Dugo testified in his deposition that, although “claims legal”
21 may give an opinion concerning the “legal obligation” at issue, “they wouldn’t make the
22

1 final decision.” (Dugo Dep. at 74:23-75:17.) Instead, Mr. Dugo testified that he and Mr.
2 Kennedy made the final decisions concerning claims. (*Id.* at 75:19-23.)

3 In addition, to participation in “roundtable” discussions, MKB also asserts that the
4 timing of certain telephone calls between Mr. Dugo and Mr. Edsey “suggests” that Mr.
5 Edsey participated in or even “directed” the hiring of one of Zurich’s geotechnical
6 consultants, Ninyo & Moore (“N&M”). (Mot. at 5-6.) However, MKB fails to mention
7 that Mr. Dugo testified that he did not “think David Edsey was involved in the initial
8 process of hiring [N&M],” rather “[i]t was Steve Kennedy [who] got [him] in touch with
9 [N&M].” (Dugo Dep. at 199:14-17.) In addition, Mr. Kennedy testified that he “actually
10 hired [N&M] because [he] believed they were more qualified” than the engineer initially
11 hired by Zurich’s subrogation department. (*See* 6/30/14 Videa Decl. (Dkt. # 85) Ex. O
12 (“Kennedy Dep.”) at 43:1-12.) In the face of this direct testimony, the court finds the
13 evidence MKB offers concerning the timing of phone calls to be a thin reed upon which
14 to build its position.

15 Finally, MKB asserts that Mr. Edsey also participated in Zurich’s determination
16 concerning whether earth movement was the “dominant cause” of MKB’s loss under the
17 policy’s language. (Mot. at 11.) MKB bases this assertion on Mr. Dugo’s testimony that
18 if there were competing causes with respect to MKB’s loss, then “claims legal” would
19 “provide an opinion” as to whether a given cause was the dominant cause under an
20 endorsement to the policy. (*Id.* at 9 (citing Dugo Dep. at 65:24-66:10; 74:23-75:17).)
21 Nevertheless, this argument ignores Mr. Dugo’s testimony, referenced above, that
22 although “claims legal” provided “opinions,” they did not make any final decisions. (*See*

1 Dugo Dep. at 74:23-75:17.) According to Mr. Dugo, he and his supervisor, Mr.
2 Kennedy, made those decisions. (*Id.* at 75:19-23.)

3 **B. Evidence from which a Reasonable Person Could Reasonably Conclude that**
4 **Zurich Engaged in Bad Faith Tantamount to Civil Fraud**

5 MKB also argues that Zurich’s communications with Mr. Edsey are discoverable
6 based on the civil fraud exception to the attorney-client privilege described in *Cedell*.
7 (Mot. at 11-13.) MKB argues that Zurich engaged in “bad faith tantamount to civil
8 fraud” when it processed MKB’s claim by “attempt[ing] to defeat a meritorious claim.”
9 (*See id.* at 13 (quoting *Cedell*, 295 P.3d at 246).) MKB cites a variety of evidence in
10 support of this assertion. (*See* Mot. at 3-5, 6-8, 11-13.)

11 1. Evidence that Zurich “Buried” Expert VanDerostyne’s Report

12 First, MKB argues that Zurich buried the report from its initial expert, David
13 VanDerostyne. (Mot. at 3-5, 12.) Zurich’s subrogation adjuster, Kathleen LaVallie,
14 retained Mr. VanDerostyne “to assist in determining the cause of the sinking.” (6/16/14
15 Mullenix Decl. (Dkt. # 80) Ex. 9 at 1.) On October 3, 2012, Mr. VanDerostyne provided
16 his preliminary report, which was based on his review of an earlier, February 16, 2012,
17 geotechnical report, his review of the invitation to bid the project, and his discussions
18 with Mr. Jensen of MBK. (6/30/14 Videa Decl. Ex. R at 1.) Mr. VanDerostyne stated:

19 . . . MKB . . . appropriately used the information contained in the
20 referenced documents . . . in their bids and in planning and execution of
21 their work.

22 (*Id.* at 3.) MKB asserts that this statement was favorable to its position and the report
should have been disclosed. (Mot. at 4.) Nevertheless, MKB asserts that Mr. Dugo never

1 disclosed Mr. VanDerostyne's report to MKB prior to Zurich's denial of MKB's claim.
2 (Mot. at 4.)⁴

3 Zurich responds that Mr. VanDerostyne was not hired by Zurich's claims
4 department but rather its subrogation department, although Zurich admits that Mr. Dugo
5 did communicate with Mr. VanDerostyne and received his preliminary findings. (Resp.
6 (Dkt. # 82) at 8.) Indeed, after he received Mr. VanDerostyne's preliminary findings, Mr.
7 Dugo asked Mr. VanDerostyne to confirm that "the loss was not due to workmanship,
8 materials or design." (6/30/14 Videa Decl. Ex. S at 1.) Mr. VanDerostyne replied:

9 We see no indications that this was due to workmanship or materials.
10 However, poor design information provided by the geotechnical engineer
11 caused MKB to import more soil than they anticipated. While design
12 information did not cause the settlement, it did not properly identify it.

13 (*Id.*) Zurich argues that Mr. VanDerostyne's statements are consistent with Zurich's
14 March 26, 2013, denial letter. (Resp. at 13-14.) Zurich argues that Mr. VanDerostyne's
15 statement that "poor design . . . caused MKB to import more soil than they anticipated"
16 (6/16/14 Videa Decl. Ex. S) establishes that MKB's loss, if it had one, was caused by
17 defective planning or design, which was an excluded cause of loss under the policy and set
18 forth in Zurich's March 26, 2013, denial letter. (Resp. at 13-14.) Thus, Zurich asserts that
19 Mr. VanDerostyne's report is not inconsistent with the positions it takes in its March 26,

20 ⁴ MKB asserts that Mr. Dugo admitted in his deposition that Mr. Vanderostyne's report
21 "probably should have been provided." (Mot. at 4.) The pages of Mr. Dugo's deposition that
22 MKB cites in support of this fact, however, do not contain this statement (*see* 6/16/14 Mullinex
Decl. Ex. 15 at 186:6-7), nor could the court find the statement elsewhere in the record. *See*
United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam) ("[J]udges are not like
pigs, hunting for truffles buried in briefs."). Thus, the court will not consider this "fact" in its
evaluation of MKB's motion.

1 2013, denial letter. (*See id.*) In any event, Zurich asserts that Mr. VanDerostyne’s report
2 was preliminary in nature, and that Mr. VanDerostyne expressly states in his report that
3 “[a]dditional evaluation is need . . . to further refine our preliminary evaluation as to the
4 cause of the settlement.” (6/30/14 Videa Decl. Ex. R at 3-4.) The fact remains, however,
5 that Zurich did not reveal the report to MKB prior to its March 26, 2013, denial letter.

6 2. Mr. Dugo’s Deposition Testimony Concerning the N&M Report

7 MKB also argues that its assertion of civil fraud is supported by (1) Mr. Dugo’s
8 deposition testimony that if the building pad in fact settled more than two inches that
9 Zurich should have paid MKB’s claim and (2) Mr. Dugo’s inability to “explain why he
10 rejected [the N&M] findings” of five and a half inches of settlement. (*See id.* at 7, 13.)
11 Further, MKB asserts that Zurich’s March 16, 2013, denial letter was “premised on the
12 conclusion that no settlement beyond the expected two inches had occurred.” (Mot. at 6-
13 7.) MKB also argues that Mr. Dugo testified that a “consensus” was developed at one of
14 the “roundtable” discussions rejecting the conclusion in the N&M report concerning five
15 and a half inches of excess settlement—apparently implicating Mr. Edsey in MKB’s
16 allegations of bad faith tantamount to civil fraud. (*See* Mot. at 8 (citing Dugo Dep. at
17 160:5-11).)

18 Zurich counters that the primary reason for its denial of MKB’s claim was that
19 MKB had not suffered physical loss or damage. (Resp. at 11-12.) Zurich points out that
20 N&M advised Zurich that MKB needed 46,000 tons of gravel to comply with MKB’s
21 contract with LYSD, but that MKB had only purchased 45,658 tons. (6/16/14 Videa Decl.
22 Ex. B at 12-13.) Thus, Zurich asserts that MKB had not yet suffered a loss at the time

1 MKB submitted its claim.⁵ (Resp. at 4-5, 11-12.) Further, Zurich notes that its denial
2 letter expressly acknowledged that, although LYSD specified that MKB should supply
3 enough gravel for two inches of settlement, approximately five and a half inches of
4 settlement occurred. (6/16/14 Videa Decl. Ex. A at 1.)

5 Zurich also counters that MKB's description of Mr. Dugo's testimony—that if the
6 building pad settled more than two inches, then Zurich should have paid the claim—is not
7 a strictly accurate account. (See Resp. at 11 (“MKB pieces together a false coverage
8 position for . . . Zurich based on its interpretation of deposition answers to ambiguous or
9 hypothetical questions.”).) Although both counsel's questions and Mr. Dugo's responses
10 are less than crystal clear during the course of his deposition, the court agrees that MKB's
11 characterization of Mr. Dugo's deposition testimony stretches it further than it can be
12 comfortably pulled. First, although it is true that Mr. Dugo states unequivocally that he
13 disagreed with the conclusion in the N&M report concerning five and a half inches of
14 settlement (Dugo Dep. at 138:6-12; 147:10-20), he nevertheless also states that he relayed
15 the report's conclusion in the March 26, 2013, denial letter to MKB because Zurich had
16 the report (*id.* at 146:20-25) and “it impacted the coverage decision” (*id.* 147:10-15).

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19 ⁵ Zurich also asserts that in N&M's later June 7, 2013, report, N&M used a finer
20 measurement rendered a more accurate calculation and found that the fill MKB imported to the
21 site was short of the contract's requirements by over 6,000 tons of gravel. (6/16/14 Videa Decl.
22 Ex. E.) Zurich also asserts that the finer measurement reduced the amount of unaccounted for
gravel (i.e., gravel that settled more than two inches) from five and half inches to three-fourths of
an inch. (See *id.* Ex. D (“Johnson Dep.”) at 15.) MKB, however, points out that Zurich obtained
this additional information after it had sent its March 26, 2013, denial letter, and therefore, this
information could not have served as a foundation for Zurich's denial of MKB's claim.

1 Further, in at least two portions of Mr. Dugo's deposition testimony, Mr. Dugo
2 clearly states, contrary to MKB's position, that there are two factors in play with respect
3 to N&M's report: (1) the five and a half inch settlement, and (2) the shortage of fill
4 purchased by MKB. Although his testimony is somewhat muddled, he states on more
5 than one occasion that, irrespective of whether the earth settled beyond two inches or not,
6 he would have denied MKB's claim because MKB did not suffer a loss due to its failure
7 to import sufficient gravel fill to meet the contract's requirements. Specifically, Mr. Dugo
8 testifies:

9 Q: . . . If the building pad sank more than two inches . . . , tha's a covered
10 loss that should have been immediately evaluated and paid, correct?

11 A: If it sunk—if we actually had proof positive that we have a settling of
12 the soil to whatever degree beyond 2 inches, is that a compensable loss you
13 are asking me?

14 Q: Right.

15 A: I would have to say it might be. Yeah, it might be.

16 Q: Okay. Would it be?

17 *****

18 A: Possibly. Again, if you don't have other factors—and I go back to the
19 report. There's two domains. One is the question of five and a half inches
20 or whatever it is. The other is shortage of fill. We have two things in play.
21 It's an opinion . . . espoused by the expert.

22 *****

Q: You are saying there are two domains, correct?

A: Correct.

1 Q: One of the domains is maybe MKB underestimated how much fill it
would need?

2 A: Correct.

3 Q: . . . Even if MKB did underestimate how much fill it needed to bring,
4 the earth still sank, correct?

5 *****

6 A: Possibly. We have an expert that says it sank. That doesn't mean that
7 he is correct.

8 (Dugo Dep. at 142:14-144:8.) In another portion of his deposition testimony, Mr. Dugo
9 again states that even if he believed N&M's conclusion concerning five and a half inches
10 of settlement, he would have still denied MKB's claim because he believed MKB had not
11 suffered a loss due to the shortage of fill MKB had brought to the site. (Dugo Dep. at
12 136:21-137:11.) Thus, the court cannot conclude that Mr. Dugo unequivocally "admitted
13 that more than two inches of settlement would have triggered coverage." (See Mot. at 7.)
14 His deposition testimony is subject to interpretation and possibly clarification at trial.

15 Finally, the court also disagrees with MKB characterization of Mr. Dugo's
16 deposition testimony that "a 'consensus' was developed at one of the roundtables that the
17 [N&M] finding of [5.5 inches of excess settlement] was incorrect." (See Mot. at 8.) Mr.
18 Dugo testifies that "it was the consensus that we did not have a settlement issue, but a
19 loss of fill issue," that he thinks the "roundtable" looked at the N&M report, and that
20 Zurich conducted a roundtable discussion of coverage before it sent the denial letter to
21 MKB. (See Dugo Dep. at 160.) Nevertheless, the court could find no clear statement in
22 the portion of Mr. Dugo's deposition cited by MKB that a "consensus" was developed at

1 a “roundtable” discussion that N&M’s conclusion of five and a half inches of excess
2 settlement was factually incorrect. (*See id.*) Indeed, under Zurich’s analysis of MKB’s
3 claim in its denial letter (6/16/14 Videa Decl. Ex. A), it would not be necessary for
4 Zurich to reject N&M’s conclusions for Zurich to deny MKB’s claim. Instead, Zurich
5 argues that, irrespective of any excess settlement, MKB could not demonstrate it had
6 incurred expenses beyond its performance of the contract or suffered a loss under the
7 policy because MKB had not yet imported sufficient quantities of gravel fill to meet the
8 contract’s requirements. (*See Resp.* at 12.)

9 III. ANALYSIS

10 As the court discussed in its previous order in this case involving MKB’s first
11 motion to compel, *Cedell* significantly altered application of the attorney-client privilege
12 in the context of first-party bad faith claims in Washington State. *See MKB*, 2014 WL
13 2526901, at *4. Most significantly, in such cases, *Cedell* creates a “presumption that
14 there is no attorney-client privilege relevant between the insured and the insurer in the
15 claims adjusting process, and that the attorney-client . . . privilege[is] generally not
16 relevant.” *Id.* (citing *Cedell*, 295 P.3d at 246). Nonetheless, an insurer may overcome
17 *Cedell*’s new “presumption of discoverability by showing its attorney was not engaged in
18 the quasi-fiduciary tasks of investigation and evaluating or processing the claim, but
19 instead in providing the insurer with counsel as to its own liability: for example, whether
20 or not coverage exists under the law.” *Cedell*, 295 P.3d at 246.

21 Even if, however, an insurer demonstrates that an attorney was not serving in a
22 quasi-fiduciary role, under *Cedell*, an insured may still be able to pierce the insurer’s

1 | assertion of attorney-client privilege. *See MKB*, 2014 WL 2526901, at *4. If the insured
2 | asserts that the insurer has engaged “in an act of bad faith tantamount to civil fraud” and
3 | makes “a showing that a reasonable person would have a reasonable belief that an act of
4 | bad faith has occurred” or that “an insurer [has] engage[d] in bad faith in attempt to
5 | defeat a meritorious claim,” then the insurer will be deemed to have waived the privilege.
6 | *See Cedell*, 295 P.3d at 246-47. Obviously, something more than an honest disagreement
7 | between the insurer and the insured about coverage under the policy must be at play here.

8 | In *Cedell*, the Washington Supreme Court directs state trial courts to conduct *in*
9 | *camera* reviews of the disputed privileged documents at two points in the forgoing
10 | process—when the insurer asserts that its attorney was not engaged in quasi-fiduciary
11 | tasks, *id.* at 246, and when the insured asserts that the insurer has engaged in an act of
12 | bad faith tantamount to civil fraud, *id.* at 246-47. Unfortunately, in both circumstances,
13 | the Washington Supreme Court is not clear whether demonstrating the required showing
14 | is a prerequisite to the *in camera* review or whether evidence gleaned from the *in camera*
15 | review can be utilized to make the necessary showing. *See id.*; *see also MKB*, 2014 WL
16 | 2526901, at *4 (discussing this inconsistency in the *Cedell* opinion). In any event, in
17 | *MKB*, this court determined that *Cedell*’s *in camera* review requirement was procedural
18 | in nature and thus not mandatory in federal court. *MKB*, 2014 WL 2526901, at *7
19 | (“[T]he court may conduct *in camera* reviews as described by the Washington Supreme
20 | Court in *Cedell*, but it is not bound to do so.”).

21 | The court also held that *Cedell*’s rulings with respect to the work product doctrine
22 | were not applicable in federal court. *MKB*, 2014 WL 2526901, at *8. This is so because

1 “[a]lthough the attorney-client privilege is a substantive evidentiary privilege, the work
2 product doctrine is a procedural immunity governed by the Federal Rules of Civil
3 Procedure, specifically Rule 26(b)(3).” *Id.* Thus, to the extent that MKB seeks any
4 documents that Zurich withholds on grounds of the work product doctrine, federal law—
5 not *Cedell*—governs Zurich’s right to withhold those documents.

6 MKB has accepted Zurich’s counsel’s representation that each of the pre-denial
7 work product claims are for opinion work product. (Mot. at 14, n.68.) The Ninth Circuit
8 has held, in the context of a bad faith settlement insurance coverage dispute, that “on a
9 case-by-case basis” an insured may be able to obtain opinion work product. *See*
10 *Holmgren v. State Farm Mut. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992). The insured,
11 however, must not show simply a “substantial need” for the documents, but rather must
12 show that the attorney’s mental impressions are at issue and the insured’s need for the
13 documents is “compelling.” *Id.*

14 With these general principles in mind, the court now discusses the specific
15 documents in dispute here. In its order on MKB’s first motion to compel, the court found
16 that Zurich had met its initial burden of showing that Mr. Edsey was not engaged in “the
17 quasi-fiduciary tasks . . . , but instead in providing the insurer with counsel as to its own
18 liability: for example, whether or not coverage exists under the law,” *MKB*, 2013 WL
19 2526901, at *9 (citing *Cedell*, 295 P.3d at 246). The court noted that Mr. Edsey did not
20 take any witness examinations under oath or conduct any other investigatory activities.
21 *Id.* In the context of the present motion, Mr. Edsey again testifies that he “did not take an
22 examination under oath or do any other investigation on the claim.” (Edsey Decl. (Dkt.

1 83) ¶ 4.) He testifies that he “did not make any claim decisions.” (*Id.*) He states that
2 “provided legal services and advice concerning . . . Zurich’s liability for MKB’s
3 insurance claim under the insurance policy and applicable law.” (*Id.*)

4 In its present motion, MKB tries to undermine Zurich’s showing by presenting
5 evidence that Mr. Edsey was involved in several “roundtable” discussions or conference
6 calls with Mr. Dugo and Mr. Kennedy concerning MKB’s claim and that these
7 “roundtable” discussions occurred just prior to critical junctures in Zurich’s claim
8 handling process. (*See generally* Mot. at 10-11.) The court, however, does not find the
9 number of communications nor their timing surprising if Mr. Edsey was to provide
10 counsel to Zurich as to its own liability concerning coverage under the law or with
11 respect to its handling of MKB’s claim. In order to provide advice on these issues, Mr.
12 Edsey would necessarily need to be informed concerning the development of evidence
13 surrounding MKB’s claim and Zurich’s methods for acquiring and evaluating that
14 evidence. This does not mean that Mr. Edsey was engaged in investigating the claim
15 himself. These are simply facts Mr. Edsey would need to know to provide Zurich with
16 the best legal advice concerning its own liability in this matter.

17 In several of the cases upon which MKB relies, the activities of attorneys found to
18 have engaged in quasi-fiduciary activities and to have waived any privilege far exceeds
19 the evidence concerning Mr. Edsey’s activities here. For example, in *Cedell*, the
20 insurer’s attorney examined witnesses under oath. *Cedell*, 295 P.33d at 242. He also
21 communicated directly with the insured, authored and signed the insurer’s denial letter,
22 and initiated settlement negotiations with the insured. *See id.*; *see also Hilborn v. Metro.*

1 | *Group Prop. & Cas. Ins. Co.*, No. 2:12-cv-00636-BLW, 2013 WL 6055215, at *3 (D.
2 | Idaho Nov. 15, 2013) (attorneys admitted that they were retained to investigate the claim
3 | and one attorney placed a phone call to a third party to investigate the claim); *HSS*
4 | *Enters., LLC v. Amco Ins. Co.*, No. C06-1485-JPD, 2008 WL 163669, at *1-2 (W.D.
5 | Wash. Jan. 14, 2008) (attorneys conducted examinations under oath, assisted the insurer
6 | with its factual investigation, and adjusted the claim); *Ivy Hotel San Diego, LLC v.*
7 | *Houston Cas. Co.*, No. 10cv2183-L (BGS), 2011 WL 4914941, at *5 (S.D. Cal. Oct. 17,
8 | 2011) (attorney became primary point of contact with insured regarding insured's claim).
9 | There is no evidence that Mr. Edsey engaged in any of these types of activities. The
10 | court finds that MKB has not overcome Zurich's showing that Mr. Edsey was not
11 | engaged in quasi-fiduciary activities.

12 | Nevertheless, the court is concerned about some of the evidence that MKB
13 | presents concerning *Cedell's* civil fraud exception. In particular, the court is concerned
14 | with Zurich's failure to disclose Mr. VanDerostyne's report to MKB. The court does not
15 | conclude that Mr. VanDerostyne's report renders Zurich's coverage decision incorrect.
16 | Indeed, the court has made no determination concerning the coverage issues at all in this
17 | proceeding. The court also does not conclude at this point in time that Zurich's failure to
18 | reference the report was deliberate or that reference to the report was even necessarily
19 | required. The court simply finds the omission sufficiently troubling that, in this instance,
20 | it will exercise its discretion and order an *in camera* review of the documents that MKB
21 | has placed at issue with respect to Mr. Edsey. As noted in its prior order, in federal
22 | district court, the *in camera* review required under *Cedell* remains discretionary. *MKB,*

1 2014 WL 2526901, at *6-7. MKB has persuaded the court that, in this instance, the court
2 should exercise that discretion. In addition, the court will review *in camera* those
3 documents that Zurich also withholds on grounds of work product to better assess MKB's
4 assertion of compelling need for their production.

5 The court orders MKB to produce these documents to the court for *in camera*
6 inspection no later than 12:00 noon, on Thursday, July 31, 2014.⁶ After the court has
7 received these documents and reviewed them, it will issue a further order concerning
8 their continued protection under the attorney-client privilege and/or work product
9 doctrine or their production to MKB. The court will also consider MKB's request to
10 reopen the deposition of Mr. Edsey after it has conducted its *in camera* review.

11 There is one further issue to address. In its order on MKB's first discovery
12 motion, the court held that Zurich did not have to produce any of the communications
13 with its subrogation counsel, George Shumsky. *MKB*, 2014 WL 2526901, at *9. Zurich
14 had asserted the work product doctrine with respect to all documents referencing
15 communications with Mr. Shumsky. The court held that Zurich had met its burden under
16 the federal work product doctrine with respect to these documents because subrogation
17 activity anticipates litigation through its very purpose—recovering insurance payments
18 from responsible third parties—often through litigation or the threat of litigation. *Id.* The

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20 ⁶ The court recognizes that this deadline requires counsel to respond quickly. Ordinarily,
21 the court would provide more time. The case schedule, however, demands a quick response.
22 The dispositive motions deadline has already passed, and trial is scheduled to commence on
October 20, 2014. If the court is to maintain the parties' trial date, it must resolve this remaining
discovery dispute as quickly as possible. Presumably, Zurich has these documents already
segregated, and thus it should be able to comply even given the short time provided.

1 court also held that MKB had not met its burden of showing a compelling need for the
2 production of these documents despite their work product nature. *Id.*

3 Zurich asserts, once again, that the documents on its privilege log related to Mr.
4 Shumsky are protected under both the attorney-client privilege and the federal work
5 product doctrine and that MKB “makes no showing of need” to overcome this protection.
6 (Resp. at 15-16.) In its reply memorandum, MKB admits that it “does not seek Shumsky
7 documents” in this motion, but rather only documents related to Mr. Edsey. (Reply (Dkt.
8 # 86) at 2.) The court notes, however, that several entries on Zurich’s amended privilege
9 log that MKB places at issue in this motion appear to relate only to communications with
10 Mr. Shumsky or subrogation counsel. (*See* Mullinex Decl. Ex. 1 (Entry Nos. AZ 00919;
11 AZ 00921; AZ 01230; AZ 01544; AZ 01546; AZ 01939; AZ 01987; AZ 01991; AZ
12 03961).) Assuming that these entries do not involve Mr. Edsey or communications with
13 Mr. Edsey, then based on MKB’s statement above, Zurich need not produce these
14 documents for *in camera* review. If, however, these documents do involve Mr. Edsey,
15 then Zurich should produce them for *in camera* review at the time ordered above.

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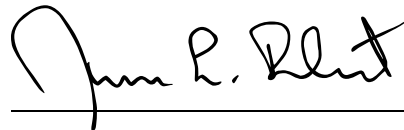
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IV. CONCLUSION

Based on the foregoing, the court GRANTS in part and DENIES in part MKB's third motion to compel (Dkt. # 79).

Dated this 28th day of July, 2014.



JAMES L. ROBART
United States District Judge