

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 PATRICIA S. HAWTHORNE, individually
10 and as assignee of Oklahoma Court Services,
11 Inc.,

12 Plaintiff,

13 v.

14 MID-CONTINENT CASUALTY
15 COMPANY, OKLAHOMA SURETY
16 COMPANY, an Oklahoma Insurance
17 Company,

18 Defendant.

Case No. C16-1948RSL

ORDER GRANTING IN PART
PLAINTIFF'S MOTION TO
COMPEL

19 This matter comes before the Court on plaintiff Patricia S. Hawthorne's motion to
20 compel. Dkt. # 40. Having considered the parties' briefing¹ and the remainder of the record, the
21 Court finds as follows.

22 In November 2016, acting in her individual capacity and as assignee of various insurance

23 ¹ The Court expresses its frustration with plaintiff's counsel's apparent failure to proofread its
24 work product before filing. In plaintiff's twelve-page motion alone, there are at least eight errors that
25 spell-checking software would miss but that a conscientious human review would have caught: for
26 example, on page 11, plaintiff's brief asserts that "it can failure be said that the document was prepared
27 or obtained because of the prospect of litigation." Presumably "failure" displaced "fairly."
28 Additionally, the brief regularly misuses apostrophes – including them where they should not be, and
omitting them where they are needed – and relies unnecessarily on underlining to attract the Court's
attention.

Plaintiff's counsel is directed to file a corrected version of its motion, at counsel's own cost.

ORDER GRANTING IN PART PLAINTIFF'S
MOTION TO COMPEL - 1

1 claims, plaintiff filed this action in King County Superior Court against Oklahoma Surety
2 Company (“Oklahoma Surety”) for bad faith, violation of Washington’s Unfair Trade Practices
3 Act, and breach of the contractual duties to defend, settle, and indemnify. Dkt. # 1-1. On
4 December 21, 2016, Oklahoma Surety removed this case to federal court, Dkt. # 1, and shortly
5 thereafter moved to dismiss the case for lack of personal jurisdiction, Dkt. # 9. The Court denied
6 that motion in April 2017. Dkt. # 39.

7 With discovery underway, plaintiff moves under Local Civil Rule 37 to compel
8 production of certain emails that defendant Oklahoma Surety has withheld on the grounds that
9 they constitute privileged attorney-client communications and/or work product. Plaintiff argues
10 that, under Washington state law, these privileges give way in the context of an insurance bad
11 faith claim.

12 It is true that Washington law establishes an exception to the attorney-client privilege in
13 the context of certain insurance bad-faith claims. As this Court recognized in Meier v. Travelers
14 Home and Marine Insurance Company, No. C15-22RSL, 2016 WL 4447050 (W.D. Wash. Aug.
15 24, 2016), under Washington law, in the context of first-party insurance coverage, an insurer
16 owes its insured a quasi-fiduciary duty to investigate and adjust the claim in good faith. Cedell
17 v. Farmers Ins. Co. of Washington, 176 Wn.2d 686, 696 (2013).² In Cedell, the state Supreme
18 Court determined that when an insured asserts that the duty has been breached, the insured
19 should have access to the entire claim file: an insurer will not be permitted to refuse production
20 “because of the participation of lawyers hired or employed by the insurers” for fear that a
21 blanket privilege “would unreasonably obstruct discovery of meritorious claims and conceal
22 unwarranted practices.” Id. at 696–97. Thus, there is a presumption in such cases that the
23

24 ² Oklahoma Surety suggests that Cedell does not apply squarely to this situation because Cedell
25 was grounded on an insurer’s quasi-fiduciary duty to a first-party insured, see Cedell, 176 Wn.2d at 696,
26 and plaintiff in this case is a third party. See Dkt. # 46 at 9. But here, where the first-party insured has
27 assigned its claims to plaintiff through a covenant judgment, plaintiff stands in the shoes of the first-
28 party insured to assert its bad faith and contractual claims. Accordingly, Cedell applies.

1 attorney-client privilege does not apply as between an insured and her insurer in the claims
2 adjusting process. Id. at 698–99. The insurer can rebut the presumption by showing that a
3 particular communication or document had nothing to do with the insurer’s quasi-fiduciary
4 functions (*e.g.*, investigating, evaluating, negotiating, or processing the claim). To the extent the
5 insurer is able to show that documents in the claim file seek or reflect legal advice regarding the
6 insurer’s own liability under the policy, those documents are not subject to the presumption and
7 remain privileged under state law. Id. at 699–700. Even with regards to these documents,
8 however, the insured may pierce the privilege by showing a foundation in fact for her allegation
9 of bad faith. If the insured is able to make a colorable showing that the insurer attempted in bad
10 faith to defeat a meritorious claim for coverage, the privilege is waived, and the entire claim file
11 must be produced. Id. at 700.

12 Oklahoma Surety argues, however, that the privilege law of Oklahoma, not Washington,
13 applies. Applying Washington choice-of-law rules, see Patton v. Cox, 276 F.3d 493, 495 (9th
14 Cir. 2002), the Court concludes: (1) an actual conflict exists between Washington law, under
15 which, in discovery, the attorney-client privilege gives way to claims of insurer bad faith, see
16 Cedell, 176 Wn.2d at 700, and Oklahoma law, which lacks an equivalent to the Cedell bad-faith
17 exception; and (2) even assuming *arguendo* that Oklahoma has “the most significant
18 relationship” with the attorney-client communication here, there is no “special reason” why the
19 Washington policy favoring admission of the communication should not be given effect, see
20 State v. Donahue, 105 Wn. App. 67, 71 (2001).

21 The facts that Oklahoma Surety cites to show a “special reason” do not suggest otherwise.
22 For example, the fact that both parties to the insurance policy are Oklahoma companies bears on
23 which state has the “most significant relationship” to the communications at issue, not on
24 whether a “special reason” exists to override the evidentiary policy of the forum state. And the
25 communications here appear to be material, as they may shed light on any inconsistencies
26 between Oklahoma Surety’s initial coverage analysis and its ultimate justifications for denying
27

1 coverage. Other facts cited effectively urge application of the Oklahoma policy on the grounds
2 that it is a better policy than Washington's. The Court will not ground its choice-of-law
3 determination on such a slippery foundation.

4 Next, Oklahoma Surety attempts to distinguish Cedell on the grounds that in this case, the
5 attorney in question was not performing the "quasi-fiduciary tasks of investigating and
6 evaluating or processing the claim," but rather was "providing counsel to the insurer and not
7 engaged in a quasi-fiduciary function." Cedell, 176 Wn.2d at 700. But Cedell explicitly
8 contemplates that even the privilege for attorney communications providing counsel to a client-
9 insurer may be "pierced" by an assertion of the civil fraud exception. Id. As explained above,
10 where an insurer engages in bad faith in an attempt to defeat a meritorious claim, that bad faith is
11 tantamount to civil fraud, and the privilege does not apply. Id.

12 Whether an attorney was providing counsel rather than performing a quasi-fiduciary task,
13 and whether an act of bad faith tantamount to civil fraud occurs in the course of that counsel,
14 require an in camera review of the communications in question. Id. at 699–700. To warrant an
15 in camera review of the claimed privileged materials under the civil fraud exception, the
16 requesting party must make a showing that a reasonable person would have a reasonable belief
17 that an act of bad faith has occurred. Id. at 700. If, after reviewing the materials in camera, the
18 Court finds that there is a foundation to permit a claim of bad faith to proceed, the attorney-client
19 privilege shall be deemed to be waived. Id.

20 In this case, plaintiff has made a colorable showing that Oklahoma Surety attempted in
21 bad faith to defeat a meritorious claim for coverage: after initially agreeing to defend the insured
22 under a reservation of rights, Oklahoma Surety ultimately rescinded that defense on the grounds
23 that the claim could not possibly be covered under the insured's policy.


24 Accordingly, the Court concludes that an in camera review of the attorney-client
25 communications is warranted. During that review, the Court will determine (1) whether
26 Oklahoma Surety's attorney was providing counsel to the insurer or performing a quasi-fiduciary
27

task; and if so, (2) whether a foundation exists to permit a claim of bad faith to proceed. See
Taladay v. Metro. Group Prop. & Cas. Ins. Co., No. C14-1290JPD, 2015 WL 12030116, at *6–7
(W.D. Wash. Dec. 18, 2015) (explaining procedure for in camera review in federal court).

At that time, the Court will also consider whether the federal work-product privilege
requires complete or partial redaction of the withheld materials notwithstanding Cedell. See
Fed. R. Civ. P. 26(b)(3); In re Grand Jury Subpoena (Mark Topf), 357 F.3d 900, 907 (9th Cir.
2004) (holding that a document is eligible for work-product protection if it “can be fairly said to
have been prepared or obtained because of the prospect of litigation”); United States v. Richey,
632 F.3d 559, 567–68 (9th Cir. 2011) (holding that where a document serves dual purposes, in
that it was not prepared exclusively for litigation, the issue is whether the document was created
“because of” the litigation as opposed to for some other purpose). Because plaintiff has failed to
demonstrate a “substantial need” for any work product contained in the withheld materials,
Oklahoma Surety will be permitted to redact whatever work product the Court finds in those
documents.

For the foregoing reasons, plaintiff’s motion to compel (Dkt. # 40) is GRANTED in part.
Within thirty days of the date of this order, Oklahoma Surety is directed to deliver to the Court
two copies of the withheld materials – one unredacted, and one with proposed redactions for the
Court’s consideration – along with a privilege log indicating which privileges are claimed as to
each redaction. If the parties are ultimately able to resolve this dispute between themselves – as
they are strongly encouraged to do – they shall notify the Court on or before the thirty-day
deadline that in camera review is no longer necessary.

DATED this 31st day of May, 2017.


Robert S. Lasnik
United States District Judge