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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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BRUCE CEDELL, a single man,

Petitioner,

vs.

FARMERS INSURANCE COMPANY OF WASHINGTON, doing business in the
State of Washington,

Respondent.

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SUPREME COURT
STATE OF WASHINGTON
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APPEAL FROM GRAYS HARBOR COUNTY SUPERIOR COURT
Honorable David L. Edwards, Judge

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF MUTUAL
INSURANCE COMPANIES (NAMIC)

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae National Association of Mutual Insurance Companies (NAMIC) is the largest and most diverse national property/casualty insurance trade and political advocacy association in the United States. Its 1,400 member companies write all lines of property/casualty insurance business and include small, single-state, regional, and national carriers accounting for 50 percent of the automobile/ homeowners market and 31 percent of the business insurance market. NAMIC has been advocating for a strong and vibrant insurance industry since its inception in 1895.

NAMIC has 110 member insurance carriers doing business in the state of Washington, who write approximately 31 percent of the property/casualty insurance business in the state. These NAMIC members issue thousands of insurance policies in this state, many of which include first-party coverages.¹

At times, coverage issues arise relating to claims made under the first-party coverages of NAMIC members. NAMIC members in this state

¹ First-party coverages are those under which benefits are paid to the insured. *Mulcahy v. Farmers Ins. Co.*, 152 Wn.2d 92, 95 n.1, 95 P.3d 313 (2004). First-party coverages include health, personal injury protection (PIP), and property coverages. Third-party coverage—*i.e.*, liability coverage—is paid to someone other than an insured. *Id.*

at times retain coverage counsel to assist them in determining their rights and obligations as to these claims. On occasion, a NAMIC member may become a party to litigation with its insured regarding the coverage issues and/or the company's claims handling, in which case a NAMIC member will retain counsel to represent it. Sometimes, the opposing party in such litigation may plead bad faith or other extracontractual claims against the NAMIC member.

Thus, amicus and its members have a substantial interest in the scope of the attorney-client privilege and any exceptions thereto as applied to first-party claims, such as are presented in the instant case.

II. ISSUES PRESENTED

A. Is a first-party, non-underinsured motorist ("UIM") insurer that is not relying on an "advice of counsel" defense generally entitled to the protection of the attorney-client privilege in bad faith or other extracontractual litigation?

B. If so, what are the parameters and scope of the civil fraud exception to the attorney-client privilege?

III. STATEMENT OF THE CASE

Amicus adopts the Statement of the Case in Appellant's Opening Brief.

IV. ARGUMENT

A. THE ATTORNEY-CLIENT PRIVILEGE BENEFITS THE PUBLIC INTEREST.

RCW 5.60.060(2)(a) codifies the common law attorney-client privilege as follows:

An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

See Dike v. Dike, 75 Wn.2d 1, 9, 448 P.2d 490 (1968). The oldest and perhaps “the most sacred” of the privileges known to the common law, the attorney-client privilege protects communications between an attorney and client, including documents containing privileged communications. *United States v. Zolin*, 491 U.S. 554, 562, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989); *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997); *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997). The privilege allows a client to communicate freely with its attorney. *Dietz*, 131 Wn.2d at 842.

This Court has recognized that the privilege benefits not merely the client, but also the broader public interest in observance of the law and the administration of justice. *In re Disciplinary Proceeding of Schafer*, 149 Wn.2d 148, 160, 66 P.3d 1036 (2003); *see generally Zolin*, 491 U.S. at 562-63. This is because the confidential relationship between the attorney

and client encourages the client to seek early legal assistance and facilitates proper representation. *Schafer*, 149 Wn.2d at 161. As a result, society benefits because lay persons obtain legal services that permit them to learn their legal rights *and* their legal responsibilities. *Id.* Thus, this Court has declared the privilege “pivotal in the orderly administration of the legal system, which is the cornerstone of a just society.” *Id.* at 160.

B. FIRST-PARTY, NON-UIM INSURERS ARE GENERALLY ENTITLED TO THE ATTORNEY-CLIENT PRIVILEGE.

Many courts in other jurisdictions have ruled that absent waiver or an exception to the privilege, first-party, non-UIM insurers that are not relying on the advice of counsel defense² are—like everyone else—generally entitled to the protection of the attorney-client privilege, even in bad faith litigation.³

² In an “advice of counsel” defense, the insurer affirmatively claims that its actions were in good faith because it acted in reliance on the advice of legal counsel. See *Fidelity & Deposit Co. v. McCulloch*, 168 F.R.D. 516, 520 (E.D. Pa. 1996). It does not appear that the insurer in the instant case has asserted an “advice of counsel” defense.

³ See, e.g., *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869 (5th Cir. 1991); *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*, 173 F.R.D. 7 (D. Mass. 1997); *Chambers v. Allstate Ins. Co.*, 206 F.R.D. 579 (S.D. W.Va. 2002); *Genovese v. Provident Life & Acc. Ins. Co.*, ___ So.3d ___ (Fla. 2011) (2011 WL 903988); *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685 (S.D. 2011); *Aetna Cas. & Sur. Co. v. Superior Ct.*, 153 Cal. App. 3d 467, 200 Cal. Rptr. 471 (1984); *Clausen v. National Grange Mut. Ins. Co.*, 730 A.2d 133 (Del. Super. 1997); *Hartford Financial Servs. Group, Inc. v. Lake County Park & Recreation Bd.*, 717 N.E.2d 1232 (Ind. App. 1999); *Maryland Am. Gen’l Ins. Co. v. Blackmon*, 639 S.W.2d 455 (Tex. 1982); see generally Annot., *Attorney-Client Privilege as Extending to Communications Relating to Contemplated Civil Fraud*, 31 A.L.R.4th 458, § 3 (1984 & Supp). See also *Freedom Trust v. Chubb Group of Ins. Cos.*, 38 F. Supp. 2d 1170 (C.D. Cal. 1999).

For example, in *Aetna Casualty & Surety Co. v. Superior Court*, 153 Cal. App. 3d 467, 200 Cal. Rptr. 471 (1984), the insurer retained coverage counsel to provide an opinion as to whether a first-party property claim was covered. The insurer subsequently filed a declaratory action. The insured counterclaimed for bad faith denial of coverage and sought to discover the coverage attorney's file. The insurer raised the attorney-client privilege. Ruling that the privilege applied, the court explained:

[A]s [the insured] states in his own brief, in the case before us "Aetna retained Thornton to investigate [the insured]'s claim and make a coverage determination under the policy." This is a classic example of a client seeking legal advice from an attorney. The attorney was given a legal document (the insurance policy) and was asked to interpret the policy and to investigate the events that resulted in damage to determine whether Aetna was legally bound to provide coverage for such damage.

153 Cal. App. 3d at 476; accord *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 736, 219 P.3d 736, 101 Cal. Rptr. 3d 758 (2009).

The court further explained:

[A]n insurance company should be free to seek legal advice in cases where coverage is unclear without fearing that the communications necessary to obtain that advice will later become available to an insured who is dissatisfied with a decision to deny coverage. A contrary rule would have a chilling effect on an insurance company's decision to seek legal advice regarding close coverage questions, and would disserve the primary purpose of the attorney-client privilege—to facilitate the uninhibited flow of information between a lawyer and client so as to lead to an accurate ascertainment and enforcement of rights.

153 Cal. App. 3d at 474. *Accord Hartford Financial Services Group, Inc. v. Lake County Park & Recreation Board*, 717 N.E.2d 1232, 1235-36 (Ind. App. 1999).

Most claims representatives are not lawyers. Consequently, an insurer faced with a claim that might not be covered will often retain a lawyer to provide it with a legal opinion to assist it in making the correct decision.

RPC 2.1 requires lawyers to “exercise independent professional judgment and render candid advice.” Thus, when an insurer asks coverage counsel for advice on coverage or claims handling, the attorney has a duty to give the insurer his or her “straightforward advice expressing the lawyer’s honest assessment”, even if that advice involves “unpleasant facts and alternatives that a client may be disinclined to confront.” *Id.* & comment [1].

Accordingly, the lawyer will advise not only as to the insurance company’s legal *rights*, but also as to its legal *obligations*. Discouraging insurers from retaining counsel would deprive them of valuable legal advice not only as to what they *can* do but also as to what they *must* do. Indeed, if insurers knew that their confidential communications with their legal counsel would be disclosed whenever an insured brings a bad faith suit, insurers would simply forego retaining counsel. *Cf. Genovese v.*

Provident Life & Accident Insurance Co., ___ So. 2d ___, ___ (Fla. 2011) (2011 WL 903988, at *3) (purpose of attorney-client privileged would be “severely hampered” if insurer knew its confidential communications with counsel would be revealed to insured).

Consequently, if non-UIM, first-party insurers were precluded from asserting the attorney-client privilege in all extracontractual litigation, the result could well be more erroneous coverage decisions and worse claims handling and service to policyholders, and more extracontractual lawsuits. This would not be in the public interest.

This Court has already recognized that enforcing the privilege helps to *prevent* wrongdoing or misconduct by encouraging clients to consult with an attorney as to the propriety of a contemplated course of action. *Schafer*, 149 Wn.2d at 161. Enforcing the privilege would thus promote proper coverage and claims handling decisions by insurers.

Accordingly, an insurer—just like any other client—should be able to consult with an attorney as to whether a claim is covered or whether a proposed course of handling a claim is legally proper without fear that its communications with that attorney will not be protected. *Aetna*, 153 Cal. App. 3d at 476. And that attorney should be able to give candid advice to the insurer about its options and the strengths and weaknesses thereof without fear that that advice will someday come before a jury in a bad

faith case. *Palmer v. Farmers Insurance Exchange*, 261 Mont. 91, 106, 861 P.2d 895, 904 (1993), *see* RPC 2.1.

C. PERMITTING NON-UIM, FIRST-PARTY INSURERS TO ASSERT THE ATTORNEY-CLIENT PRIVILEGE IS CONSISTENT WITH THEIR QUASI-FIDUCIARY RELATIONSHIP WITH THE INSURED.

Allowing a non-UIM, first-party insurance company to assert the attorney-client privilege in bad faith cases is consistent with the relationship between such an insurer and its insured. While some courts have ruled that the privilege may not always apply where a beneficiary sues a *true* fiduciary for breach of its obligations to the beneficiary⁴, a non-UIM, first-party insurer is not a *true* fiduciary.

This Court has repeatedly and correctly recognized that an insurer is *not* a true fiduciary. *E.g.*, *St. Paul Fire & Marine Insurance Co. v. Onvia, Inc.*, 165 Wn.2d 122, 130 n.3, 196 P.3d 664 (2008); *Barstad v. Stewart Title Guaranty Co.*, 145 Wn.2d 528, 542-43, 39 P.3d 984 (2002); *Safeco Insurance Co. of America v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992). Instead, in Washington, a non-UIM, first-party insurer bears a

⁴ This fiduciary exception to the attorney-client privilege is typically applied to express trusts and derivative actions by shareholders. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 84 & § 85, comments a-b (2000). Shareholders must show good cause. *Mueller Indus., Inc. v. Berkman*, 399 Ill. App. 3d 456, 927 N.E.2d 794, 807, *appeal denied*, 938 N.E.2d 522 (2010). The exception applies only if the communications with the attorney were in regard to the ordinary affairs of the corporation; the exception does not apply if the communications concerned the fiduciary's personal liability or were made in anticipation of adversarial litigation. *Id.*

quasi-fiduciary relationship with its insured. *Van Noy v. State Farm Mutual Automobile Insurance Co.*, 142 Wn.2d 784, 793, 16 P.3d 574 (2001).

Unlike a true fiduciary, an insurer *is not required to put the insured's interests ahead of its own.* *Orvia*, 165 Wn.2d at 130 n.3. Instead, an insurer need give only *equal* consideration to its insured's interests. In other words, the interests of the insurer and the insured "run parallel to each other, neither being superior." *Bailey v. Allstate Insurance Co.*, 844 P.2d 1336, 1339 (Colo. App. 1992).

Indeed, insurance companies not only have a duty of good faith to insureds making a claim under their policies, they also have a duty to their shareholders and other policyholders "not to dissipate its reserves through the payment of meritless claims." *Bosetti v. United States Life Insurance Co.*, 175 Cal. App. 4th 1208, 1237 n.20, 96 Cal. Rptr. 3d 744 (2009); *Love v. Fire Insurance Exchange*, 221 Cal. App. 3d 1136, 1149, 271 Cal. Rptr. 246 (1990); *see also Warren v. Liberty Mutual Fire Insurance Co.*, 691 F. Supp. 2d 1255, 1272 (D. Colo. 2010); *Bailey*, 844 P.2d at 1340; *see also Love*, 221 Cal. App. 3d at 1149.

Consequently, a first-party, non-UIM insurer *cannot* put its insured's interests *above* its own. Rather, it need only give its insured's interests the same consideration as its own. Because the insurer is not a

true fiduciary, that the attorney-client privilege should apply, absent waiver or an applicable exception.

D. THE INSURED'S CASES ARE NO LONGER GOOD LAW OR ARE OTHERWISE UNPERSUASIVE.

The insured in the instant case relies on a handful of out-of-state cases to support his argument that an insurer in bad faith litigation is never entitled to the protection of the attorney-client privilege. However, these cases are either no longer good law or are otherwise unpersuasive.

Three cases on which the insured relies are Montana federal district court cases purporting to interpret Montana law, *In re Bergeson*, 112 F.R.D. 692 (D. Mont. 1986), *Silva v. Fire Insurance Exchange*, 112 F.R.D. 699 (D. Mont. 1986), and *Baker v. CNA Insurance Co.*, 123 F.R.D. 322 (D. Mont. 1988). See FED. R. EVID. 501. But in *Palmer v. Farmers Insurance Exchange*, 261 Mont. 91, 861 P.2d 895 (1993), the Montana Supreme Court held, "The attorney-client privilege protects communications in first-party bad faith cases when the insurer's attorney did not represent the interests of the insured in the underlying case." *Id.* at 108, 861 P.2d at 906. In first-party cases, the insurer's attorney does not represent the insured in the underlying claim. Thus, *Bergeson*, *Silva*, and *Baker* (to the extent that *Baker* discusses first-party insurers), are no longer good law.

The insured here also relies on the four cases relied upon by the *Bergeson* court. Two of these, *Gibson v. Western Fire Insurance Co.*, 210 Mont. 267, 682 P.2d 725 (1984), and *Brown v. Superior Court*, 137 Ariz. 327, 670 P.2d 725, 735 n.7 (1983), did not even decide whether the attorney-client privilege applies and thus are totally inapposite. The other two cases, *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982), and *United Services Automobile Association v. Werley*, 526 P.2d 28 (Alaska 1974), did not hold that the attorney-client privilege is never available to a first-party insurer in bad faith litigation. Instead, they held that the insured had to show that the civil fraud exception to the privilege applies. See *In re Mendel*, 897 P.2d 68, 74 (Alaska 1995) (party seeking discovery failed to show prima facie case of crime or fraud that would overcome attorney-client privilege). Thus, none of these cases stand for the proposition that a first-party, non-UIM insurer is never entitled to the attorney-client privilege in bad faith litigation.⁵

⁵ Hence, *Bergeson* was of doubtful validity even before *Palmer. Silva*, which has been much criticized, merely cited *Bergeson* and *Brown*. See *Hartford Financial Servs. Group, Inc. v. Lake County Park & Recreation Bd.*, 717 N.E.2d 1232, 1237 n.4 (Ind. App. 1999). *Baker* was a third-party bad faith case.

E. THE CIVIL FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE IS LIMITED.

One well-established exception to the attorney-client privilege is the civil fraud exception, sometimes known as the crime-civil fraud exception. *Whetstone v. Olson*, 46 Wn. App. 308, 310, 732 P.2d 159 (1986). The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000) sets forth the exception as follows:

The attorney-client privilege does not apply to a communication occurring when a client:

(a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or

(b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud.

The exception exists because the public policy behind the attorney-client privilege is inapplicable when a client seeks advice and aid from an attorney to perpetrate future wrongdoing, as opposed to obtaining advice relating to prior misconduct. *Whetstone*, 46 Wn. App. at 310. The exception is a limited one, and the party asserting the exception has the burden of showing it applies. *Id.* at 311; *Action Performance Cos. v. Bohbot*, 420 F. Supp. 2d 1115, 1119 (2006); *Blumenthal v. Kimber Manufacturing, Inc.*, 265 Conn. 1, 826 A.2d 1088, 1100 (2003).

The exception has been applied in this state in both insurance and non-insurance cases. *See, e.g., State v. Richards*, 97 Wash. 587, 167 P. 47 (1917) (non-insurance); *Barry v. USAA*, 98 Wn. App. 199, 205, 989 P.2d 1172 (1999) (insurance); *Escalante v. Sentry Ins.*, 49 Wn. App. 375, 394, 743 P.2d 832 (1987) (insurance); *Whetstone*, 46 Wn. App. at 313 (non-insurance).

The parameters of the exception are as follows: First, “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. *Accord In re Grand Jury Investigation*, 445 F.3d 266, 274 (3d Cir.), *cert denied*, 549 U.S. 997 (2006); *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007); *see also Levin v. C.O.M.B. Co.*, 469 N.W.2d 512, 515 (Minn. App. 1991). Merely showing fraud is insufficient. The communication sought to be protected must be shown to have been made *in furtherance* of that fraud. *See In re Richard Roe, Inc.* 168 F.3d 69, 71 (2d Cir. 1999); *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002); *Olson v. Accessory Controls & Equipment Corp.*, 254 Conn. 145, 757 A.2d 14, 32 (2000); *Mueller Industries, Inc. v. Berkman*, 399 Ill. App. 3d 456, 927 N.E.2d 794, 807, *appeal denied*, 938 N.E.2d 522 (2010).

Hence, a mere showing that the attorney-client communication contains relevant evidence of fraud is insufficient. *Blumenthal*, 826 A.2d at 1101; *Koch v. Specialized Care Services, Inc.*, 437 F. Supp. 2d 362, 383 (D. Md. 2005); *see also Newman v. State*, 384 Md. 285, 863 A.2d 321, 335 (2004) (statement of intent to commit fraudulent act insufficient to show communication was in furtherance of committing fraud). Rather, the party seeking discovery must show a link between the privileged communication and the fraud. *Id.*; *see also United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989). If there is no causal connection or functional relationship between the attorney's advice and the client's fraud, the communication was not in furtherance of the fraud. *See United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997); *Koch*, 437 F. Supp. 2d at 382.

Second, the exception applies "only when the client knows, or reasonably should know, that the advice is sought for a wrongful purpose." *Whetstone*, 46 Wn. App. at 310; *accord United States v. Reeder*, 170 F.3d 93, 106 (1st Cir.), *cert. denied*, 528 U.S. 872 (1999); *Caldwell*, 644 P.2d at 33.⁶ Thus, the intent of the client (in this case, the

⁶ Several states have incorporated the "knew or should have known" requirement for the civil fraud exception into their evidence rules. *See, e.g., Mogg v. National*, 846 P.2d 806 (Alaska 1993) (ALASKA R. EVID. 503(d)(1)); *In re Motion To Quash Bar Counsel Subpoena*, 982 A.2d 330 (Me. 2009) (ME. R. EVID. 502(d)(1)); *Frease v. Glazer*, 330 Or.

insurer) is critical. See *In re Grand Jury Proceedings*, 417 F.3d 18, 23 (1st Cir. 2005), *cert. denied*, 546 U.S. 1088 (2006). As one court has explained:

Companies operating in today's complex legal and regulatory environments routinely seek legal advice about how to handle all sorts of matters There is nothing necessarily suspicious about the officers of this corporation getting [advice about campaign finance laws.]. True enough, within weeks of the meeting about campaign finance law, the vice president violated that law. But the government had to demonstrate that the Company sought the legal advice ***with the intent to further its illegal conduct***. Showing temporal proximity between the communication and a crime is not enough.

In re Sealed Case, 107 F.3d 46, 50 (D.C. Cir. 1997) (emphasis added).

Consequently, many courts, including Division I, have cautioned:

Good faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of conduct are entitled to the protection of the privilege even if that action should later be held improper.

Whetstone, 46 Wn. App. at 310 (emphasis added). *Accord United States v. Skeddle*, 989 F. Supp. 890, 901 (N.D. Ohio 1997); *Caldwell*, 644 P.2d at 33; *Blumenthal*, 826 A.2d at 1100; *In re Marriage of Decker*, 153 Ill. 2d 298, 606 N.E.2d 1094, 1102 (1992); *State ex rel. North Pacific Lumber Co. v. Unis*, 282 Or. 457, 579 P.2d 1291, 1295 (1978).

364, 4 P.3d 56 (2000) (OR. R. EVID. 503(4)(a)); *In re Small*, ___ S.W.3d ___ (Tex. App. 2009) (2009 WL 1620436) (TEX. R. EVID. 503(d)(1)).

Moreover, the exception should not apply when the client may be considering a criminal or fraudulent act but does not carry through with it. After consulting a lawyer, the client may choose *not* to commit or aid the fraud. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82, comment b, at 614 (2000). In that event, applying the exception “would penalize a client for doing what the privilege is designed to encourage—consulting a lawyer for the purpose of achieving law compliance.” *Id.*, comment c, at 615; *See also Sealed Case*, 107 F.3d at 49.

Thus, in most cases, “a client’s innocence will bar application of the crime-fraud exception.” *Sealed Case*, 107 F.3d at 49 n.2. The panel here implicitly recognized this when it held that the nine elements of fraud⁷ must be shown to avoid the privilege.

⁷ The nine elements of fraud are as follows:

- (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.

Cedell v. Farmers Insurance Co., 157 Wn. App. 267, 277, 237 P.3d 309 (2010), *rev. granted*, 171 Wn.2d 1005 (2011).

But even if this Court decides that the fraud need not be complete, at the very least, the party seeking discovery should be required to make out a prima facie case of the other elements of fraud—a false representation of material fact, knowledge of its falsity, intent to deceive, and the right to rely. *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal. App. 3d 1240, 1263, 245 Cal. Rptr. 682 (1988); see *Favila v. Katten Muchin Rosenman LLP*, 188 Cal. App. 4th 189, 115 Cal Rptr. 3d 274 (2010).

Third, while the intent of the client in seeking legal advice is crucial, the attorney's knowledge or intent is not. *Whetstone*, 46 Wn. App. at 310. Thus, the attorney may be unaware of the planned fraud and may take no affirmative step to further it. *In re Grand Jury Proceedings*, 87 F.3d 377, 379 (9th Cir.), cert. denied, 519 U.S. 945 (1996).

Fourth, the exception applies only to communications made in contemplation of the *future* or *ongoing* perpetration of a crime or fraud. *Richards*, 97 Wash. at 591; *Escalante*, 49 Wn. App. at 394. Communications made with respect to an alleged fraud *after* the fraud is committed retain the protection, since the privilege must protect the confidences of wrongdoers. *Richards*, 97 Wash. at 591; *Schafer*, 149 Wn.2d at 166 (quoting *Zolin*, 491 U.S. at 562-63).

It is insufficient for the party seeking discovery to merely allege that he or she has “a sneaking suspicion the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney.” *In Grand Jury Proceedings*, 87 F.3d at 381. Rather, the party seeking discovery must establish a “foundation in fact” for civil fraud. *Escalante*, 49 Wn. App. at 394.

To establish a foundation in fact, the party seeking discovery must first make a factual showing “adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the . . . fraud exception . . . has occurred.” *Escalante*, 49 Wn. App. at 394 (quoting *Caldwell*, 644 P.2d at 33)). If that showing is made, the trial court may then, in its discretion, conduct an *in camera* review to determine whether there is a foundation in fact for the claimed fraud. *Id.*

V. CONCLUSION

A first-party, non-UIM insurer should be able, in good faith, to freely consult with an attorney about its legal obligations and rights when a claim is made. Depriving insurers of the attorney-client privilege every time they are sued for extracontractual liability would have a chilling effect on such consultations and might even lead insurers to refrain from seeking legal counsel. Without competent legal advice, the frequency of

erroneous coverage and claims decisions would likely increase, to the benefit of no one.

This Court should rule that first-party, non-UIM insurers are generally entitled to the protection of the attorney-client privilege in bad faith or other extracontractual litigation, absent waiver or a recognized exception to the privilege such as civil fraud.

Further, the civil fraud exception should not penalize an insurer when it engages in good faith consultations with legal counsel. To this end, this Court should hold that the exception requires a showing that the insurer was engaged in or planning a fraud at the time the privileged communication was made; that the insurer knew or reasonably should have known, that the advice was sought for a wrongful purpose; that the communication was made in furtherance of the fraud; and that the fraud must have been completed or at the very least, there must be a showing of a false representation of material fact, knowledge of its falsity, intent to deceive, and the right to rely.

DATED this 23rd day of August 2011.

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