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Protecting Confidential Communications: Application Of The Attorney-Client Privilege In First-Party Insurance Bad-Faith Cases

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Commentary

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I. Introduction

Discovery of the insurance company's entire claim file — including confidential communications between the insurer and its attorney — is often the first target on the insured's agenda in a first-party bad-faith lawsuit.[1] In any other context, a party's request for discovery of the opposing party's confidential attorney-client communications would be viewed by courts as a brazen and inappropriate attempt to obtain information obviously protected by the attorney-client privilege; however, in the context of bad-faith litigation, this type of request has been dignified by courts who often look for ways to permit discovery of the insurer's attorney-client communications.

The typical first-party bad-faith action involves an underlying claim for insurance coverage or benefits (and often an underlying lawsuit for damages), which the insured alleges was handled in "bad faith" by the insurer.[2] Immediately upon the filing of the bad-faith litigation, insureds often seek (among other things) discovery of all confidential communications between the insurer and its attorneys concerning the handling of the insured's underlying claim for benefits. When insurers object to these requests, and assert the attorney-client privilege, courts are often asked, in essence, to address the issue of whether the attorney-client privilege should protect an attorney's communications with an insurance company to the same extent the privilege protects an attorney's communications with all other clients.

Insureds in jurisdictions throughout the country have crafted — with varying degrees of success — a variety of arguments to compel discovery of confidential communications that took place between their insurers and their insurer's attorneys during the course of the underlying claim or litigation. By understanding and anticipating these arguments, insurers and their attorneys can often take steps to protect confidential attorney-client communications.

II. Overview Of Attorney-Client Privilege

The attorney-client privilege is one of the oldest and most revered common law privileges protecting confidential communications.[3] Courts generally recognize that the purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and to thereby promote the broader public interest in advancing the administration of justice.[4]

Today, the attorney-client privilege has been codified in jurisdictions throughout the country.[5] For example, in Florida, the attorney-client privilege provides, in pertinent part, as follows: "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, 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."[6]

A. Disputes Over Scope Of Privilege Generally

Disputes often arise over the issue of whether a particular communication is protected by the attorney-client privilege. When resolving these disputes, courts typically acknowledge the general principle that the attorney-client privilege is "absolute."[7] This means a court, when addressing whether the attorney-client privilege protects a particular communication, will not simply balance the relative needs to the parties, nor will it apply a test similar to the one applied by courts when determining whether the work product doctrine protects a particular document. Under the work product doctrine, a document prepared in anticipation of litigation is not protected from disclosure when the party seeking disclosure shows it has "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[8] In contrast, under the attorney-client privilege, confidential communications between an attorney and his or her client are protected from disclosure, regardless of whether the party seeking disclosure needs the material, and regardless of whether the party seeking disclosure cannot obtain equivalent materials without undue hardship.[9]

B. Disputes In First-Party Bad-Faith Cases

The principle that the attorney-client privilege is "absolute" has significant implications in bad-faith cases. Insureds often argue (and courts usually agree) that the underlying claim file (including confidential communications between and insurer and its attorneys) is the evidence the insured "needs" to prove the insurer acted in bad faith. For this reason, courts typically recognize that the work-product doctrine does not protect the underlying claim file from disclosure.[10] Thus, if a court were to look solely at the insured's "need" for the communications between the insurer and its attorney, there is a good chance a court would rule that the insured is entitled to discovery of those materials.

But most courts in bad-faith cases also recognize (as courts do generally) that the attorney-client privilege, unlike the work-product doctrine, is not concerned with the litigation "needs" of the insured, or whether the insured can obtain the "substantial equivalent" of the materials "without undue hardship.[11] Most courts agree that the insured's professed "need" for materials protected by the attorney-client privilege should not be viewed as a justification that will warrant disclosure of communications protected by the attorney-client privilege.[12]

This does not mean, however, that the privilege protects all attorney-client communications; the privilege protects only those communications that are confidential *and* made in connection with the rendition of legal services.[13] Thus, determining the applicability of the attorney-client privilege always involves a consideration of the context and purpose of the communication. This is particularly true when the client is an insurance company, because insurance companies typically seek legal advice and assistance from attorneys on a wide spectrum of issues and matters, ranging from those tasks that arguably have no obvious connection to the rendering of legal advice (e.g., inspecting property damage) to those tasks that are classic examples of an attorney providing legal advice (e.g., preparing legal opinion letters).

Adding further to the potential complexity of the determination of whether the privilege protects a particular communication is the fact that legal advice is often commingled with non-legal advice. Moreover, the context and purpose of an attorney's relationship with its insurer client may change over time. An insurer may retain an attorney initially to investigate a claim by interviewing witnesses and inspecting property damage. Later, the insurer may ask that same attorney to render a legal opinion on a coverage issue.

III. Common Arguments Raised By Insureds

In most jurisdictions, courts routinely protect the attorney-client privilege — even in first-party bad-faith cases.[14] Nonetheless, courts throughout the country have recognized several narrow exceptions or exclusions to the attorney-client privilege in first-party bad-faith lawsuits. As a result of these decisions, insurers and their attorneys may wish to consider several important questions concerning the actual protection provided by the attorney-client privilege in first-party bad-faith cases. These questions include the following:

- Does the attorney-client privilege protect all confidential communications between the insurer and its attorney regarding the attorney's investigation of the insured's claim for benefits?

- Does the attorney-client privilege protect all confidential communications between the

insurer and its attorney when the attorney is retained to both investigate the insured's claim for benefits and provide advice on whether the claim is covered under the policy?

- In cases where the alleged bad faith involves intentional misconduct, does the attorney-client privilege protect the insurer's communications with its attorney?

- In cases where the insurer does not raise the advice-of-counsel defense, does the attorney-client privilege protect confidential communications between the insurer and its attorney with respect to the attorney's advice on whether the insurance policy provides coverage?

A. The 'Attorney-As-Adjuster' Exception

When an attorney is retained by an insurer for the limited purpose of assisting in the investigation of a claim, the insurer and the attorney should anticipate that the insured may argue that the communications between the insurer and its attorney are not protected by the attorney-client privilege.

Several jurisdictions have expressly held that the communications of an attorney acting as an adjuster, rather than as an attorney, are not privileged.[15] To fall within the "attorney-as-adjuster" exception to the attorney-client privilege, these cases uniformly require the insured to establish that the insurer hired the attorney to conduct ordinary claims investigations, and not to perform services as an attorney.[16]

1. *Genovese* ('Investigation' v. 'Legal Advice')

In *Genovese v. Provident Life & Accident Ins. Co.*, the Florida Supreme Court held that an insured in a first-party bad-faith action may not discover privileged communications that occurred between the insurer and its attorney during the underlying action.[17] The Court stated, however, that the attorney-client privilege protects only those communications that pertain to the rendering of legal advice and not solely to the investigation of the underlying claim.[18]

In *Genovese*, an insured sued his own insurer, Provident Life & Accident Insurance Company ("Provident"), apparently for breach of contract, after Provident stopped payment of monthly benefits under his disability insurance policy.[19] At the conclusion of the litigation of the insured's underlying claim for disability benefits, the insured filed a statutory first-party bad-faith action against Provident.[20] Once the bad-faith action was filed, the insured requested production of Provident's entire litigation file, including all correspondence and communications made between the attorneys representing Provident and Provident's agents regarding the insured's claims for benefits.[21]

Provident objected to the request, based on the attorney-client privilege. The insured then moved to compel production, arguing he was entitled to attorney-client communications between the insurer and its attorney based on the earlier Florida Supreme Court case of *Allstate Indem. Co. v. Ruiz,*[22] where the Florida Supreme Court held that an insured may discover the insurer's work product materials in a first-party bad-faith action. The trial court agreed with the insured and issued an order compelling production of the documents.

Provident then filed a petition for writ of certiorari, asking the Fourth District Court of Appeal to quash the trial court's order. The Fourth District Court granted the petition and quashed the trial court's order compelling discovery of documents protected by the attorney-client privilege. Additionally, the Court certified the following question: "Does the Florida Supreme Court's holding in [*Ruiz*], 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?"[23]

The Florida Supreme Court answered the certified question in the negative, and held that attorney-client privileged communications are not discoverable in a first-party action.[24] In reaching its decision, the court noted that the attorney-client privilege and the work-product doctrine are two distinct concepts. On the one hand, the work product doctrine provides that a party may obtain discovery of documents prepared by the party (including the parties' attorneys) in anticipation of litigation upon a showing that the party seeking production has a need for the materials in the preparation of the case and is unable without "undue hardship" to obtain the substantial equivalent of the materials by other means.[25]

On the other hand, the Court explained that the attorney-client privilege, unlike the work-product doctrine, is not concerned with the litigation "needs" of the party seeking production of the materials.[26] The Court noted the purpose of the attorney-client privilege is to "encourage full and frank communication" between an attorney and the client, and that this purpose "would be severely hampered if an insurer were aware that its communications with its attorney, which were not intended to be disclosed, could be revealed upon request by the insured."[27]

In carving out an attorney-as-investigator exception to the attorney-client privilege, the Florida Supreme Court stated:

> Although we conclude that the attorney-client privilege applies, we recognize that cases may arise where an insurer has hired an attorney to both investigate the underlying claim *and* render legal advice. Thus, the materials requested by the opposing party may implicate both the work product doctrine and the attorney-client privilege. Where a claim of privilege is asserted, the trial court should conduct an in-camera inspection to determine whether the sought-after materials are truly protected by the attorney-client privilege. If the trial court determines that the investigation performed by the attorney resulted in the preparation of materials that are required to be disclosed pursuant to *Ruiz* and did not involve the rendering of legal advice, then that material is discoverable.[28]

Thus, under *Genovese*, in the event an insurer's attorney is involved in the rendering of legal advice, the materials prepared by the attorney would be protected by the attorney-client privilege, even if the attorney was also involved in the investigation of the claim.

The *Genovese* court was obviously concerned that insurance companies might try to shield everyday adjusting activities from discovery by hiring attorneys to act as adjusters. In a specially concurring opinion, Justice Pariente addressed this concern by further emphasizing the importance of an in-camera inspection to determine whether the sought-after materials "are truly protected by the attorney-client privilege or whether the materials pertain to the investigation or evaluation of the underlying claim."[29] Justice Pariente noted the potential importance of evidence regarding an insurer's communications with its attorney in first-party bad-faith cases, stating: "[I]t is undeniable that an attorney's interaction with the insurer during the time that the decision is being made to pay or deny the claim is often an important consideration in determining the critical issue of whether the insurer has acted in good faith in handling the claim."[30] For this reason, Justice Pariente stated her opinion that the attorney-client privilege does not protect communications between an insurer and its attorney in cases where the insurer has hired an attorney to "investigate or evaluate the underlying claim and not to render legal advice."[31]

2. Problems With 'Investigation' v. 'Legal Advice' Distinction

At first glance, it may appear reasonable to adopt a procedure whereby an in-camera inspection is scheduled whenever an insurer objects to the production of attorney-client communications in cases where the insurer retained an attorney to investigate and provide legal advice. In theory, the inspection can allow the court to decide whether a particular communication pertains to the rendering of legal advice (and thus is protected by the privilege), or whether the communication relates to the "investigation" (and thus is not protected by the privilege).

In practice, however, making this determination will be difficult. Neither Justice Pariente nor the majority suggest how courts conducting in-camera inspections can differentiate between cases where an insurer retains an attorney to serve solely as an adjuster or investigator, and those cases where an insurer retains an attorney to provide both legal advice and assistance in connection with the investigation of the underlying claim.

Moreover, it is not always easy to determine whether an attorney is acting as an "investigator" and not as an attorney. Attorneys do not always function solely as an investigator whenever they are retained by an insurer to investigate an insurance claim. When an attorney is retained to investigate a claim, the attorney (one would hope) applies a broad range of considerations to assist in evaluating the claim. As a legal advisor, attorneys are expected to consider both legal and non-legal matters. As set forth in the Florida Rules of Professional Conduct: "In representing a client, a lawyer shall exercise

independent professional judgment and render advice. In rendering advice, a lawyer may refer not only to law but other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation."[32]

Thus, when an attorney investigates and evaluates an insurance claim, the attorney acts in his or her professional role of advisor, not as a traditional adjuster or investigator. When attorneys are hired to investigate claims, one should expect that they will consider matters other than the law. Even if an attorney is hired solely to investigate a claim, the attorney is still an attorney — who may spot legal issues that may not be apparent to the investigator who is not an attorney.[33] It would be an oversimplification, and inaccurate, to suggest that the attorney is not acting in his or her professional role as an advisor whenever the attorney is hired to investigate a claim.

3. Steps To Protect The Privilege

In light of the "attorney-as-adjuster" exception, insurers and their attorneys in certain cases may wish to take steps to expressly clarify their relationship. For example, upon retaining an attorney to investigate a claim, the insurer may wish to provide the attorney with written instructions expressly requesting — as part of the investigation — that the attorney "provide legal advice on any pertinent issues." Additionally, the attorney who is retained to investigate a claim may wish to expressly state on his or her written report that the report is "protected by the attorney-client privilege" and that the attorney is commenting on the existence of any "known legal issues" related to the investigation.

Most insurers probably expect their attorneys to report on any known legal issues, even in those cases where an attorney is retained to investigate a claim without any express request for "legal advice." By expressly clarifying the relationship, attorneys and insurers can make it easier for the courts to identify the attorney's professional role in the investigation, thereby making it less likely a court will rule (incorrectly) that the attorney was hired solely to investigate and without any expectation of providing relevant legal advice.

B. The 'Crime-Fraud' Exception

One generally recognized exception to the attorney-client privilege is that the privilege cannot be used to protect a client in the perpetration of an ongoing crime or fraud.[34] Some courts have concluded that the civil-fraud exception should be extended to insurance bad-faith cases when the insurer's conduct rises to the level of fraud.[35]

Although a few courts adopt a broad view of the crime-fraud exception, courts typically hold that the mere allegation of bad faith, standing alone, will not trigger application of this exception in first-party bad-faith cases.[36] Courts generally recognize that an insurance bad-faith claim is not similar to a fraud claim and, thus, there is no legitimate reason to include bad-faith claims within the crime-fraud exception to the attorney-client privilege.[37] Thus, the crime-fraud exception is typically applied in bad-faith cases only where the alleged bad faith involves intentional misconduct tantamount to fraud.[38]

Moreover, the crime-fraud exception is typically applied in first-party bad-faith cases only when there is both an allegation and a prima facie showing by the insured of conduct rising to the level of civil fraud committed by the insurer with the assistance of its attorney.[39] The required prima facie showing was described in *Hutchinson v. Farm Family Cas. Ins. Co.*,[40] where the Supreme Court of Connecticut held that an insured who makes an allegation of bad faith against his insurer is entitled to an in-camera review of privileged materials only when the insured has established, on the basis of non-privileged materials, probable cause to believe that (1) the insurer acted in bad faith, and (2) the insurer sought the advice of its attorneys in order to conceal or facilitate its bad-faith conduct.[41]

Given the limited parameters of the "crime-fraud exception" in first-party bad-faith cases, it seems clear the exception would be applicable only in rare cases. Merely alleging fraud in connection with the bad-faith claim would be insufficient; the communications sought to be protected must be shown by the insured to have been made in furtherance of the alleged fraud.[42] If there is no showing that the attorney's advice was made in furtherance of the client's fraud, the communication cannot be deemed in furtherance of the fraud.[43]

C. The 'At-Issue' Doctrine

Under the "at-issue" doctrine, a court may rule that the attorney-client privilege has been waived where the holder of the privilege makes a claim or defense based

on the privileged matter and then attempts to use the privileged information in order to establish its claim or defense.[44] Thus, under the "at-issue" doctrine, the discovery of attorney-client privileged communications between an insurer and its counsel may be permitted in cases where the insurer raises the advice of counsel as a defense in the action and the communication is necessary to establish the defense.[45]

Again, courts generally recognize that a party cannot force an insurer to waive the protection of the attorney-client privilege merely by bringing a bad-faith claim.[46] Where, however, the insurer asserts defenses to the bad-faith claim and those defenses incorporate, expressly or implicitly, the advice and judgment of the insurer's attorney, there is a good chance a court will rule that the attorney-client privilege does not protect the attorney's communications with the insurer.[47]

1. *Loeb* (Waiver Of Privilege Must Be Clear)

A recent Florida appellate decision addressed the parameters of the "at-issue" doctrine in the context of a first-party bad-faith lawsuit.[48] In *Teachers Ins. Co. v. Loeb*, insureds brought a bad-faith action against their homeowner's carrier in connection with the carrier's handling of the insureds' property damage claim. The insureds moved to compel discovery of certain attorney-client communications that took place between the insurer and its attorneys during the course of the insured's underlying claim and litigation seeking property damage benefits. The requested communications related to two topics, including the insurer's payment of checks to a particular contractor, and the insurer's decision to withdraw an affirmative defense of fraud and misrepresentation in the underlying breach of contract action. The trial court granted the motion to compel, ruling the insurer's corporate representative had disclosed confidential communications with the insurer's attorneys concerning the payment of checks to the contractor, thereby resulting in a limited waiver of the privilege on that particular issue.[49] In addition, the trial court ruled that the insurer had waived the attorney-client privilege regarding the insurer's decision to withdraw its affirmative defense of fraud and misrepresentation during the underlying breach of contract action.

The insurer subsequently petitioned for certiorari review of the trial court's order, arguing that the trial court erred when it found the insurer had waived the attorney-client privilege. The appellate court found that the insurer had, in fact, waived the attorney-client privilege with respect to the payment of checks to the contractor, based on the deposition testimony of the insurer's corporate representative. The court, however, held that the insurer did not waive the attorney-client privilege regarding the insurer's decision to withdraw the fraud and misrepresentation affirmative defense.

In reaching its decision, the court stated the insurer's corporate representative provided no testimony indicating the insurer wished to waive the privilege concerning the insurer's decision to withdraw the fraud affirmative defense.[50] The court stated that the corporate representative's testimony that he discussed the issue with the insurer's counsel was insufficient to support a waiver of the privilege.[51] Moreover, the court noted the insurer did not plead an affirmative defense of advice of counsel in the bad-faith action. In fact, the insurer's counsel specifically stated on the record during the deposition of the insurer's corporate representative that the insurer was not relying on the advice of counsel defense.[52] Thus, the court held the insurer did not waive the attorney-client privilege by merely defending against the bad-faith lawsuit.[53]

2. Steps To Avoid Waiver

Under the "at-issue" doctrine, it is clear courts typically look for specific evidence of the insurer's intent to waive the attorney-client privilege with respect to the specific matter at issue. When the advice of counsel is not raised by the insurer as a defense, a strong argument can be made that the insurer has not waived the attorney-client privilege.

Of course, the insurer's corporate representative should be careful in making admissions during depositions. The testimony of the insurer's corporate representative can be used to resolve the issue of whether the insurer has waived the privilege. If the corporate representative testifies he relied on the advice of counsel, a court may find the insurer has waived the privilege with respect to the advice provided. On the other hand, if the corporate representative simply testifies that he consulted with counsel and that the substance of those consultations are confidential, there is a strong likelihood a court will protect the communications from disclosure.

VI. Conclusion

When an attorney gives confidential legal advice to an insurance company about the company's legal obligations, the company and its attorney can — and

should — feel comfortable that those communications are protected by the attorney-client privilege. Insurers and their attorneys, however, should be cautious about the arguments frequently raised by insureds in the context of first-party insurance bad-faith cases. By anticipating those arguments, insurers and their attorneys can take steps to protect confidential communications.

Ultimately, when disputes arise regarding the proper scope of the privilege, the challenge for insurers and their attorneys will be to convince courts that the attorney-client privilege should protect an attorney's communications with an insurance company to the same extent the privilege protects an attorney's communications with all other clients. When insurers assert the privilege, courts may need to be reminded that the generally recognized purpose of the attorney-client privilege — to encourage full and frank communication between attorneys and their clients, thereby promoting the broader public interest in advancing the administration of justice — has special importance in first-party bad-faith cases, which often arise out of complex coverage matters, wherein legal advice is often expressed in terms of probabilities and reasonable minds can often differ regarding the best course of action. Protecting the attorney-client privilege encourages insurers to seek legal advice on close coverage issues and allows insurers and their attorneys to freely discuss and develop all facts essential to the representation, thereby promoting the public interest in advancing the administration of justice.

Endnotes

1. This article addresses the attorney-client privilege in the context of "first-party" cases, not "third-party" cases, which involve different scenarios and different rules. A "first-party" case arises out of a claim by an insured against the insured's own insurer for failure to pay benefits owed directly to the insured. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 59 (Fla. 1995). Typical examples of first-party cases include claims for uninsured motorist benefits, and claims for property damage under homeowner's policies. Most jurisdictions permit a personal cause of action for bad faith in first-party cases. *See, e.g.*, Parker v. Southern Farm Bureau Cas. Ins. Co., 935 S.W.2d 556 (Ark. 1996); Laforet, 658 So. 2d at 62; and Boone v. Vanliner Ins. Co., 744 N.E.2d 154 (Ohio 2001).

2. Jurisdictions have adopted different standards of care governing an insurer's liability for bad faith in first-party cases. For example, in Florida, an insured may sue an insurer for bad faith where an insurer has "[n]ot attempt[ted] in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for [the insured's] interests." Laforet, 658 So. 2d at 62 (quoting Fla. Stat. § 624.155(1)(b)1). In Florida, bad faith (in both first and third-party cases) is determined under "the totality of the circumstances" standard. Laforet, 658 So. 2d at 62. The factors to be considered include: (1) whether the insurer was able to obtain a reservation of the right to deny coverage if a defense were provided; (2) efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds; (3) the substance of the coverage dispute or the weight of legal authority on the coverage issue; (4) the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage; and (5) efforts made by the insurer to settle the liability claim in the face of the coverage dispute. Laforet, 658 So. 2d at 63 (citing Robinson v. State Farm Fire & Cas. Co., 583 So. 2d 1063, 1068 (Fla. 5th DCA 1991).

3. Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 682 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.").

4. Fisher v. United States, 425 U.S. 391, 403, 96 S. Ct. 1569 (1976) ("The purpose of the [attorney-client] privilege is to encourage clients to make full disclosure to their attorneys."); Hunt v. Blackburn, 128 U.S. 464, 470, 9 S. Ct. 125, 127 (1888) (The attorney-client privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

5. *See, e.g.*, Fla. Stat. § 90.502(2).

6. Fla. Stat. § 90.502(2).

7. Swidler & Berlin v. United States, 524 U.S. 399, 118 S. Ct. 2081 (1998) ("The privilege is absolute, rather than qualified, and is not determined on a 'case-by-case balancing.' "); Genovese v. Provident Life & Accident Ins. Co., 74 So. 3d 1064, 1068 (Fla. 2011)("[T]he attorney-client privilege, unlike the work-product doctrine, is not concerned with the litigation needs of the opposing party.").

8. Rule 26(b)(3)(A)(ii), Federal Rules of Civil Procedure.

9. Hagans v. Gatorland Kubota, LLC/Sentry Ins., 45 So. 3d 73 (Fla. 1st DCA 2010) ("The attorney-client privilege is not subject to any balancing test and, unlike matters protected by work product privilege, cannot be discovered by a showing of need, undue hardship, or some other competing interest.").

10. *See* Allstate Indemnity Co. v. Ruiz, 899 So. 2d 1121, 1128-29 (Fla. 2005).

11. Genovese v. Provident Life & Accident Ins. Co., 74 So. 3d 1064, 1069 (Fla. 2011) (holding that "the attorney-client privilege is applicable in the first-party bad faith context.").

12. Genovese, 74 So. 3d at 1068 quoting Quarles & Brady, LLP v. Birdsall, 802 So. 2d 1205, 1206 (Fla. 2d DCA 2002) ("[U]ndue hardship is not an exception, nor is disclosure permitted because the opposing party claims that the privileged information is necessary to prove their case.").

13. *See, e.g.*, Fla. Stat. § 90.502(2).

14. *See, e.g.*, Aetna Cas. & Sur. Co. v. Superior Court, 153 Cal. App. 3d 467 (Cal. Ct. App. 1984)(holding the attorney-client privilege applies in bad-faith actions arising from a first-party property loss because an insurer "should be free to seek legal advice in cases where coverage is unclear without fearing that the communication necessary to obtain that advice will later become available to an insured who is dissatisfied with a decision to deny coverage" and because "[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 flow of information between the lawyer and the client so as to lead to an accurate ascertainment and enforcement of rights"); Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 260 (Del. 1995)(holding that an insured "cannot force an insurer to waive the protections of the attorney-client privilege merely be bringing a bad faith claim"); State v. Madden, 601 S.E.2d 25 (W. Va. 2004)(holding trial court erroneously ruled that the attorney-client privilege was inapplicable in a first-party insurance bad-faith action). But *see* Boone v. Vanliner Ins. Co., 744 N.E.2d 154 (Ohio 2001)(holding that in an action alleging bad-faith denial of insurance coverage, the insured is entitled to discover claim file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage).

15. *See, e.g.*, First Aviation Servs., Inc. v. Gulf Ins. Co., 205 F.R.D. 65, 69 (D. Conn. 2001)(where the court held that an insurance company may not "insulate itself from discovery by hiring an attorney to conduct ordinary claims investigations"); St. Paul Reinsurance Co. v. Commercial Fin. Corp., 197 F.R.D. 620, 641 (N.D. Iowa 2000)(where the court held the attorney-client privilege does not apply when the attorney acts as a claims investigator or claims adjuster, and not as an attorney); In re Allen, 106 F.3d 582, 602 (4th Cir. 1997)(where the court stated that no privilege attaches "when an attorney performs investigative work in the capacity of an insurance claims adjuster, rather than as a lawyer.").

16. *See, e.g.*, St. Paul Reinsurance Co., 197 F.R.D. at 641.

17. Genovese, 74 So. 3d at 1068.

18. *Id.*

19. The Genovese decision refers to the insured's underlying "action," but does not state the precise claims asserted or how those claims were resolved. Under Florida law, a bad-faith lawsuit cannot be commenced until the resolution of the insured's underlying claim for benefits under the policy. Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So. 2d 1289 (Fla. 1991). Therefore, it can reasonably be assumed that the insured's action seeking benefits against Provident concluded in favor of the insured before the insured sued Provident for bad faith.

20. Genovese, 74 So. 3d at 1066. The lawsuit was filed pursuant to section 624.155, Florida Statutes (2010).

21. Genovese, 74 So. 3d at 1066. The decision does not state whether the request was limited to the litigation trial for the underlying litigation only, or whether the request encompassed the litigation file from the bad-faith action as well. Presumably, the request was limited to the litigation file up through the conclusion of the underlying litigation only.

22. Allstate Ins. Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005).

23. Genovese, 74 So. 3d at 1065.

24. *Id.* at 1066.

25. *Id.* at 1067; Fla. R. Civ. P. 1.280(b)(3).

26. Genovese, 74 So. 3d at 1068.

27. *Id.*

28. *Id.*

29. *Id.* at 1069 (Pariente, J., specially concurring).

30. *Id.*

31. *Id.*

32. Florida Rule of Professional Conduct 4-2.1.

33. It should also be noted that the investigator or adjuster may spot other issues not apparent to the attorney.

34. United Servs. Auto. Ass'n v. Werley, 526 P.2d 28 (Alaska 1974); Clark v. United States, 289 U.S. 1, 53 S. Ct. 465 (1932)("A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."). *See* also Fla. Stat. § 90.502(4) ("There is no lawyer-client privilege under this section when: (a) The services or the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud . . . .").

35. Cent. Constr. Co. v. Home Indem. Co., 794 P.2d 595 (Alaska 1990)(Insurer's belated reservation of rights letter and its actions after letter was sent were sufficient to compel conclusion that an in-camera review of the insurer's claims file might reveal evidence to establish a crime-fraud exception); Werley, 526 P.2d at 33 ("When and insurer through its attorney engages in a bad faith attempt to defeat . . . the rightful claim of its insured, invocation of the attorney-client privilege for communications pertaining to such bad faith dealing seems clearly inappropriate.").

36. Compare, e.g., Werley, 526 P.2d at 32 (holding prima facie evidence of bad faith is sufficient to trigger crime-fraud exception in first-party bad faith actions), with State ex rel. U.S. Fidelity & Guar. Co. v. Montana Second Judicial Dist. Ct., 783 P.2d 911 (Mont. 1989)(holding evidence of bad faith cannot trigger crime-fraud exception).

37. *See* Freedom Trust v. Chubb Group of Ins. Cos., 38 F. Supp. 2d 1170, 1173 (C.D. Cal. 1999)(holding that "bad faith denial of insurance coverage is not inherently similar to fraud" and, therefore, there is "no persuasive reason to include bad faith in the fraud exception to the lawyer-client privilege.").

38. *See* State Farm Fire & Cas. Co. v. Superior Court, 54 Cal. App. 4th 625, 62 Cal. Rptr. 2d 834 (1997)(holding crime-fraud exception applied to claim of bad faith where insureds established prima facie case that insurer and its agents allegedly deceived insureds about the scope of coverage, forged signatures on insurance application, and destroyed and manufactured evidence, and that attorneys had participated in cover-up); Hutchinson v. Farm Family Cas. Ins. Co., 867 A.2d 1 (Conn. 2005)(concluding crime-fraud exception can be applied in claim of first-party bad faith where insured alleges – and presents prima facie evidence showing – that the communication between the insurer and its attorney was made "for the purpose of evading a legal or contractual obligation to an insured without reasonable justification" and, thus, constitutes evidence of bad faith under Connecticut law, which defines bad faith as "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. . . ."); Schorno v. State Farm Fire & Cas. Co., No. 10-35772, 2011 WL 3325873 (9th Cir. Aug. 3, 2011)(Washington law)(holding that attorney-client privilege protects communications between an insurer and its coverage counsel, even in a bad faith denial of coverage action, where insured fails to make a prima facie showing of bad faith tantamount to civil fraud); Cedell v. Farmers Ins. Co. of Washington, 237 P.3d 309, 314 (Ct. App. of Wash.

2010)(holding an insurer has a right to assert the attorney-client privilege in a first-party claim of insurance bad faith absent showing of "bad faith tantamount to civil fraud.").

39. Werley, 526 P.2d at 32-33.

40. Hutchinson v. Farm Family Cas. Ins. Co., 867 A.2d 1 (Conn. 2005).

41. Hutchinson, 867 A.2d at 7.

42. Barry v. USAA, 989 P.2d 1172 (Wash. Ct. App. 1999).

43. *See* United States v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997); Koch v. Specialized Care Servs., Inc., 437 F. Supp. 2d 362, 382 (D. Md. 2005).

44. *See, e.g.*, Teachers Ins. Co. v. Loeb, 75 So. 3d 355 (Fla. 1st DCA 2011); Savino v. Luciano, 92 So. 2d 817, 819 (Fla. 1957). In Savino, the Florida Supreme Court articulated the "at issue" doctrine as follows: "[W]hen a party has filed a claim, based upon a matter ordinarily privileged, the proof of which will necessarily require that the privileged matter be offered in evidence, we think that he has waived his right to insist, in pre-trial discovery proceedings, that the matter is privileged." *Id.See* also Lee v. Progressive Express Ins. Co., 909 So. 2d 475, 477 (Fla. 4th DCA 2005)("[I]f proof of the claim would require evidence of the privileged matter, the privileged matter is discoverable.").

45. *See, e.g.*, Genovese, 74 So. 3d at 1069; Coats v. Akerman, Senterfitt & Eidson, P.A., 940 So. 2d 504, 510 (Fla. 2d DCA 2006); Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 259 (Del. 1995).

46. Tackett, 653 A.2d at 259. *See* also XL Specialty Inc. Co. v. Aircraft Holdings, LLC, 929 So. 2d 578 (Fla. 1st DCA 2006).

47. *See* Tackett, 653 A.2d at 259.

48. Teachers Ins. Co. v. Loeb, 75 So. 3d 355 (Fla. 1st DCA 2011).

49. *Id.* at 356.

50. *Id.*

51. *Id.* at 357, quoting Coates v. Akerman, Senterfitt & Eidson, P.A., 940 So. 2d 504, 511 (Fla. 2d DCA 2006)("The client does not waive the privilege by testifying generally in the case or testifying as to the facts that were the subject of the consultation with his or her attorney. . . .").

52. Loeb, 75 So. 3d at 357.

53. *Id.* ■

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