NORCOTT, J., with whom VERTEFEUILLE, J., joins, dissenting. I disagree with the majority's conclusion that the plaintiff insureds should not have obtained a bill of discovery from the trial court because they failed to meet the prongs of the civil fraud exception. Because I conclude that the precautions employed by the trial court in the present case were sufficient to safeguard the attorney-client privilege, but also to allow the plaintiffs to make a claim of bad faith against the defendant insurer that otherwise would be foreclosed to them, I respectfully dissent.

The issue of whether we should recognize an exception to the attorney-client privilege for claims of bad faith against first party insurers, under the limited circumstances of the present case, wherein there was both an in camera review of the disputed documents and a finding of necessity and relevancy, is one of first impression for this court. The majority correctly notes that the attorney-client privilege ''was created to encourage full and frank communication between attorneys and their clients . . . [so that] [e]xceptions . . . should be made only when the reason for disclosure outweighs the potential chilling of essential communications.'' (Citation omitted; internal quotation marks omitted.) *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 52, 730 A.2d 51 (1999). On the other hand, it is also important to recognize that ''bad-faith actions against an insurer, like actions by client against attorney, patient against doctor, can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did.'' *Brown* v. *Superior Court*, 137 Ariz. 327, 336, 670 P.2d 725 (1983). Accordingly, many claims of bad faith by insureds, who risk being taken advantage of when they rely upon their insurers as fiduciaries and have no resources with which to challenge and investigate any suspected wrongdoing, would fail without some form of limited access to the claim file.[1] It is our responsibility as a court to balance these competing interests; the majority, however, seems insensitive to the latter.

As the majority points out, this court previously has held in *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, supra, 249 Conn. 56–57, that a claim of need, in and of itself, is insufficient to destroy the privilege. The trial court's three part exception in the present case, however, guarantees *both* need *and* relevance, *and* properly balances need and relevance against the potential chilling effects of this exception on attorney-client communications through the intervention of an independent arbiter. This new exception is, therefore, not inconsistent with our prior holding in *Metropolitan*

Life Ins. Co. regarding exceptions to the attorney-client privilege.[2] To the contrary, this combination of need and relevance in the context of the special, quasi-fiduciary nature of the first party insurance relationship between the plaintiffs and the defendant provides a particularly compelling basis for disclosure in the present case.

The majority states that a fiduciary relationship did not exist between the parties in the present case because, as a result of the inherent nature of uninsured and underinsured motor vehicle coverage, their relationship was adversarial from the inception of the claim. It concludes, therefore, that the plaintiffs were not entitled to the privileged materials as they would have been had their interests not been adverse. For this conclusion, the majority relies on *Kujawa* v. *Manhattan National Life Ins. Co.*, 541 So. 2d 1168 (Fla. 1989).

American jurisprudence, however, has long recognized that ''an insurer and its insured have a 'special relationship' ''; *Vu* v. *Prudential Property & Casualty Ins. Co.*, 26 Cal. 4th 1142, 1150, 33 P.3d 487, 113 Cal. Rptr. 2d 70 (2001); that is '' 'characterized by elements of public interest, adhesion and fiduciary responsibility.' '' *White* v. *Unigard Mutual Ins. Co.*, 112 Idaho 94, 99, 730 P.2d 1014 (1986). These characteristics, along with unequal bargaining power, leave insureds no choice but to ''depend on the good faith and performance of the insurer.'' *Vu* v. *Prudential Property & Casualty Ins. Co.*, supra, 1151. ''In the seminal cases in which this court has recognized the existence of a fiduciary relationship, the fiduciary was . . . in a dominant position, thereby creating a relationship of dependency . . . .'' (Internal quotation marks omitted.) *Biller Associates* v. *Peterken*, 269 Conn. 716, 723–24, 849 A.2d 847 (2004). Accordingly, this unique dependency imposes fiduciary-like duties on the part of first party insurers, which are greater and distinct from the duties of parties to ordinary commercial contracts.

Moreover, although the majority fails to mention them, there are many jurisdictions outside of Florida that recognize a fiduciary-like duty of insurers to insureds even in the context of adversarial first party relationships. See *Manhattan Fire Ins. Co.* v. *Weill & Ullman*, 69 Va. 389, 26 Am. Rep. 364 (1877); see also *White* v. *Unigard Mutual Ins. Co.*, supra, 112 Idaho 99–100 (recognizing ''covenant of good faith and fair dealing'' and describing relationship between first party insurers and insureds as ''special''); *Motorists Mutual Ins. Co.* v. *Said*, 63 Ohio St. 3d 690, 699, 590 N.E.2d 1228 (1992) (''the duty of an insurance company to its insured is analogous to that of a fiduciary''); *Danner* v. *Auto-Owners Ins.*, 245 Wis. 2d 49, 69, 629 N.W.2d 159 (2001) (stating that insurer has special fiduciary relationship to insured). Due to the diversion of interests in first party relationships, however, I am more persuaded by the reasoning of jurisdictions that recognize first party insurance contracts as quasi-fiduciary. In *Peterman* v. *State Farm Mutual Automobile Ins. Co.*, 961 P.2d 487, 494 (Colo. 1998), the court aptly stated that ''[w]e recognize that the insurer becomes almost adversary to its own insured in the context of uninsured motorist coverage, but that conflict does not vitiate the underlying contractual and quasi-fiduciary duty that the insurer owes its insured.'' Fundamentally, first party insurance contracts are *not* arm's-length transactions, and they involve the same relationship of dependency on insurers' good faith that characterizes third party contracts. I am therefore puzzled as to how the majority could consider them to be anything less than quasi-fiduciary.

This principle is consistent with the advertising of the insurance industry itself, which assures customers that they are ''in good hands or dealing with a good neighbor.'' (Internal quotation marks omitted.) *White* v. *Unigard Mutual Ins. Co.*, supra, 112 Idaho 99. Accordingly, this special relationship supports the adoption of a limited new exception to the attorney-client privilege in the context of allegations of bad faith against first party insurers.

Additionally, the states of Ohio and Arizona similarly have recognized exceptions to the attorney-client privilege and the privilege accorded to attorneys' mental impressions, respectively, for claims of bad faith against insurers. In *Boone* v. *Vanliner Ins. Co.*, 91 Ohio St. 3d 209, 213–14, 744 N.E.2d 154 (2001), the court held that ''in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage.'' Similarly, in *Brown* v. *Superior Court*, supra, 137 Ariz. 337–38, the Arizona Supreme Court concluded that the denial of a motion to compel production of an insured's loss of earnings claim file was improper because claims of bad faith against insurers give rise to an overwhelming need for disclosure of such information.[3]

I am simply not persuaded that such a limited exception to the privilege will have a chilling effect on attorney-client communications. An in camera review of the otherwise privileged communications provides an independent review of the disputed materials and ensures that they are relevant to the claim of bad faith in particular. This is consistent with the standard applied by this court to bills of discovery. In order for a trial court to grant a bill of discovery, ''[a] plaintiff must be able to demonstrate good faith as well as probable cause that the information sought is both material and necessary to his action.'' *Berger* v. *Cuomo*, 230 Conn. 1, 7, 644 A.2d 333 (1994). Similarly, in cases of parties alleging claims of bad faith against their first party insurers, as is the case here, it is the trial court's role to ensure relevancy and necessity of disclosure by means of an in camera review. This limited level of judicial intervention is sufficient to minimize the risk of undue interference with attorney-client communications.

I, therefore, conclude that the three part analysis that the trial court employed in the present case provides a sensible limited exception to the attorney-client privilege. On the one hand, it recognizes the overwhelming need for claims information in the context of claims of bad faith by insureds against their first party insurers, as well as the fiduciary-like nature of the relationship between them. On the other, it limits this greater availability of otherwise privileged communications to those specifically necessary and relevant to the claim of bad faith by means of an in camera review. This is the same benchmark already utilized in decisions regarding bills of discovery. Accordingly, it is very narrow and, at the same time, consistent with the principles of fairness and justice underlying the quasi-fiduciary nature of insurance contracts and the attorney-client privilege itself.

I conclude that the trial court did not abuse its discretion by ordering disclosure of the privileged communications in this matter. I would therefore affirm the trial court's judgment. Accordingly, I respectfully dissent.

[1] The majority reasons that a new, albeit limited, exception to the attorney-client privilege is unnecessary because either: (1) insurers will waive the privilege by asserting a routine handling defense, which puts the privileged materials at issue; or (2) a fact finder will determine that an insurer had no reasonable basis to act as it did in a particular situation. This, however, does not resolve the issue in the present case because although the defendant concedes that misleading insureds about coverage is grossly improper, there is a fundamental factual dispute over whether that was in fact done, proof of which seems to lie in the privileged materials, according to the trial court's determination of relevancy and necessity. The majority ignores this fact and places upon the insured the often impossible burden of proving probable cause to suspect bad faith from facts already obtained. I question whether, without access to the claim file, insureds realistically will be able to provide evidence that the insurer sought legal advice ''in order to conceal or facilitate its bad faith conduct,'' as the majority requires.

[2] I note that *Metropolitan Life Ins. Co.* did not concern a claim of bad faith; therefore, it is not controlling on the issue of whether we should recognize a new exception in the present case other than to warn against doing it on the basis of need alone.

[3] The majority states that the information sought in *Brown* v. *Superior Court*, supra, 137 Ariz. 327, consisted only of nonprivileged materials prepared in anticipation of litigation to which the substantial need standard applies, implying that it has no relevance to the present case. This characterization is inaccurate because the information sought and disclosed in *Brown* was the *entire* claims file, which included, among other things, the mental impressions of the insurer's attorneys, which are usually absolutely privileged from disclosure. Id., 337. The court explained that it based its decision to allow a limited exception for these materials on overwhelming need, stating that the materials sought were central to the plaintiff's claim of bad faith. Id., 338.