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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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BRUCE CEDELL, a single man,

Plaintiff/Petitioner,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Defendant/Respondent

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**RESPONDENT'S ANSWER TO WASHINGTON STATE  
ASSOCIATION FOR JUSTICE FOUNDATION AMICUS  
CURIAE BRIEF ON THE MERITS**

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## I. IDENTITY OF RESPONDENT

Respondent, Farmers Insurance Company of Washington, requests the Court affirm the Court of Appeals decision below.

## II. DECISION

The Court of Appeals filed its decision in this case on October 21, 2010. A copy of this decision is attached as Appendix A to appellant's Petition, dated November 18, 2010.

## III. ISSUES PRESENTED FOR REVIEW

The Washington State Association for Justice Foundation (WSAJF) raises two issues in its Amicus Brief that are not before the Court for this appeal. The only issue properly before the Court is whether Division II's opinion should be affirmed, given that it is consistent with Washington case law, including *Escalante*<sup>1</sup> and *Barry*<sup>2</sup>. Nonetheless, Farmers provides this Answer to the WSAJF's Amicus Brief addressing below the issues it raised therein.

## IV. STATEMENT OF THE CASE

The *Amicus Curiae* Brief submitted by the WSAJF presents no new factual background not already responded to by Respondent in its prior Answer to Petitioner's Petition for Discretionary Review

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<sup>1</sup> *Escalante v. Sentry Ins.*, 49 Wn. App. 375, 743, P.2d 832 (1987).

<sup>2</sup> *Barry v. USAA*, 98 Wn. App. 199, 989 P.2d 1172 (1999).

dated December 21, 2010. Therefore, Respondent reincorporates herein its Statement of the Case from its prior Answer.

## V. ARGUMENT

### A. WSAJF misstates *Escalante* and *Barry*.

Despite the WSAJF's request to the Court that it uphold *Escalante*, it seeks to reverse and re-write it. The WSAJF misstates the holding in *Escalante*. First, the WSAJF argues that the "*Escalante* [court] conclude[d] that insurance bad faith is tantamount to civil fraud." *See* Amicus Brief at 15; *see also* Amicus Brief at 4 ("such [bad faith] misconduct should be considered tantamount to fraud."). Second, the WSAJF argues that *Escalante*'s "civil fraud" exception to the attorney-client privilege should be satisfied automatically based solely on the cause of action pled. Neither of these two arguments, however, is consistent with *Escalante*.

In *Escalante*, the plaintiffs sued Sentry Insurance for bad faith, among other claims, for failure to pay an underinsured motorist (UIM) claim. *Escalante*, 49 Wn. App. at 379–80. The Escalantes sent interrogatory requests that sought general information and materials related to Sentry's evaluation of the Escalantes' claim. *Id.* at 393. Sentry objected based on the attorney-client privilege and work product doctrine. *Id.* The trial court denied the Escalantes' motion to compel. *Id.* at 381. On appeal, the

Escalantes argued that the attorney-client privilege did not protect information relevant to a bad faith claim. *Id.* at 393.

*Escalante* recognized the attorney-client privilege rule codified by RCW 5.60.060(2). *Id.* at 393. The court acknowledged the “civil fraud” exception to the privilege. *Id.* at 394. The court held that the civil fraud exception could be invoked only when the insured presented a prima facie showing of “bad faith tantamount to civil fraud.” *Id.* at 394. The court did not hold, however, that there was no attorney-client privilege in a bad faith lawsuit, nor did the court hold, as argued by the WSAJF, that *every* instance of bad faith was automatically “tantamount to civil fraud.” *Id.*

The “fraud exception” is invoked only when the insured presents a prima facie showing of “bad faith tantamount to civil fraud.” *Id.* at 394. To strip a communication of the attorney-client privilege, the party seeking discovery must show that (1) its opponent was engaged in or planning a fraud at the time the privileged communication was made, and (2) the communication was made in furtherance of that activity. *Barry*, 98 Wn. App. at 205.

*Escalante* established a two-step analysis for determining whether fraudulent conduct exists that is sufficient to overcome the privilege. *Barry*, 98 Wn. App. at 205. First, the trial court determines whether there is a factual showing adequate to show that

wrongful conduct sufficient to evoke the fraud exception has occurred. *Escalante*, 49 Wn. App. at 394. Second, if so, the court conducts an in-camera inspection of the documents to determine whether there is a foundation in fact to overcome the privilege based on civil fraud. *Escalante*, 49 Wn. App. at 394.

*Escalante* and *Barry* both recognize the difference between bad faith conduct and fraudulent conduct. *Escalante*, 49 Wn. App. at 394-95 (“The exception is usually invoked only upon a prima facie showing of bad faith tantamount to civil fraud.”); *Barry*, 98 Wn. App. at 206-207 (“[w]hile these allegations may be sufficiently supported by the record to establish a prima facie case of bad faith insurance ... , they do not, in and of themselves, constitute a good faith belief that [the insurer] committed fraud.”); see *Cedell v. Farmers Ins. Co. of Wash.*, 157 Wn. App. 267, 277, 237 P.3d 309 (2010) (“Contrary to Cedell’s argument, proving fraud is different from proving bad faith.”).

The elements of bad faith and fraud are separate and distinct. *Cedell*, 157 Wn. App. at 278. To establish fraud, a litigant must show: (1) a representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) [the speaker's] intent that [the fact] should be acted upon by the person to whom it is made, (6) ignorance of [the fact's]

falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) [the right of the person] to rely on it, and (9) [the person's] consequent damage. A bad faith claim is proven by conduct involving unreasonable, unfounded or frivolous conduct by an insurer, or conduct that is otherwise not in good faith. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998).

The WSAJF takes a single statement from *Escalante* wholly out of context to support its argument that "*Escalante* concludes that insurance bad faith is tantamount to civil fraud." See Amicus Brief at 15 (citing *Escalante*, 49 Wn. App. at 394 ("The exception is usually invoked only upon a prima facie showing of bad faith tantamount to civil fraud.")) Although the WSAJF's revision of this single sentence in *Escalante* is subtle, the difference in meaning between the sentence in the *Escalante* opinion and the WSAJF's revision is significant. *Escalante* did not hold that bad faith and fraud are equivalent. To the contrary, *Escalante* recognized that the "civil fraud" exception does not apply in all bad faith litigation. Instead, the exception applies in those situations where the insurer's bad faith conduct *demonstrably rises* to the level of fraud. Where an insurer's bad faith conduct does not rise to the level of fraud, the exception to the privilege has no application.

*Barry* confirmed this. In *Barry*, an insured sued her insurer, USAA, for bad faith. *Barry*, 98 Wn. App. at 202. During discovery, she requested documents including reports from the claims adjuster and correspondence from the attorney who handled the UIM claim. *Id.* When USAA did not comply, the insured moved to compel production. *Id.* at 203. The trial court found that the insured failed to establish sufficient wrongful conduct to invoke the fraud exception to the attorney-client privilege and declined to inspect the claims file. *Id.* at 202-03.

On appeal, Division III affirmed the trial court's decision, finding that while the insured had sufficiently established a prima facie showing of bad faith conduct, it failed to present and support a good faith belief that the insurer had committed fraud. *Id.* at 206-07. Accordingly, the Court of Appeals held that the "civil fraud" exception was inapplicable. *Id.*

Farmers, like the WSAJF, requests the Court uphold *Escalante*. This Court should not, however, adopt the WSAJF's interpretation or attempted revisions to the *Escalante* holding. The two-step analysis in *Escalante*'s articulation of the "civil fraud" exception should be followed here while maintaining the distinction between bad faith conduct and civil fraud conduct. This is exactly

what the Court of Appeals panel recognized and held in its decision below, and the Court should affirm the same.

**B. The trial court did not address the role of Farmers' coverage counsel, and it is premature for the appellate courts to address application of the work product doctrine with respect to the same.**

The attorney work product doctrine first appears in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). It is intended "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (quoting *Hickman v. Taylor*, 329 U.S. 495). The *Hickman* doctrine is now codified in the civil rules at CR 26(b)(4).

[A] party may obtain discovery of documents ... discoverable ... and prepared in anticipation of litigation or for trial by or for another party ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

CR 26(b)(4).

Work product refers to documents prepared by counsel in anticipation of litigation. *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985). There are two categories: (1) factual information; and (2) attorneys' mental impressions, research, legal

theories, opinions, and conclusions. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605-06, 963 P.2d 869 (1998). Disclosure of counsel's memoranda of witnesses' oral statements is "particularly disfavored because it tends to reveal the attorney's mental processes." *Upjohn Co. v. United States*, 449 U.S. 383, 399, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Notes of oral statements gathered during preparation for litigation are included with mental impressions in the "opinion" work product category. *In re Firestorm 1991*, 129 Wn.2d 130, 159, 916 P.2d 411 (1996) (Madsen, J., concurring).

The court may allow an adverse party to discover factual information gathered by an attorney only upon a showing of substantial need for the information in preparing the party's case and an inability to obtain the substantial equivalent without undue hardship. CR 26(b)(4); *Heidebrink*, 104 Wn.2d at 395. Opinion work product, by contrast, enjoys nearly absolute immunity. *Soter v. Cowles Pub. Co.*, 131 Wn. App. 882, 894, 130 P.3d 840 (2006). Work product protection belongs to the attorney as well as to the client. *United States v. Nobles*, 422 U.S. 225, 238-39, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). The court may release it only in very rare and extraordinary circumstances. CR 26(b)(4); *Upjohn*, 449 U.S. at 401.

Work product documents need not be prepared personally by counsel; they can be prepared by or for the party or the party's representative, so long as they are prepared in anticipation of litigation. *Heidebrink*, 104 Wn.2d at 396; *Smith v. Diamond Offshore Drilling*, 168 F.R.D. 582, 584 (S.D.Tex.1996).

Cedell and the WSAJF argue that the work product doctrine does not apply where an insurer's attorney, such as Mr. Hall, operates as a claims adjuster rather than as coverage counsel for the insurer. *See* Amicus Brief at 16. In fact, the Court of Appeals below acknowledged that "an insurance company may not hire an attorney as a claims adjuster just to fall within the attorney client privilege [and purportedly the work product doctrine]." *Cedell*, 157 Wn. App. at 275. "A claims adjuster's conduct is not privileged simply because the claims adjuster happens to be a lawyer." *Id.*

But the *Cedell* panel acknowledged that an attorney can serve in a dual role for the insurer. The attorney can act as claims adjuster, and in doing so, his conduct would not be privileged to the extent such conduct fell within the scope of his role as adjuster. Alternatively, the attorney could act as coverage counsel, and his conduct would be privileged to the extent such conduct fell within the scope of his role as coverage counsel. *See Cedell*, 157 Wn. App.

at 275-76 (“only information, investigation, and advice Hall gave Farmers in his capacity as an attorney is subject to the privilege.”)

Accordingly, it is necessary to take a look at the involved attorney’s role and scrutinize each communication by the attorney to determine in what role the attorney was functioning at the time of the conduct to determine whether the work-product protection applies. In the present case, the trial court did not do this. Instead, the trial court merely concluded that the attorney-client privilege and work product doctrine do not apply. *See* CP 487-88 (“[T]he insured is entitled to discover the entire claims file kept by the insured without exceptions for any claims of attorney-client privilege.” “[T]he defendant’s claims of attorney-client privilege are without merit.”) Additionally, the trial court concluded that the work product doctrine did not apply to any communication or documentation without giving any consideration to the role in which Farmers’ counsel was operating – that is, as coverage counsel or as insurance adjuster – or to the character of any particular document withheld. *See* CP 487-88 (“The plaintiff is entitled to receive all documents withheld and/or redacted in reliance upon the work product rule.”). The trial court concluded that all “mental impressions” of Farmers’ coverage counsel were discoverable regardless of what role he was acting in the present case. CP 488.

Given that the role of Farmers' coverage counsel was not even addressed by the trial court or by the Court of Appeals, that subject should not now be considered by the Supreme Court here.

**C. WSAJF's reliance on *Soter v. Cowles Publishing Co.* is misplaced.**

WSAJF cites *Soter* in support of its argument that Washington law recognizes a "bad faith" exception to the attorney-client privilege where an insured alleges wrongful conduct involving the insurer's lawyer. *See* Amicus Brief at 16. The *Soter* case does not support the WSAJF's position.

In *Soter*, a local newspaper sought disclosure of a school district's records under the public disclosure act. The school district had previously entered into a settlement agreement with the surviving relatives of a minor student who had died of anaphylactic shock after he ate a snack containing a known allergen provided by the district. Specifically, the newspaper sought "the investigator's notes of interviews with witnesses, the investigator's hand-drawn map, counsel's conference notes, and counsel's report to the District's large loss insurer evaluating the District's legal position." *Id.* at 890. The trial court examined the documents and concluded that they constituted "classic" attorney work product and attorney-

client privileged material and was therefore exempt from disclosure.

*Id.*

On appeal, the publishing company sought to apply a number of exceptions to the work product rule, including what the Court of Appeals in *Soter* termed the “Bad Faith” exception. In its discussion of the “Bad Faith” exception, the court cited *Escalante* and *Barry* only. The purpose of citing these cases was solely to distinguish insurance bad faith cases from public disclosure requests.

Moreover, the *Soter* court’s discussion of *Escalante* and *Barry* was limited to two paragraphs only. Those paragraphs addressed the importance of certain information typically contained in an insurer’s claim file in light of the long held rule that a court may allow an adverse party to discover factual information gathered by an attorney upon a showing of substantial need for the information in preparing the party’s case and an inability to obtain the substantial equivalent without undue hardship. *Id.* at 893-95 (citing CR 26(b)(4); *Heidebrink*, 104 Wn.2d at 395). *Soter*’s discussion of *Escalante* and *Barry* did not address the attorney-client privilege, but the work product doctrine only.<sup>3</sup> Moreover, *Soter*’s

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<sup>3</sup> The *Soter* opinion separates its discussion regarding the work product doctrine from the attorney-client privilege. In its discussion of the attorney-client privilege, the *Soter* opinion is silent with respect to any “bad faith” exception, the “civil fraud” exception, *Escalante*, or *Barry*.

discussion of the so-called “Bad Faith” exception did not address the two-step analysis of the “civil fraud” exception.

Additionally, the Supreme Court accepted discretionary review of the Court of Appeals’ decision in *Soter*. *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007). In affirming the Court of Appeals, the Supreme Court was silent with respect to any reference to *Escalante* or *Barry* and did not address the Court of Appeals’ reference to a “bad faith” exception to the work product doctrine. *See, generally, id.*

Even assuming the Court of Appeals decision in *Soter* is good law, it has absolutely no bearing on the present issue before this Court.

**D. WSAJF’s reliance on *United Servs. Auto Ass’n v. Werley* is misplaced.**

The WSAJF asserts, correctly, that *Escalante* cited with approval *United Servs. Auto Ass’n v. Werley*, 526 P.2d 28 (Alaska 1974). *Escalante* cited *Werley* for two propositions only: (1) “the ‘fraud’ or ‘civil fraud’ exception[] has been utilized in several insurance bad faith decisions outside of this jurisdiction, and is based on the recognition that attorney-client communications should not be protected when they pertain to ongoing or future fraudulent conduct by the insurer;” and (2) “the exception is usually invoked only upon

a prima facie showing of bad faith tantamount to civil fraud.” *Escalante*, 49 Wn. App. at 394 (citing *Werley*, 526 P.2d at 32).

But even the *Werley* Court recognized that “[t]he mere **allegation** of a crime or civil fraud will generally not suffice to defeat the attorney-client privilege.” *Werley*, 526 P.2d at 32 (emphasis added). “To drive the privilege away, there must be ‘something to give colour to the charge’; there must be ‘prima facie evidence that it has some **foundation in fact**’.” *Id.* (quoting *Clark v. United States*, 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993 (1932)).<sup>4</sup>

This is entirely consistent with Division II’s opinion here. Division II noted that while Cedell’s allegations regarding Farmers’ conduct might constitute bad faith and/or CPA violations, it does not rise to a sufficient quantum of proof to invoke the fraud exception. Thus, the WSAJF’s reliance of *Werley* supports the argument that the Division II’s opinion should be affirmed.

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<sup>4</sup> The *Werley* Court went further to define the quantum of proof necessary to constitute a *prima facie* showing of fraud: “The general rule is that there must be a prima facie showing of fraud before the attorney-client privilege is deemed defeated. We think the requirement of prima facie evidence of fraud as opposed to a mere allegation of fraud seems particularly meritorious in the circumstance where a party is seeking to discover all the attorney-client communications relating to the defense of an insurance claim by an insurer. ... A prima facie case is one in which the evidence in one’s favor is sufficiently strong for his opponent to be called on to answer it. This definition can be rephrased as requiring that the evidence in favor of a proposition be sufficient to support a finding in its favor, if all the evidence to the contrary be disregarded.” *Werley*, 526 P.2d at 32-33 (citations omitted).

**E. WSAJF's reliance on *Seattle NW Securities Corp. v. SDF Holding Co., Inc.* is misplaced.**

The WSAJF relies on *Seattle NW Securities Corp. v. SDG Holding Co., Inc.*, 61 Wn. App. 725, 812 P.2d 488 (1991) in support of its argument that all insurance bad faith is equivalent to fraud. See Amicus Brief at 16-17. In *Seattle NW Securities Corp.*, the plaintiff purchased a corporation from defendants and sued them for a defense when the corporation was sued. In a discovery dispute between the parties, the plaintiff sought to abrogate the attorney-client privilege with respect to certain privileged communications between a lawyer and his client. In support of this argument, plaintiff cited numerous exceptions to the attorney-client privilege, including the "civil fraud" exception set forth in *Escalante*.

The trial court ordered the privileged documents disclosed, but the Court of Appeals reversed and concluded that the assertion of the attorney-client privilege was valid. In its discussion regarding *Escalante*, the Court of Appeals acknowledged that even under *Escalante*, clients (including insurers) are entitled to the attorney-client privilege unless the documents sought to be protected pertain to present or future "fraudulent" conduct by an insurer. *Id.* at 740 (citing *Escalante*, 49 Wn. App. at 394). The Court of Appeals also acknowledged and accurately articulated the two-pronged analysis

for determining whether “fraudulent conduct” sufficient to justify invasion of the privilege exists. *Id.*

This is exactly the analysis that the trial court in the present case should have employed did not. This is the analysis that the Court of Appeals held applied to the present case and instructed the trial court to employ on remand. Thus, the WSAJF’s reliance on *Seattle NW Securities Corp.* supports Farmers’ argument that the Division II’s decision should be affirmed.

**F. The Court should reject the WSAJF’s proposed bright line rule and protect the attorney-client privilege, subject to the “civil fraud” exception in *Escalante*.**

Automatically abolishing the attorney-client privilege for communications between an insurer and its counsel would be inconsistent with established Washington law and with the law of the great majority of jurisdictions that have addressed this question. Moreover, the “bright line rule” urged by the WSAJF would be contrary to the public interest rationale underlying the attorney-client privilege, because it would discourage full and frank communication of issues related to coverage between an insurer and counsel retained to determine whether the policy covers the claim at issue. The Court should reject the proposal.

In support of their argument, the WSAJF cites Ohio law, which it claims permits discovery of claims files in first-party insurance bad faith litigation up to the point when coverage is denied or the insurer ceases attempts to resolve the claim, without regard to the attorney-client privilege or work product rule. *See* Amicus Brief at 19 (citing *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154 (Ohio), *cert. denied*, 534 U.S. 1014 (2001) at 158-59). However, Ohio case law does not provide any reasoned basis for abolishing the privilege. *See generally*, *Boone* 744 N.E.2d 154. *Boone* purported to adopt its ruling from *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331 (Ohio 1994), which was not an insurance bad faith case.

Moreover, as the WSAJF is forced to concede, *Boone* is no longer good law in Ohio. As a direct result of the *Boone* and *Moskovitz* decisions, the Ohio legislature enacted legislative changes in 2006 to overrule and abandon the holding in *Boone*. In order to trigger an exception to the attorney-client privilege in insurance bad faith litigation in Ohio, the legislature required that claimants make a prima facie showing, similar to that of *Escalante*, of insurance bad faith, fraud, or criminal misconduct, before abrogation of the privilege. Ohio Rev. Code. Ann. § 2317.02(A)(2)<sup>5</sup>; *see also*,

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<sup>5</sup> According to the legislative history, R.C. 2317.02(A) was amended in 2006 in direct response to the decisions of *Boone* and *Moskovitz*. “The General Assembly declares that the attorney-client privilege is a substantial right and that it is the public policy of Ohio

Amicus Brief at 14, fn12. Thus, the WSAJF's reliance on *Boone* and other Ohio cases does not support its proposal for the creation of a bright line rule in Washington abrogating the privilege as a matter of course.

Additionally, *Boone* has been criticized for its "chilling effect" on insurance companies' ability to seek legal advice. See *Spiniello Companies v. Hartford Fire Ins. Co.*, 2008 WL 2775643 (D. New Jersey, 2008) (citing Steven Plitt, *The Elastic Contours of Attorney-Client Privilege and Waiver in the Context of Insurance Company Bad Faith: There's a Chill in the Air*, 34 Seton Hall L.Rev. 513, 572 (2004)).

Instead, the more reasoned approach is that taken by Washington in *Escalante* and *Barry* and now *Cedell*, which is consistent with virtually all other jurisdictions. See, e.g., *Aetna Cas. & Ins. Co. v. Superior Court of the City and County of San Francisco*, 153 Cal.App.3d 467, 200 Cal. Rptr. 471 (Cal. Ct. App. 1984 (California)); *Tacket v. State Farm Fire & Cas. Ins. Co.*, 653

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that all communications between an attorney and a client in that relation are worthy of the protection of privilege, and further that where it is alleged that the attorney aided or furthered an ongoing or future commission of insurance bad faith by the client, that the party seeking waiver of the privilege must make a prima facie showing that the privilege should be waived and the court should conduct an in camera inspection of disputed communications. The common law established in *Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St.3d 209, *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, and *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, is modified accordingly to provide for judicial review regarding the privilege."

A.2d 254 (Del. 1995) (Delaware); *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*, 173 F.R.D. 7, 11 (D.Mass.1997) (Massachusetts); *State ex. rel. U.S. Fid. & Guar. Co. v. Canady*, 460 S.E.2d 677 (W. Va. 1995) (West Virginia); *Palmer by Diacon v. Farmers Ins. Co.*, 261 Mont. 91, 861 P.2d 895 (Mont. 1995) (Montana); *Dixie Mill Supply Co., Inc. v. Continental Cas. Co.*, 168 F.R.D. 554, 558 (E.D.La.1996) (Louisiana); *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685 (S.D. 2011) (South Dakota; considering and rejecting the approach in *Boone*); *Hartford Din. Servs. Group, Inc. v. Lake County Park & Recreation Brd.*, 717 N.E.2d 1232 (Ind. Ct. App. 1999) (Indiana); *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 13 P.3d 1169 (Ariz. 2000)<sup>6</sup> (Arizona); *Genovese v. Provident Life & Accident Ins. Co.*, \_\_\_ So.3d \_\_\_, 2011 WL 903988 (March 11, 2011) (Florida)

### **G. Conclusion.**

The Court should reject the WSAJF's interpretation and mischaracterization of *Escalante's* "civil fraud" exception to the attorney-client privilege, because (1) the WSAJF proposes to apply

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<sup>6</sup> The WSAJF cites *Lee* in support of its argument that "[w]here an insurer makes factual assertions in defense of a bad faith claim that implicitly incorporate the advice of counsel, as a matter of fairness the court will find waiver so that the insured can uncover and test the foundation for those assertions." See Amicus Brief at 12. However, *Farmers* has not asserted the "advice of counsel" defense here. Moreover, the Arizona Supreme Court in *Lee* rejected "the idea that the mere filing of a bad faith action ... may be found to constitute an implied waiver of the privilege." *Lee*, 199 Ariz. at 62.

the exception where only bad faith is alleged and evidenced, (2) *Escalante* held that the “civil fraud” exception does not apply unless the facts are adequate to support a good faith belief by a reasonable person that wrongful conduct tantamount to fraud has occurred; and (3) *Barry* held that the quantum of proof necessary to trigger the civil fraud exception requires evidence of conduct more egregious than bad faith alone.

Additionally, the Court should reject the WSAJF’s proposed “Bright Line” rule precluding application of the attorney-client privilege and work product doctrine in all circumstances irrespective of indicia of bad faith or fraud, where such a “bright line” rule would have a chilling effect on an insurer’s willingness and ability to obtain confidential legal advice regarding the proper handling of first party claims.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of September 2011.

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on September 14, 2011, I caused service of the foregoing pleading on each and every attorney of record herein via e-mail (by agreement) and U.S. mail:

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DATED this 14<sup>th</sup> day of September, 2011, in Seattle,  
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