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Florida Supreme Court Upholds Attorney-Client Privilege in Bad Faith Claims

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Insurance Coverage Alert / Lawyers for the Profession® Alert

In *Peter R. Genovese, M.D. v. Provident Life & Accident Ins. Co.,* No. SC06-2508 (Mar. 17, 2011) (*per curiam*), plaintiff insured brought a first-party bad faith lawsuit against defendant insurer after the insurer terminated the monthly payments under a disability income policy. The insured sought production of the insurer's entire litigation file, including all correspondence and communications between the attorneys representing the insurer and its agents regarding the insured's claim for disability benefits. The trial court ordered the production of the entire litigation file, including all attorney-client communications between the insurer and its attorneys. The insurer sought a writ of certiorari to the intermediate appellate court to quash the discovery order. The district court of appeal granted the writ and quashed the discovery order, holding that information covered by the attorney-client privilege is not discoverable in a first-party bad faith suit. The court then certified the following question to the Florida Supreme Court as a matter of great public importance:

DOES THE FLORIDA SUPREME COURT'S HOLDING IN ALLSTATE INDEMNITY CO. V. RUIZ, 899 SO. 2D 1121 (FLA. 2005), RELATING TO DISCOVERY OF WORK PRODUCT IN FIRST-PARTY BAD FAITH ACTIONS BROUGHT PURSUANT TO SECTION 624.155, FLORIDA STATUTES, ALSO APPLY TO ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS IN THE SAME CIRCUMSTANCES?

In *Ruiz*, the Florida Supreme Court held that work product materials were discoverable in a first-party bad faith lawsuit, which included items contained in the underlying claim and related litigation files material that was created up to and including the date of resolution of the underlying disputed matter and pertained in any way to coverage, benefits, liability or damages. The issue before the Florida Supreme Court in *Genovese* was whether or not this also included attorney-client communications contained in such claim and related litigation files.

In deciding that the Court's prior holding in *Ruiz* did not apply to attorney-client communications, the Florida Supreme Court held that the work product doctrine and attorney-client privilege are two distinct concepts. The attorney-client privilege, governed by Fla. Stat. § 90.502 (2010), precludes discovery or disclosure of "the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client." Fla. Stat. § 90.502(2) (2010). On the other hand,

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under Fla. R. Civ. P. 1.280(b)(3) (2010) (which tracks the federal rules of civil procedure), the work product doctrine protects against the discovery of "documents and tangible things otherwise discoverable under [Fla. R. Civ. P. 1.280(b)(1) (2010)] and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent. . . ." Work product is subject to production, however, upon a showing that the party in need of the materials is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. Fla. R. Civ. P. 1.280(b)(3) (2010). The Court held that, in the context of a bad faith claim, the underlying claim and litigation files are necessary to advance such a claim and to evaluate the allegations of bad faith. However, there is no exception to the attorney-client privilege for either a need for the opposing party to prove their case or undue hardship. Thus, the bases for providing an exception to the work product doctrine are not present with respect to the attorney-client communications. In fact, those bases would do harm to the purpose of such communications, namely to promote full and frank discussion between a client and the attorney. Therefore, the Court held that when an insured brings a bad faith action against its insurer, the insured may not discover privileged communications between the insurer and its attorneys during the underlying action.

The Court acknowledged circumstances where an insurer retains an attorney to both investigate the underlying claim *and* render legal advice. Where a lawyer solely performs investigative work in evaluating the underlying claim and does not otherwise provide legal advice, such communications between the attorney and the insurer are not privileged, as the privilege only extends to the providing of legal advice. The Court held that where an attorney is hired by an insurer to conduct both an investigation of the underlying claim and to provide legal advice, the trial court must conduct an *in camera* inspection to determine which communications are work product, and thus discoverable, and which communications fall within the attorney-client privilege. The Court also held that where an insurer asserts the "advice of counsel" defense in a bad faith lawsuit, the communications upon which the insurer relies in asserting such a defense are waived.

Practice Note

This decision removes any doubt left in the wake of *Ruiz* as to whether attorney-client communications regarding the underlying claim are discoverable in a bad faith suit. Insurers should note that when counsel is retained to assist in the investigation of a claim, without the rendering of legal services, such communications are *not* subject to the attorney-client privilege and may be discoverable in a subsequent bad faith lawsuit. Where counsel is retained to conduct both the investigation and provide legal advice, the trial court will need to conduct an *in camera* review to identify those communications that are merely related to the investigation as opposed to communications concerning the providing of legal advice. Finally, insurers should be aware that the attorney-client privilege may be waived where an insurer asserts the "advice of counsel" defense in a bad faith suit.

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