

THE HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE PHOENIX INSURANCE COMPANY, a
foreign insurance company,

Plaintiff,

v.

DIAMOND PLASTICS CORPORATION, a
Nevada corporation, and H.D. FOWLER
COMPANY, a corporation,

Defendants.

CASE NO. C19-1983-JCC

ORDER

This matter comes before the Court on Plaintiff’s motion to strike (Dkt. No. 27). Having considered the parties’ briefing and the relevant record, the Court hereby DENIES the motion for the reasons explained herein.

I. BACKGROUND

On March 24, 2017, Kiewit Infrastructure West Co. contracted with H.D. Fowler¹ to supply sewer and water pipe for a utility conveyance system linking the Kent/Auburn corridor. (Dkt. No. 1 at 3.) Fowler purchased the pipe from Defendant and had the pipe delivered to the project cite. (*Id.*) The installation of the pipe did not go smoothly, and Kiewit eventually charged

¹ Although Fowler appears in the caption of this case, the Court dismissed Fowler as a defendant on June 1, 2020. (Dkt. No. 45.)

1 Fowler \$1.5 million for delays and other costs. (*Id.*)

2 On March 27, 2019, Fowler sued Defendant in King County Superior Court, seeking to
3 recoup the \$1.5 million that it had paid to Kiewit. (*Id.*) On March 29, 2019, Defendant notified
4 Plaintiff, Defendant's insurer, of Fowler's lawsuit. (Dkt. No. 25 at 2.) That same day, Plaintiff's
5 parent company, Travelers Indemnity Company,² opened a "coverage" claim file and assigned
6 Mark Croom, one of Travelers's adjusters, to investigate whether Fowler's claims against
7 Defendant were covered by Defendant's insurance policy with Plaintiff. (*See* Dkt. Nos. 27-3 at 3,
8 33-1 at 5.) As part of that investigation, Croom consulted with Laura Hogan, an attorney in
9 Travelers's Claims Legal Group. (Dkt. No. 27-3 at 3.) "[Croom's] consultation with Ms. Hogan
10 was limited to providing [Plaintiff] with counsel as to its own potential liability [for Fowler's
11 claims], including whether or not coverage exists under the law." (*Id.*) Following the
12 consultation, Croom summarized in his claim file Hogan's opinion regarding whether Fowler's
13 complaint triggered Plaintiff's duty to defend.³ (*See id.*; Dkt. No. 33-1 at 2.) Croom marked the
14 opinion as "SENSITIVE" and "Attorney Client Privilege." (Dkt. Nos. 27-3 at 3, 33-1 at 2.)

15 While Croom's investigation was ongoing, Travelers opened a "defense" claim file and
16 assigned Brian Skinner, another adjuster at Travelers, to help with Plaintiff's possible defense of
17 Defendant. (*See* Dkt. Nos. 27-2 at 3, 33-2 at 5–6.) Although Skinner's claim file was supposed to
18 be separate from Croom's claim file, Croom's unredacted notes, including his notes from his
19 consultation with Hogan, were inadvertently uploaded to Skinner's claim file in April of 2019.
20 (*See* Dkt. No. 27-2.)

21 On June 3, 2019, Croom sent Defendant a letter informing Defendant that Plaintiff would

22 ² The parties often refer to Travelers and Plaintiff interchangeably. (*See, e.g.*, Dkt. No. 32 at 1)
23 (defining Plaintiff as "Travelers"). The two entities are legally distinct, however, and the Court
24 encourages the parties to refer to them as such.

25 ³ Defendant attempts to characterize the entry as Croom's "conclusion that a duty to defend was
26 owed." (Dkt. No. 32 at 7.) Defendant's characterization is untenable: the wording of the entry
shows that Croom was summarizing Hogan's opinion, not detailing his own conclusion. (*See*
Dkt. Nos. 27 at 2, 27-3 at 3.)

1 defend Defendant against Fowler’s lawsuit under a reservation of rights. (Dkt. No. 33-3 at 2.)
2 The letter also told Defendant that Plaintiff was appointing Floyd, Pflueger & Ringer as
3 Defendant’s counsel. (*Id.* at 10.) Shortly thereafter, Skinner sent Floyd, Pflueger & Ringer his
4 defense claim file. (Dkt. No. 27-2 at 3.) Before sending the file, Skinner did not redact or remove
5 the portions of the file relating to Croom’s consultation with Hogan. (*Id.*)

6 On December 4, 2019, Plaintiff filed the present action to determine if it has a duty to (1)
7 continue defending Defendant and (2) indemnify Defendant from any liability arising out of
8 Fowler’s lawsuit. (Dkt. No. 1 at 17–21.) In response, Defendant filed counterclaims alleging that
9 Plaintiff breached its duty of good faith and violated Washington’s Consumer Protection Act,
10 Wash. Rev. Code ch. 19.86, by, among other things, waiting an unreasonable time to notify
11 Defendant that Plaintiff would provide a defense. (*See* Dkt. No. 20 at 11–13.) As evidence of
12 Plaintiff’s unreasonable delay, Defendant quoted the entry in Croom’s claim file that
13 summarized his consultation with Hogan. (*Id.* at 8.) Plaintiff now moves to strike the quoted
14 entry from Defendant’s counterclaim. (Dkt. No. 27.)

15 **II. DISCUSSION**

16 **A. Federal Rule of Civil Procedure 12(f) and Privileged Material**

17 Federal Rule of Civil Procedure 12(f) allows a court to “strike from a pleading . . . any
18 redundant, immaterial, impertinent, or scandalous matter.” “‘Immaterial’ matter is that which has
19 no essential or important relationship to the claim for relief or the defenses being pleaded.’
20 ‘Impertinent’ matter consists of statements that do not pertain, and are not necessary, to the
21 issues in question.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) (citations
22 omitted).

23 “Courts utilize Rule 12(f) to strike sections of a pleading that include inadmissible or
24 privileged information.” *Fodor v. Blakey*, 2012 WL 1289386, slip op. at 14 (C.D. Cal. 2012);
25 *see, e.g., Hensley v. City of Port Hueneme*, 2018 WL 5903963, slip op. at 9 (C.D. Cal. 2018);
26 *Sims v. Roux Laboratories, Inc.*, 2007 WL 2571941, slip op. at 1 (E.D. La. 2007); *Stewart v.*

1 *Wachowski*, 2004 WL 5618386, slip op. at 2 (C.D. Cal. 2004); *Alldread v. City of Grenada*, 1991
2 WL 501642, slip op. at 7 (N.D. Miss. 1991). Courts strike privileged material because it is
3 inadmissible and thus can have “no possible bearing upon the subject matter of the litigation.”
4 *Fodor*, 2012 WL 1289386, slip op. at 23 (quoting *Wailua Assocs. v. Aetna Cas. & Sur. Co.*, 183
5 F.R.D. 550, 553–54 (D. Haw. 1998)). In other words, privileged material falls squarely within
6 the ambit of Rule 12(f). *See Fantasy, Inc.*, 984 F.2d at 1527.

7 **B. Plaintiff’s Motion to Strike**

8 Plaintiff’s motion to strike turns on two issues: (1) whether Croom’s notes about his
9 conversation with Hogan are privileged and (2) whether that privilege was waived when Skinner
10 disclosed those notes to Floyd, Pflueger & Ringer. The Court concludes that although those notes
11 are privileged, the privilege was waived.

12 1. Privilege

13 Defendant’s counterclaims are based on Washington law. (*See* Dkt. No. 20 at 11–13.)
14 Accordingly, Washington law governs Plaintiff’s claim of attorney-client privilege. Fed. R. Evid.
15 501. Under Washington law, it is presumed that when an insured brings a bad faith claim against
16 its insurer, the attorney-client privilege does not protect from disclosure the communications
17 between the insurer’s attorney and the insurer’s adjuster.⁴ *See Cedell v. Farmers Ins. Co. of*
18 *Wash.*, 295 P.3d 239, 246 (Wash. 2013). To overcome the presumption, the insurer must show
19 that its attorney was counseling the adjuster as to the insurer’s own potential for liability rather
20 than investigating, evaluating, or processing the insured’s claim. *Id.* Upon such a showing, the
21 insurer is ordinarily⁵ entitled to the redaction of notes that reflect the attorney’s mental

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23 ⁴ Although the Washington Supreme Court articulated the presumption of discoverability in a
24 first-party property damage case, the Court has previously explained that the presumption
25 logically applies to third-party liability cases as well. *See Trotsky v. Travelers Indem. Co.*, Case
26 No. C11-2144-JCC, Dkt. No. 144 at 12 (W.D. Wash. 2013).

⁵ Even if an attorney was counseling the insurer as to its potential for liability, the attorney’s
mental impressions are still discoverable if the insured shows “that a reasonable person would
have a reasonable belief that an act of bad faith tantamount to civil fraud has occurred.” *Cedell*,

1 impressions. *Id.*

2 Here, Plaintiff has offered sufficient evidence to establish that Hogan was counseling
3 Croom as to Plaintiff's potential for liability. In a sworn declaration, Croom explains that
4 attorneys in Travelers' Claims Legal Group "do not adjust claims or take part in the quasi-
5 [fiduciary] ta[s]ks of investigation, evaluating or processing existing claims. Rather, the
6 attorneys . . . provide Travelers and its subsidiaries with counsel as to their own potential
7 liability." (Dkt. No. 27-5 at 2.) Croom further explains that he sought Hogan's counsel for the
8 latter purpose—that is, to understand "whether or not coverage exist[ed] under the law." (*Id.* at
9 3.) Defendant does not dispute Croom's account or otherwise offer evidence showing that Hogan
10 participated in the investigation of Defendant's claim. Accordingly, Hogan's mental impressions,
11 which Croom summarized in his claim file, are privileged. *See Cedell*, 295 P.3d at 246.

12 2. Waiver

13 Having determined that Hogan's impressions are privileged, the Court must decide
14 whether the privilege was waived when Skinner sent Croom's unredacted notes to Floyd,
15 Pflueger & Ringer. Both parties appear to assume that if Skinner and Croom lacked authority to
16 intentionally waive Plaintiff's attorney-client privilege, then the privilege could not have been
17 waived by Skinner's inadvertent but voluntary disclosure of Croom's unreacted notes. (*See* Dkt.
18 No. 32 at 7–12) (arguing the privilege was waived because (1) Skinner and Croom were
19 empowered to waive it and (2) Plaintiff and Travelers did not take precautions to prevent
20 inadvertent disclosure); (Dkt. No. 39 at 10–15) (arguing that an adjuster cannot inadvertently

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22 295 P.3d 246. Defendant does not argue that civil fraud occurred. (*See generally* Dkt. No. 32.)
23 Instead, Defendant argues that the communication is "highly relevant to the bad faith claim that
24 Travelers waited two months before it advised [Defendant] that it would defend under a
25 reservation of rights and eight months before it filed this coverage action in which it claims it has
26 no duty to defend." (*Id.* at 11–12.) Defendant may be correct, but plausible claims of bad faith do
not, standing alone, justify piercing the attorney-client privilege in Washington; there must be
evidence of fraud. *See Leahy v. State Farm Mut. Auto. Ins. Co.*, 418 P.3d 175, 182 (Wash. 2018).
Defendant has not offered any such evidence.

1 waive an insurer’s attorney-client privilege because adjusters are not empowered to waive the
2 insurer’s privilege). This assumption is mistaken.

3 The parties’ mistaken assumption stems from a misreading of *Commodity Futures*
4 *Trading Commission v. Weintraub*, 471 U.S. 343 (1985). At issue in *Weintraub* was whether a
5 trustee of a corporation in bankruptcy had the power to intentionally waive the debtor
6 corporation’s attorney-client privilege. *See id.* at 345–46, 358. In deciding that the trustee could
7 waive the debtor-corporation’s privilege, the Supreme Court analogized corporations in
8 bankruptcy to those outside of bankruptcy. *See id.* at 351–53. “Because the attorney-client
9 privilege is controlled, outside of bankruptcy, by a corporation’s management,” the Supreme
10 Court reasoned, “the actor whose duties most closely resemble those of management should
11 control the privilege in bankruptcy.” *Id.* Plaintiff seizes on this language, arguing that “the
12 Supreme Court clearly stated that a corporation’s management and only a corporation’s
13 management has the ability to waive a corporation’s attorney-client privilege.” (Dkt. No. 39 at
14 10) (emphasis in original).

15 Although Plaintiff correctly summarizes what the Supreme Court said in *Weintraub*,
16 Plaintiff ignores that the Supreme Court was speaking about the power of corporate management
17 to intentionally waive a corporation’s attorney-client privilege. *See Weintraub*, 471 U.S. at 351–
18 53. The Supreme Court said nothing about what happens if lower-level employees inadvertently
19 yet voluntarily disclose privileged material while acting within the scope of their authority. *See*
20 *id.* When faced with such disclosures, many courts have held that the disclosure waives the
21 corporation’s attorney-client privilege if the corporation took inadequate steps to prevent the
22 disclosure. *See, e.g., Barcomb v. Sabo*, 2009 WL 5214878, slip op. at 4 (N.D.N.Y. 2009);
23 *Specialty Beverages, L.L.C. v. Pabst Brewing Co.*, 2006 WL 8436581, slip op. at 2 (W.D. Okla.
24 2006); *Denny v. Jenkins & Gilchrist*, 362 F. Supp. 2d 407, 414 (S.D.N.Y. 2004); *Jonathan Corp.*
25 *v. Prime Comput., Inc.*, 114 F.R.D. 693, 698–700 (E.D. Va. 1987). These courts observe that, in
26 general, “[t]he voluntary disclosure of privileged communications to third parties . . . by the

1 client or the client’s authorized agent destroys both the communications confidentiality and the
2 privilege that is premised upon it.” *Denny*, 362 F. Supp. 2d at 414 (emphasis in original) (quoting
3 Paul R. Rice, Attorney–Client Privilege in the United States § 9:27 (2d ed.1999)). Exempting
4 corporations from this general rule would be unfair, these courts reason, because corporations
5 would have no responsibility to monitor how their low-level employees handle privileged
6 communications even though those employees are covered by modern expansions of the
7 attorney-client privilege. *See Jonathan Corp.*, 114 F.R.D. at 698–99.

8 The Court finds this reasoning persuasive. Accordingly, the Court must decide if Plaintiff
9 took adequate steps to prevent Skinner and Croom from disclosing Croom’s confidential
10 communications with Hogan. Plaintiff bears the burden of proving that it took such steps. *See*
11 *Sitterson v. Evergreen Sch. Dist. No. 114*, 196 P.3d 735, 740, 742 (Wash. Ct. App. 2008). Yet,
12 Plaintiff has offered no evidence that it instituted procedural safeguards—such as reviewing
13 claims files for privileged information before sending them to a third-party—to prevent a
14 disclosure of the type at issue here. Consequently, the Court finds that Plaintiff’s privilege was
15 waived when Skinner voluntarily sent Croom’s summary of Hogan’s mental impressions to
16 Floyd, Pflueger & Ringer.

17 **III. CONCLUSION**

18 For the foregoing reasons, the Court DENIES Plaintiff’s motion to strike (Dkt. No. 27).
19 DATED this 24th day of July 2020.

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23 John C. Coughenour
24 UNITED STATES DISTRICT JUDGE
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