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Scary Stuff: Insurance Claim Files And Exceptions To The Attorney-Client Privilege

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Commentary

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I. Introduction

In May 2008, we wrote in this Commentary:

> Are all attorney-client communications contained in such claim files that were thought to be confidential now discoverable because the insurer lost the underlying first-party claim, litigation, or appeal?
>
> The sanctity of the attorney-client privilege is so great that such communications cannot be forcibly disclosed even to provide evidence of a felony or the identity of a serial killer or rapist who is presently terrorizing the community. Yet, due to sloppy jurisprudence and ignorance of the nature of first-party insurance claims, we have courts ordering disclosure of attorney-client privileged communications to assist an insured in its prosecution of an insurance "bad-faith" claim for extra-contractual damages against its insurer. Is there any wonder why insurance companies are paranoid and distrustful of our civil justice system? The rights of a serial killer are given greater protection and respect than those of an insurance company.
>
> There are few exceptions to the "absolute" protection afforded by the attorney-client privilege. Apparently some courts believe there is yet another exception – "the insurance-bad-faith-suit" exception. One of the problems is that some courts do not understand there are material differences between a first-party claim and third-party claim.[1]

One would expect that a concept as deeply rooted in American jurisprudence as the *sacrosanct* "attorney-client" privilege would be well understood by our courts, and not easily violated. Due, however, to careless jurisprudence and a lack of understanding concerning the nature of "first-party" insurance claims, courts continue to erroneously order insurance companies to disclose "attorney-client" privileged communications to assist an insured in its pursuit of a "first-party" insurance "bad-faith" claim for extra-contractual damages.[2] Recently, a federal magistrate addressed the "attorney-client" privilege as well as the "work-product" doctrine in such a "first-party" insurance "bad-faith" claim,[3] once again reflecting a misunderstanding of "first-party bad-faith" insurance claims. We note a few common jurisprudential mistakes that hopefully will not be followed by other courts.

In the case of *Minter v. Liberty Mutual Fire Ins. Co.*,[4] a federal magistrate initially correctly refers to the "attorney-client protection" as a "privilege" and "work-product" as a "doctrine." Unfortunately, the Court also, at least once, refers to the "work-product" as a "privilege," which makes one wonder whether the distinctions between the two are fully appreciated. Often attorneys, trial courts, and appellate courts erroneously refer to "work-product" as a "privilege."[5] It is not. It is a protection afforded by the courts, not by statute, and is not an "absolute" right or privilege, such as the "attorney-client" privilege.[6] Such erroneous references result in sloppy jurisprudence.

Attorney-Client Privilege

As *Minter* correctly notes, in this diversity case, issues of privilege are controlled by substantive state law in diversity cases and usually by statute. The "work-product" doctrine, however, is procedural, and, therefore, controlled by federal law. In *Minter*, applying Kentucky substantive law, the federal court noted Kentucky's definition of "attorney-client privilege:"

> [A] confidential communication made for the purpose of *facilitating* the rendition of professional legal services to the client . . . [b]etween the client . . . and the client's lawyer. . . [*Emphasis* supplied.][7]

This definition of "attorney-client privilege" does *not* encompass the lawyer's representations.[8] Nonetheless, the courts of Kentucky,[9] like other jurisdictions,[10] seem to protect the representations of the attorney to his or her client under the privilege as well.

Statements made by the attorney to his client have been protected as "attorney-client" privileged communications if such communications "rest" on confidential information obtained from the client, or where such communications would reveal "the substance" of the client's confidential communication to the attorney.[11] As one federal appellate court stated in *In re Sealed Case*:[12]

> In practice, however, advice does not spring from lawyers' heads as Athena did from the brow of Zeus. Inevitably, attorneys' opinions reflect an accumulation of education and experience in the law and the large society law serves. In a given case, advice prompted by the client's disclosures may be further and inseparably informed by other knowledge and encounters. We have therefore stated that the privilege cloaks a communication from attorney to client " 'based, *in part at least*, upon a confidential communication [to the lawyer] from [the client].' "[13]

Courts that have protected communications by the attorney to the client as "attorney-client" privileged have also noted that the "communications" must be made for "the purpose of facilitating the rendition of legal advice or services," that is not just stating underlying facts; the communications must be predominantly of a legal character.[14]

In *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*,[15] a federal trial court noted that even if the communications by the attorney to his or her client were of a legal character, such communication must contain the client's confidences in order to be protected as "attorney-client" privileged communications. The *Neuberger* Court identified the three different approaches used to determine which communications from the attorney to the client are deemed privileged and thus protected from disclosure. The narrow approach protects only those communications that, if disclosed, would *reveal* confidential communications from the client.[16] A broader approach protects those communications that are *based on* a confidential communication from the client to the attorney.[17] The broadest approach protects *all* communications from the attorney to the client *regardless* of their relationship to client communications.[18]

A recent decision by Pennsylvania's Supreme Court, *Gillard v. AIG Ins. Co.*,[19] illustrates the analysis of courts that extend the reach of a statute limiting the "attorney-client" privilege to communications from the client to attorney, and grant "derivative" protection to protect communications made by an attorney to a client. *Gillard* concerned a "bad-faith" claim arising out of the handling of an uninsured motorist claim. The insured sought to compel production of all documents withheld from the file of the law firm representing the insurers in the underlying litigation.

The insured argued that the statute in Pennsylvania was limited to confidential communications *initiated*

by the client. In response, the insurers asserted the privilege broadly, as if it were a "two-way street," and argued that "under the case law prevailing in the bad-faith litigation arena, a carrier asserting an advice-of-counsel defense waives the attorney-client privilege relative to such advice" and that "such a waiver would be superfluous were the advice of counsel discoverable from the outset."[20]

Applying the Pennsylvania's statute governing attorney-client privilege,[21] the trial court held that the statute protected *only* the communications from the insurers to the law firm. While the trial court appeared "to accept the possibility of some derivative protection,"[22] the court noted that the insurers "had not argued that the withheld attorney communications contained information originating with the client."[23] The appellate court also recognized the possibility of this "derivative" protection,[24] but affirmed, holding the privilege did not apply, and noting that the insurers had made "no specific claim" that the documents at issue would disclose confidential communications made by the insurers to their attorneys.[25]

The insurers appealed, arguing:

> [T]he threshold issue [is] "whether communications from an attorney to the client may *ever* enjoy protection from disclosure as an attorney-client communication." They acknowledge the particular terms of the statute protecting confidential *client* communications, but they assert the provision was not intended to change or limit the essential nature of the common law governing confidential lawyer-to-client communications. . . . "That the *attorney's communications to the client* are also within the privilege was always assumed in the earlier cases and has seldom been brought into question." [26]

The insurers also argued that the purpose of the communications, rather than the direction of flow, should govern, and that maintaining "strict and formalistic limits on derivative protection [is] unrealistic and unworkable, on account of the close relationship between client confidences and responsive advice."[27] The insured argued the insurers failed to establish that the documents created by the attorneys contained confidential information conveyed by the client, that the withheld documents contained advice, opinion and/or analysis, and that any extension of the attorney-client privilege would be an "inappropriate judicial interference with the prevailing legislative scheme."[28]

Although the Pennsylvania Supreme Court acknowledged the insured's arguments, it expressly stated that it did not find that the Legislature had "intended" to strictly limit what it termed the "necessary derivative protection."[29] The Court reversed the appellate court's ruling, and held:

> [I]n Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.[30]

Two Justices dissented from the majority's decision. In his dissenting opinion, Justice Eakin stated:

> I cannot agree with the majority that the attorney-client privilege applies with equal force to attorney-to-client communications as it does to client-to-attorney communications. Certainly a derivative privilege equally protects those attorney-to-client communications containing client-to-attorney communication, but where the communication contains no information at all emanating from the client, and the communication is relevant to the legal rights at issue in a separate and distinct action, I would not find it covered by a blanket privilege. [31]

Justice McAfferty also dissented, expressing his views differently:

> With this decision, the majority has, in my view, acted in a legislative capacity, and therefore, I must respectfully dissent.
>
> The attorney-client privilege as codified in this Commonwealth could hardly be clearer; it expressly applies to "confidential communications made to [counsel] by his [or her] client." 42 Pa.C.S. § 5928. This Court

recently stated the following with regard to application of this privilege:

> "The attorney-client privilege has been a part of Pennsylvania law since the founding of the Pennsylvania colony, and has been codified in our statutory law." While the attorney-client privilege is statutorily mandated, it has a number of requirements that must be satisfied in order to trigger its protections. **First and foremost is the rule that the privilege applies only to confidential communications made by the *client* to the attorney in connection with the provision of legal services.**[32]

If the Pennsylvania Supreme Court cannot agree on whether the "attorney-client" privilege protects the communications of the attorney to her client, is there any wonder why our courts are still confused?

Work-Product Doctrine

The "attorney-client" privilege must be distinguished from the "work-product" doctrine, which protects an attorney's litigation preparation materials from discovery, as opposed to communications to a client.[33] Indeed, the *Minter* court cites correctly to the seminal decision of the United States Supreme Court in *Hickman v. Taylor*[34] for the proposition that the "work-product" doctrine protects a lawyer's trial preparation materials from discovery but may be overcome if the party requesting the materials shows it has a "substantial need" for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. The Supreme Court in *Hickman* explained the "work-product doctrine" as distinguished from the "attorney-client privilege" by stating:

> [T]he protective cloak of this [attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.
>
> . . .
>
> [I]n performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free form unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways-aptly though roughly termed by the Circuit Court of Appeals in this case as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.
>
> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. . . . But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish

> adequate reasons to justify production through a subpoena or court order.[35]

The attorney for the party pursuing opposing counsel's work product in *Hickman v. Taylor* "frankly" admitted that he sought the discovery because he "want[ed] the oral statements only to help prepare himself to examine witnesses and to make sure that he ha[d] overlooked nothing."[36] The Supreme Court ultimately decided that his stated reason was "insufficient under the circumstances to permit him an exception to the policy underlying the privacy of [the attorney's] professional activities."[37]

Note, to be protected "attorney work-product," the materials must be prepared in anticipation of litigation. This requirement raises an interesting question: If an attorney writes legal analysis but does not anticipate litigation and that document is not communicated to the client, is it protected from discovery?[38] In *In re Professional Direct Ins. Co.*, the federal court considered "[t]he lone issue [of] whether the disputed documents were prepared in anticipation of litigation,"[39] and explained:

> If a document is prepared in anticipation of litigation, the fact that it also serves an ordinary business purpose does not deprive it of protection, but the burden is on the party claiming protection to show that anticipated litigation was the "driving force behind the preparation of each requested document."[40]

Exceptions to the Attorney-Client Privilege

Meanwhile, *Minter* goes on to state that:

> [T]here is an inherent tension between the attorney-client privilege and the plaintiff's otherwise legitimate discovery requests. The Kentucky Supreme Court has repeatedly declared that the attorney-client privilege is generally *sacrosanct* and may not be overridden, even by an opposing party showing its need to obtain the information contained in privilege communications.[41]

The confidential communications from a client to her attorney, and from the attorney to her client, for the purposes of facilitating the rendition of legal services must be held inviolate. Absent waiver, it is difficult to imagine a scenario where such communications are discoverable.

The *Minter* court went on to note the most commonly used exception to the "attorney-client privilege" in an insurance "bad-faith" case is "[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."[42] What possible language would an insurance company use in such representations to its own attorney that could possibly fall under this exception? Does the mere allegation that the "first-party" insurance company has attempted to defraud the insured result in entitlement to such discovery? Of course not. But does the mere allegation entitle the insured to have the court conduct an *in-camera* review of such documents? In *Minter*, the insured alleged "that her insurer violated the terms of the Unfair Claims Settlement Act,[43] which was enacted "to protect the public from unfair trade practices and fraud."[44]

The *Minter* court noted that "at least one panel of the Kentucky Court of Appeals declined to create an express exception to the "attorney-client" privilege in "bad faith litigation."[45] Quoting from that decision, *Minter* stated:

> To develop an exception in bad faith cases against insurers would impede the free flow of information and honest evaluation of claims. In the absence of fraud or criminal activity, an insurer is entitled to the attorney-client privilege to the same extent as any other litigant.[46]

Unfortunately, apparently, in some jurisdictions, maybe most, if an insured merely contends its insurer committed fraud, even if only couched within an insurance "bad faith" claim, the insured is at least granted a judicial *in camera* inspection of the documents.

In *United Heritage Property and Cas. Co. v. Farmers Alliance Mut. Ins. Co.*,[47] a Federal court granted an *in camera* inspection of correspondence between an attorney and the "third-party" insurance liability insurer's adjuster in a "third-party bad faith" action, noting that *in camera* review "only requires a showing of a

factual basis adequate to support a good faith belief by a reasonable person . . . that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies."[48] The court noted that in order to overcome the "attorney-client" privilege under the "crime-fraud" exception for outright disclosure of the privileged documents, the party seeking disclosure has the burden of showing by a "preponderance of the evidence" that the insurer "retained and/or enabled [the attorney] to commit a fraud."[49]

Of course an *in-camera* inspection, at the very least, must occur before disclosure is ordered. And, as a result of that *in-camera* inspection, the court would then be required to make a finding that "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client [insurer] knew or reasonably should have known to be a crime or fraud." Ironically, if this were a "finding of fact" by the court, it would seem that the insurance "bad-faith" suit would be a mere formality. How could such a "finding of fact" by the Court not result in a finding of insurance "bad-faith?" How does a trial court go about making this "finding of fact" as a matter of law? What possible written representations from the insurer to its own attorney could there be to cause any impartial and objective jurist to find, as a matter of law, that "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud?"

The decision in *Butler, Pappas, Weihmuller v. Coral Reef of Key Biscayne Developers, Inc.*[50] illustrates these pitfalls, while at the same time providing some judicial protocol for the analysis. In *Coral Reef*[51] the insurer had denied the insured's supplemental insurance claim, alleging the insured's breach of the insurance contract and attempt to commit insurance fraud.[52] Later, during its lawsuit for breach of contract and declaratory relief, the insured amended its complaint and included a defamation count against the insurer, and then sought to compel production of documents reflecting privileged "attorney-client" communications between its insurer and the insurer's defense counsel retained to represent the insurer during its investigation of the claim. The insured argued that the insurer accused it of fraud with the intent to injure, defraud, or deceive the insured with regard to its claim, and that the documents sought addressed the lack of veracity and motive for the "false" statements in the denial letter and went to the heart of the defamation claims, thus falling within the "crime-fraud" exception to the "attorney-client" privilege.

The trial court ordered an initial hearing to determine whether the "crime-fraud" exception would apply to the discovery sought. It also requested that the parties address (1) what evidence Coral Reef intended to rely upon to demonstrate its *prima facie* case, (2) the admissibility of that evidence, and (3) the "crime-fraud" that would support application of the "crime-fraud" exception to the "attorney-client" privilege. After an *in camera* inspection, and then a two-day evidentiary hearing, the trial court granted the insured's motion to pierce the insurance company's "attorney-client" privilege based on the "crime-fraud" exception. The insurer and its attorney filed a petition for a writ of certiorari seeking to quash the trial court's order.

The appellate court granted the petition, quashing the trial court's order that the insurer had waived the "attorney-client" privilege under the "crime-fraud" exception. The appellate court noted that the party seeking production of the privileged communications must allege under the "crime-fraud" exception that the communication was made as part of an effort to perpetrate a crime or fraud, and the party must also specify the crime or fraud. Second, the party that seeks disclosure must establish a *prima facie* case that the party asserting the "attorney-client" privilege sought the attorney's advice in order to commit, or in an attempt to commit, a crime or fraud. In explaining its decision, the appellate court found that the insured had not made a threshold showing through the production of *prima facie* evidence of the existence of an underlying crime or fraud, stating:

> If the trial court determines that the crime-fraud exception applies, the client is entitled to provide a reasonable explanation for the communication or its conduct at an evidentiary hearing, see *Turney* and *Eight Hundred, Inc. v. Florida Dept. of Rev.*, at which the client carries the burden of persuasion to

> give a reasonable explanation for its communication or conduct.
>
> **The Prima Facie Case**
>
> Coral Reef in this case must have alleged that the communications between [the insurer] and [the law firm representing it] were made as part of [the insurer's] effort to perpetrate what they knew to be a crime or fraud as defined in sections 817.234(1)(a) or 817.234(7), Florida Statutes (2003). Coral Reef's argument is that [the insurer] accused Coral Reef of fraud with the intent to injure, defraud, or deceive Coral Reef with regard to its claim. Coral Reef had the burden to produce prima facie evidence sufficient for the trier of fact to determine the applicability of the crime-fraud exception. [The insurer] in turn carried the burden of persuasion to give a reasonable explanation for its conduct or communication.
>
> We do not find that Coral Reef made its threshold showing through the production of prima facie evidence of the existence of an underlying crime or fraud. We instead conclude that [the insurer] did not commit insurance fraud through the inclusion of the sentence in its denial letter that Coral Reef had "attempted to commit insurance fraud;" and the denial letter did not contain false, incomplete, or misleading information and was not intended to injure, defraud, or deceive Coral Reef. [The insurer] had a reasonable basis to believe that Coral Reef had attempted to commit insurance fraud at the time in which it issued the denial letter.[53]

The appellate court also explained why it believed that the insurer had a reasonable basis to believe the insured had attempted to commit insurance fraud at the time in which it issued its denial letter.

> First, [the insurer] believed that the second claim of loss was grossly inflated. The claim was more than triple the initial claim of loss. Although, as Coral Reef argues, [the insurer] admitted that the first claim was a covered claim and [the insurer] expected to receive a supplemental claim, the second claim nonetheless created a highly suspect disparity between the first and second claim of loss that could not readily be dismissed as a valuation difference. The second claim was also vastly disproportionate to the original settlement amount. Second, [the insurer] understood that Coral Reef had not undertaken any repairs to the property prior to its submission of the second claim of loss, which could have justified the increase in the claim. Third, [the insurer] knew that Meruelo, Jr., the individual who signed the second claim of loss, had previously been convicted of property insurance fraud. Meruelo, Jr.'s disassociation as an officer of Coral Reef and [the insurer's] knowledge of his fraud conviction prior to its issuance of any payment to Coral Reef does not at all undermine [the insurer's] suspicion that Coral Reef was nonetheless attempting to defraud them.
>
> Finally, [the insurer] knew that Coastal Insurance Repair, Inc., the company which prepared the estimate that Coral Reef had relied on to submit the second claim of loss, was under investigation by the Department of Insurance for improper inflation of insurance estimates. Coral Reef argues that this investigation was not at all linked to Coral Reef and there was no evidence that suggested that the investigation had any relation to the relevant claim of loss. The dispositive question is whether the investigation, coupled with Meruelo, Jr.'s prior fraud conviction, other reasons notwithstanding, gave rise to a legitimate reasonable belief of fraud on the part of Coral Reef.
>
> These reasons were sufficient to support [the insurer's] reasonable belief that Coral Reef had attempted to commit insurance fraud. The trial court thus departed from the essential requirements of the law and consequently misapplied the crime-fraud exception to [the insurer's] privileged communications.[54]

Coral Reef is illustrative of how difficult it is for our courts to analytically and fairly address arguments

that the "attorney-client" privilege should be pierced based on the "crime-fraud" exception. Even with an *in camera* inspection and an extensive evidentiary hearing, the trial court in *Coral Reef* erroneously ordered production of the privileged materials.[55]

Analysis of *Minter*

The context of the *Minter* analysis on "attorney-client" privilege, the "fraud" exception, and "work product" was a dispute between the insured and her insurer, during which the insurer created a claim file that was kept confidential, only shared by the insurer with the insurer's attorney. This insurance claim file also included confidential "attorney-client" privilege communications (between the insurer and its attorney) and the attorney's "work-product." All of this claim file was kept confidential. This claim file was prepared solely for the benefit of the insurance company and its attorney. This attorney was never the attorney for the insured.

Mrs. Minter sued her insurer for insurance "bad-faith" demanding the insurance company's confidential claim file, including the "attorney-client" privileged communications and the "work-product" contained within that claim file. Presumably, she wanted these materials to prove that the insurer knew that it owed her insurance proceeds much sooner than the insurer actually paid her the policy limits. The federal magistrate in *Minter* noted:

> [F]irst-party bad-faith actions against an insurer can only be proved by showing exactly how the company processed the claim and why the company made the decisions it did. Without the claims file, a contemporaneously-prepared history of the handling of the claim, it is difficult to see how an action for first-party bad faith could be maintained without requiring an overwhelming number of depositions, whose costs would thereby render all but the rare wealthy few first-party bad faith claimants financially unable to proceed. This court is therefore unwilling to predict that Kentucky's highest court would enter an opinion that would shield portions of a claims file from discovery in a first-party bad faith case on the basis of the attorney-client privilege, and therefore, rules that the attorney-client privilege does not shield materials contained in *Ms. Minter's underlying claims file*.[56]

The problem with this "rationale" and decision is several. First, it appears to create a "claims-file" exception to the "attorney-client" privilege. That is, because the "attorney-client" privileged communications are within the insurer's claim file, they are discoverable. This is erroneous. We addressed this erroneous concept in our previous article titled "*The Begrudged 'Insurance Bad-Faith Suit' Exception to the Attorney-Client Privilege*," in which we discussed another erroneous federal court decision:

> On April 9, 2008, a Federal United States District Court issued an Order compelling production of documents in the case of *Adega v. State Farm*.[57] The Honorable Court wrote in an "Order regarding Motion to Compel Production" dated April 9, 2008 as follows:
>
> > The case of *Allstate Indemnity Company v. Ruiz*, 899 So. 2d 1121 (Fla. 2005) squarely addressed the question of discovery in a bad faith case, and in so doing dispensed with the differences between third party and first party claims. *See id*. at 1129-30. It is not in dispute that in doing so, it rendered the opinion that work product from the underlying case is discoverable in the subsequent bad faith litigation. *Id*. The question that is disputed by some courts is whether this includes materials protected by the attorney-client privilege. *Compare Fidelity & Casualty Ins. Co. of New York v. Taylor*, 525 So. 2d 908 (Fla. 3d DCA 1987) (quoted with approval in *Ruiz*), *with XL Speciality Ins. Co. v. Aircraft Holdings, LLC*, 929 So. 2d 578 (Fla. 1st DCA 2006) *review granted* 935 So. 2d 1219 (2006) and *Liberty Mutual Fire Ins. Co. v. Bennett*, 939 So. 2d 1113, 1114 (Fla. 4th DCA 2006).
> >
> > *Begrudgingly*, after carefully reviewing the language in *Ruiz*, this Court agrees with the conclusion of Judge Moreno in the case of *Nowak v. Lexington Ins. Co.*, No. 05-21682-CIV-MORENO, 2006 WL

> 3613760, at *1 (S.D. Fla. June 22, 2006) where the court stated:
>
> Absent a decision from the Florida Supreme Court on an issue of state law, this Court is bound to follow the decisions of the state's intermediate courts, unless there is some persuasive indication that the highest court of the state would decide the issue differently . . . There is some 'persuasive indication' that the Supreme Court would differ with *XL Specialty* and find the attorney-client privilege does not protect attorney-client material from discovery in a subsequent first-party bad faith suit.
>
> . . .While the Florida courts have discussed, at length, the discovery that should be permitted in a bad faith case, there has been precious little analysis of the sanctity of the attorney-client privilege – a cornerstone of the entire judicial/legal system in this country. Even in *XL Specialty*, which ruled that *Ruiz* did not intend that discovery include attorney-client protected documents, there is precious little discussion about the privilege itself, and even less in *Bennett.*
>
> . . .
>
> Having stated these reservations, this Court concludes that the language in *Ruiz* 'all materials including documents, memoranda, and letters, contained in the underlying claim and related litigation file material that was created up to and including the date of resolution of the underlying disputed matter and *pertaining in any way* to coverage, benefits, liability or damages [are discoverable]' (*emphasi*s added) certainly suggests that this includes materials normally considered to be protected by the attorney-client privilege. 899 So. 2d at 1130. . . .[58]

Of course these federal decisions are wrong. In the case of *Liberty Mutual Fire Ins. Co. v. Bennett,*[59] the Florida appellate court did not believe it was legally obligated by *Allstate Indem. Co. v. Ruiz*[60] to order discovery of attorney-client privileged communications. *Bennett* stated:

> In *Allstate Indemnity Company v. Ruiz*, 899 So. 2d 1121 (Fla. 2005), the Florida Supreme Court held that the work product *privilege* did not protect from discovery the insurer's file in a statutory first-party bad faith claim, and the trial court accordingly correctly applied *Ruiz* in holding the work product *privilege* inapplicable. We agree with Liberty Mutual, however, that the attorney-client privilege, which is not in *Ruiz*, does not apply. *XL Specialty Ins. Co. v. Aircraft Holdings, LLC*, 929 So. 2d 578 (Fla. 1st DCA 2006) (holding that *Ruiz* did not do away with the attorney-client privilege in first-party bad faith cases); *United Service Auto Ass'n v. Buckstein*, 891 So. 2d 1153 (Fla. 4th DCA 2005) (upholding the attorney-client privilege in a first party bad faith case before the Supreme Court decided *Ruiz*).[61]

Note, again the erroneous reference to "work product" as a privilege. Even Judge Polen's dissent in *Bennett* noted that "*Ruiz* did not expressly deal with the applicability of attorney-client privilege to first-party bad-faith discovery requests."[62] Unfortunately, he also erroneously concluded that the entire claims file is discoverable.

The fallacy upon which Judge Polen "supports" his conclusion is that the cases he relies upon[63] are all "third-party" bad-faith cases. As previously stated, an insured, who is being defended by mutually acceptable counsel retained by the "third-party" liability carrier, is the client in that relationship who actually owns the "attorney-client" privilege. This is not the case in a "first-party" claim.

Notwithstanding the Florida appellate courts that did not believe they were legally obligated by *Allstate Indem. Co. v. Ruiz*[64] to order discovery of attorney-client privileged communications, the federal court in *Adega v. State Farm*[65] felt compelled by "Florida common law" to hold otherwise. This federal court was not alone. In *Nowak v. Lexington Ins. Co.*,[66] the federal court in the Southern District of Florida stated:

> While the Defendant is correct that the Supreme Court in *Ruiz* did not address the precise issue, the Florida Supreme Court did use sweeping language to suggest that it would allow documents traditionally protected by attorney-client privilege to be discoverable in bad-faith litigation once the underlying coverage case was completed. In comparing first-party to third-party bad faith cases, where the attorney-client privilege has been dissolved, this Federal Court quoted the Florida Supreme Court by stating:
>
> > Any distinction between first-party and third-party bad-faith actions with regard to discovery purposes is unjustified and without support under § 624.155 and creates an overly formalistic distinction between substantively identical claims. Thus, there is no basis to apply different rules to substantially identical causes of action.[67]

Subsequently, the Florida Supreme Court in *Genovese v. Provident Life & Accident Ins. Co*.[68] clarified *Ruiz* and held that "although we held in *Ruiz* that attorney work product in first party bad faith actions was discoverable, this holding does not extend to attorney-client privileged communications. Consequently, when an insured party brings a bad faith claim against its insurer, the insured may not discover those privileged communications that occurred between the insurer and its counsel during the underlying action."[69] Thus, *Minter* does not have a monopoly on misunderstanding and confusing what is a "third-party" claim and claims file and what is a "first-party" claim and claims file. It is just a shame that this judicial confusion continues.

Second, in *Minter*, there is no finding, or even an analysis, concerning whether there is any evidence that "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." All the Court stated is that, since the only way the insured could efficiently prove such a bare allegation of insurance "bad-faith" or "fraud" is by using the insurer's claim file, the insurer's "attorney-client" privilege is somehow dissolved. Why did the Court even bother referring to the *sacrosanct* "attorney-client" privilege that can only be abrogated if obtained to perpetrate a crime or fraud if the Court did not review the documents to determine whether they indeed sought to perpetrate a crime or fraud. Respectfully, it seems as if the correct analysis was acknowledged but then ignored.

Third, *Minter* refers to the claims file as "Ms. Minter's underlying claims file." This is incorrect. There was no "underlying" claims file. Unlike a "third-party" liability case resulting in a "first-party" excess judgment "bad-faith" case where there was an "underlying" liability claims file created in defense of the insured to which the insured had full access, and which the insurer and insured shared the same lawyer, here there is no "underlying" claims file. The claims file in *Minter* was created for the "first-party" insurer's benefit and was kept confidential from everyone, including Ms. Minter. At no point did Ms. Minter have access or entitlement to that claims file. The attorney representing the "first-party" insurer was never representing Ms. Minter.

The *Minter* reference to the claims file as "Ms. Minter's underlying claims file" continues to highlight the Court's misunderstanding of the difference between a "first-party bad-faith" action and "third-party bad-faith" action, and the relationship between an insured and insurer in the context of a "first-party bad-faith action" and a "third-party bad-faith" action. As we have previously stated:

> [A] third-party claim from inception has a fiduciary relationship between the insured and the insurer and the mutually acceptable defense counsel. The insurer and defense counsel are contractually and ethically obligated to defend the insured and represent the insured in such a defense. None of the communications defense counsel has with the insurer can ever be protected as privileged from the insured. This is because a mutually acceptable defense counsel is first and foremost the attorney for the insured. After all, it is the insured who defense counsel is defending. Everything that attorney knows, certainly his or her legal opinions and recommendations, the insured is entitled to receive, and, indeed, should receive. In a third-party triumvirate relationship all defense counsel's

> opinions and mental impressions are for the benefit of the insured. The "client" in such a relationship is from the onset the insured. All this the insured is entitled to pursuant to a liability carrier's "duty-to-defend" the insured.
>
> In a first-party claim there is no "duty-to-defend" the insured and the insurance company's attorney is never representing the insured and never sharing any of their legal analysis, opinions, and mental impressions with the insured. Such written communications were and are kept confidential as maintained only between the insurance company and its legal counsel, clearly never intended to be shared with the insured.[70]

A "first-party bad-faith" action involves a case in which an insured sues *his or her own insurance company* for improper denial of benefits.[71] In a "first-party" context, the relationship between an insured and insurer is that of *debtor and creditor*.[72] A "third-party bad faith" action concerns a case in which an insured sues his own liability insurance company for "bad faith" concerning a claim (typically for failing to settle a claim) which ultimately resulted in a "third-party" judgment against him in excess of the policy limits.[73] In a "third-party" context, the liability of the insurer to its insured arises because of the *fiduciary* relationship that exists between the insured and the insurer. The relationship between an insured and insurer under a "first-party" insurance contract is not, however, a "fiduciary relationship" as it is in a "third-party" context.[74] Viewed in the context of a debtor-creditor relationship versus a fiduciary relationship, it is easy to understand why the claim file created during an insurer's investigation of a "first-party" claim is not the insured's "underlying claim file."

Shaheen

Unfortunately, *Minter* was strongly influenced by *Shaheen v. Progressive Cas. Ins. Co.*, decision,[75] stating:

> [M]indful of Judge Russell's recent opinion in *Shaheen v. Progressive Cas. Ins. Co.* in which he evaluated the applicability of the attorney-client privilege in a bad-faith action. *Shaheen* dealt with a third-party case, not a first-party case as is present here, but in determining that the privilege has some applicability under Kentucky law in a third-party bad faith action, Judge Russell noted *in dicta*: "For discovery requests in *first-party cases*, because the insurance file is created on *behalf of the insured*, the entire file is typically discoverable by the plaintiff."... Although Judge Russell cited cases from other states in support of his observation, the magistrate judge cannot disagree with his analysis, because there is no clear recent guidance from Kentucky's highest court.[76]

This reliance on *Shaheen* allowed *Minter* to "justify" production of the "attorney-client" privilege and "work-product" simply because such documents are contained within the "first-party" "insurance file ... created on behalf of the insured."[77] Unfortunately for all, this language relied upon in *Minter* was and is judicial error. *Shaheen* should have read, "For discovery requests in *third-party* bad-faith cases, because the underlying liability claims files are created in defense of the insured and which the insured has full access to, the entire liability defense claim file is typically discoverable by the insured." No doubt *Shaheen* mistakenly referenced "first-party" as opposed to "third-party."

Shaheen cites to *Dumas v. State Farm Mutual Auto Ins. Co.*,[78] *Groben v. Travelers Indem. Co.*[79] and *City v. State Farm Mutual Auto. Ins. Co*.[80] None of these cases, however, support the proposition that the insurance file in a "*first-party*" case is created in behalf of the insured. They all involved discovery of underlying "third-party" liability defense claim files—the same type of claim file that was at issue in *Shaheen.*

The *Shaheen* court, as well as the cases it cited, dealt with a "third-party" liability case resulting in a "first-party" excess judgment case for "bad-faith." The claim file and the "attorney-client privilege" communications and the "work-product" materials sought in discovery in these "third-party" excess judgment "bad-faith" cases were prepared for and in behalf of the defense of the insured. The *Shaheen* court made a mistake when it stated: "For discovery requests in *first-party cases*, because the insurance files are created on behalf of the insured, the entire file is typically discoverable by the plaintiff."[81] *Shaheen* actually noted that "[a]ppellate courts around the country take varying approaches on the degree to which the insurance file is

discoverable in a *third-party* bad faith claim [and s]ome jurisdictions permit discovery of the entire file,"[82] citing *Allstate Indem. Co. v. Ruiz*[83] and *Dunn v. National Sec. Fire and Cas. Co*. [84]

Interestingly, as well, *Shaheen* stated:

> [C]ourts persist that simply alleging a bad faith claim against an insurer does not disrupt earlier holdings on the attorney-client privilege in litigation with the insured. "To permit [the insured] access to the documents simply because it asserted a bad faith claim against [the insurer] would ignore the basic premise of protecting the attorney-client privilege."[85]

Sadly, this is exactly what happened in *Minter*.

Conclusion

The "attorney-client privilege" is and should be *sacrosanct*. Absent waiver, it is difficult to imagine a scenario where it should be abrogated. The application and legal analysis of the "crime-fraud" exception is rife with difficulties and contradictions. It is similarly difficult to imagine a scenario where an insurer would allow the "first-party" insurance "bad-faith" litigation to proceed to the point where the Court is about to conduct an *in camera* inspection of the privileged documents *if* these documents can actually be interpreted as an intent by the insurer to further a crime or fraud.

Therefore, how does a trial court actually make such a determination as a matter of law? At the very least, shouldn't the insurer be entitled to an evidentiary hearing? As a practical matter, how is that hearing to address the issues of privilege without itself waiving the privilege? Obviously, *Minter* fell far-short of any reasonable due process analysis of the actual law.

It is also important to note that we are addressing the forcible disclosure of an insurer's attorney-client communications. We are not addressing waiver. That is, any party may waive the confidentiality protections afforded by its "attorney-client" privilege. In some, if not most, "first-party bad-faith" claims, an insurer may make the strategic decision that its best defense is to waive its "attorney-client" privilege and have its coverage counsel be one of its "star" witnesses in the defense of the bad-faith, whether or not it actually raises "advice-of-counsel" as a defense.

All of us involved in the development of our civil laws must be careful, especially when it comes to forcing disclosure of a party's "attorney-client" privilege. Certainly the privilege is not disallowed simply because it is contained in an insurance company's claims file. Moreover, forcing disclosure of "attorney-client" privilege is scary stuff. Any attempts to pierce it based upon the "crime-fraud" exception should be dealt with skeptically and with strict scrutiny.

Endnotes

1. John J. Pappas, *"The Begrudged 'Insurance Bad-Faith-Suit' Exception to the Attorney-Client Privilege,"* Mealey's Litigation Report: Insurance Bad Faith, Vol. 22, #26 (May 20, 2008), *citing* John J. Pappas, "*Bad Faith Should Be Difficult To Prove*," Mealey's Litigation Report: Insurance Bad Faith, Vol. 19, #22 (March 21, 2006).

2. John J. Pappas, *"The Begrudged 'Insurance Bad-Faith-Suit' Exception to the Attorney-Client Privilege,"* Mealey's Litigation Report: Insurance Bad Faith, Vol. 22, #26 (May 20, 2008), *citing* John J. Pappas, "*Bad Faith Should Be Difficult To Prove*," Mealey's Litigation Report: Insurance Bad Faith, Vol. 19, #22 (March 21, 2006).

3. Minter v. Liberty Mutual Fire Ins. Co., 2012 WL 2430471 (W.D. Ky.).

4. 2012 WL 2430471 (W.D. Ky.).

5. Hall v. C.I.A., 2012 WL 3143839, at *20 (D.D.C. 2012) ("To the Court's knowledge, the CIA has not withheld any new information under attorney work product privilege."); Gillard v. AIG Ins. Co., 609 Pa. 65, 89, 15 A.3d 44, 59 (Pa. 2011) ("our holding does not obviate the work product privilege"); Zirkelbach Const., Inc. v. Rajan, 2012 WL 3046925, at *3 (Fla. 2d DCA 2012) ("The work product privilege protects from discovery 'documents and tangible things otherwise discoverable' if a party prepared those items 'in anticipation of litigation or for trial.' "). *See* Federal Civil Judicial Procedure and Rules, 2008 Ed. Rule 26 annotated, page 151, subdivision (b)(3) - Trial Preparation: Materials. In this annotation reference and discussion is made to the *work-product doctrine* as initially espoused in the case of Hickman v. Taylor,

329 U.S. 495 (1947). The annotation clearly notes that this is a qualified immunity and a doctrine. At no time does it refer to the work-product doctrine as a privilege.

6. The Florida Evidence Code recognizes only nine privileges: 90.5015 (journalist's privilege); 90.502 (lawyer-client privilege); 90.503 (psychotherapist-patient privilege); 90.5035 (sexual assault counselor-victim privilege); 90.5036 (domestic violence advocate-victim privilege); 90.504 (husband-wife privilege); 90.505 (privilege with respect to communications to clergy); 90.5055 (accountant-client privilege). Note, there is no "work-product" privilege. Also note that there are only six stated exceptions to the attorney-client privilege, the most notable is the crime-fraud exception (90.502(3)(4)(a)). All such exceptions, however, are very limited in scope and application.

7. Kentucky Rule of Evidence 503(b).

8. As explained by the Court in Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B, 230 F.R.D. 398, 409 (D. Md. 2005), the traditional test for determining the applicability of the attorney-client privilege was enunciated in the case of United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950), as follows:

> The privilege applies only if
>
> (1) the asserted holder of the privilege is or sought to become a client;
>
> (2) the person to whom the communication was made (a) is a member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
>
> (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purposes of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
>
> (4) the privilege has been (a) claimed and (b) not waived by the client.

9. Stinnett v. Com., 364 S.W.3d 70, 86 (Ky. 2011).

10. Munich Reinsurance America, Inc. v. American Nat. Ins. Co., 2011 WL 1466369 (D.N.J. 2011); American Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court, 280 P.3d 240 (Mont. 2012); Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 249 Conn. 36 (Conn. 1999).

11. Rehling v. City of Chicago, 207 F.3d 1009, 1019 (7th Cir. 2000); Mead Data Central, Inc. v. United States Department of Air Force, 566 F.2d 242, 254 (D.C. Cir. 1977). In United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-359 (D. Mass. 1950), the court summarized the attorney-client privilege as follows: The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

12. 737 F.2d 94 (C.A.D.C. 1984).

13. 737 F.2d 94 (C.A.D.C. 1984) (*emphasis* in original) (*citing* Brinton v. Department of State, 636 F.2d 600, at 604 (D.C. Cir. 1980), *quoting* 8 in 1 Pet Products, Inc. v. Swift & Co., 218 F. Supp. 253 (S.D.N.Y. 1963)).

14. Munich Reinsurance America, Inc. v. American Nat. Ins. Co., 2011 WL 1466369 (D.N.J. 2011) (applying New York law and quoting Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371, 377, 575 N.Y.S.2d 809, 581 N.E.2d 1055 (N.Y. 1991), the court stated: "Although typically arising in the context of a client's communication to an attorney, the privilege extends as well to communications from attorney to client. . .[but] is of course limited to communications-not underlying facts. In order for the privilege to apply, the communication from attorney to client must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship. . .[and] must be primarily or predominantly of a legal character.").

15. 230 F.R.D. 398 (D. Md. 2005).

16. Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B, 230 F.R.D. 398, 412 (D. Md. 2005), *citing* United States v. (Under Seal), 748 F.2d 871, 874 (4th Cir.1984).

17. Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B, 230 F.R.D. 398, 412 (D. Md. 2005), *citing* In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984).

18. Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B, 230 F.R.D. 398, 412 (D. Md. 2005), *citing* (Third) of the Law Governing Lawyers, § 69 (2000).

19. 609 Pa. 65, 15 A.3d 44 (Pa. 2011).

20. 609 Pa. at 70-71, 15 A.3d at 47-48.

21. Section 5928 of the Judicial Code states:

> 5928. Confidential communications to attorney
>
> In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa. C.S. § 5928.

22. 609 Pa. at 71, 15 A.3d at 48.

23. 609 Pa. at 71-72, 15 A.3d at 48.

24. 609 Pa. at 72, 15 A.3d at 48. The appellate court in *Gillard* relied on the appellate court's decision in Nationwide Mutual Insurance Co. v. Fleming, 924 A.2d 1259 (Pa. Super. 2007), which was also appealed to the Pennsylvania Supreme Court. The Court in *Fleming* was equally divided, and therefore affirmed the appellate court's order. Nationwide Mut. Ins. Co. v. Fleming, 605 Pa. 468, 992 A.2d 65 (Pa. 2010). In *Gillard*, the Pennsylvania Supreme Court expressly stated that "[i]n the aftermath of the divided *Fleming* decision, this appeal was selected to determine the appropriate scope of the attorney-client privilege in Pennsylvania." 609 Pa. at 74, 15 A.3d at 50.

25. 609 Pa. at 72, 15 A.3d at 48.

26. 609 Pa. at 74, 15 A.3d at 50 (*emphasis* in original).

27. 609 Pa. at 77, 15 A.3d at 51.

28. 609 Pa. at 82, 15 A.3d at 55-56.

29. 609 Pa. at 86, 15 A.3d at 57.

30. 609 Pa. at 89, 15 A.3d at 59.

31. 609 Pa. at 89, 15 A.3d at 59 (footnote omitted).

32. 609 Pa. at 92, 15 A.3d at 61 (citations omitted and ***emphasis*** in original).

33. As the court in In re Powerhouse Licensing, *LLC*, 441 F.3d 467 (6th Cir. 2006), stated:

> It is axiomatic that the purpose of the work-product doctrine is to allow an attorney "to assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . to promote justice and to protect [his] clients' interests." . . . Once the party requesting discovery establishes relevance, the objecting party has the burden of showing that the material was "prepared in anticipation of litigation or for trial." If that burden is not met, the court's inquiry ends and the documents must be produced.

Id. at 473 (citations omitted).

34. 2012 WL 2430471, at *3 (*citing* Hickman v. Taylor, 329 U.S. 495, 510–514 (1947), and Rule 26(b)(3)(A) of the Federal Rules of Civil Procedure, which "precludes the discovery of 'documents and tangible things that are prepared in anticipation of litigation or for trial by [a party's attorney].' ").

35. Hickman v. Taylor, 329 U.S. 495, 508 and 510-511 (1947).

36. 329 U.S. at 513.

37. 329 U.S. at 513.

38. 578 F. 3d 432 (6th Cir. 2009).

39. 578 F. 3d at 438.

40. 578 F. 3d at 439 (citations omitted).

41. 2012 WL 2430471, at *1.

42. Kentucky Rule of Evidence 503(d)(1).

43. Ky. Rev. Stat. § 304.12–230.

44. State Farm Mut. Auto. Ins. Co. v. Reeder, 763 S.W.2d 116, 118 (Ky. 1988).

45. 2012 WL 2430471, at *2 (citing George v. Guaranty Nat'l Ins. Co., No. 95-CA-1577-MR [Slip Op. March 8, 1996]).

46. 2012 WL 2430471, at *2 (*quoting George v. Guaranty Nat'l Ins. Co.*, No. 95-CA-1577-MR (Slip Op. Mar. 8, 1996)).

47. 2011 WL 781249 (D. Idaho 2011).

48. 2011 WL 781249, at *4.

49. 2011 WL 781249, at *4 (citation omitted).

50. 873 So. 2d 339 (Fla 3d DCA 2003).

51. The specific facts of the *Coral Reef* case are described in the court's opinion as follows:

> Respondent Coral Reef of Key Biscayne Developers, Inc. owns a rental apartment building in Key Biscayne, Florida and [the insurer] is Coral Reef's property insurer. In the fall of 1999, Coral Reef and its principal, Homero Meruelo, Jr., who had a prior conviction for insurance fraud, submitted two claims of loss to [the insurer] in the sum of $1.45 million. The claims represented the cost to repair property damage caused by hidden decay and collapse. Coral Reef retained Frank Inguanzo of EPIC Group as its public adjuster and based the amount of its claim on a $1.45 million estimate from contractor Andre Fuxa of Star Restoration, Inc.
>
> [The insurer] retained Concorde Adjusting, Inc. and its principal, Jon Stettin, as its independent adjuster. Stettin estimated Coral Reef's covered damages at approximately $500,000.00. [the insurer] settled the claim in December of 1999 for $551,021.80 and paid Coral Reef $440,817.44, but held back $110,204.36 pending the commencement of repair work to the property. In September of 2000, Coral Reef sued [the insurer] seeking to recover the held back amount. [The insurer] retained [its attorneys] to represent it.
>
> In May of 2000, prior to the commencement of repair work to the property, Meruelo, Jr. submitted on Coral Reef's behalf three additional claims of loss for the sum of $4.76 million. Coral Reef based the amount of this claim on an estimate from Coastal Insurance Repair, Inc., an agency under the investigation of the Department of Insurance for improper inflation of insurance claims. [the insurer] subsequently requested *341 additional information from Coral Reef in order to reach a decision upon the claims and asked to conduct an examination under oath.
>
> On January 11, 2001 [the insurer] denied Coral Reef's claim through Stettin. [the insurer] relied upon Coral Reef's breach of four insurance contract provisions, including failure to cooperate, failure to produce books and records, failure to submit to an examination under oath, and intentional misrepresentation and concealment of material facts. [the insurer] also stated that Coral Reef filed suit prior to having fulfilled its contractual obligations and that Coral Reef "attempted to commit insurance fraud."
>
> In May of 2001, Coral Reef sued [the insurer] for breach of contract and declaratory judgment on the $4.76 million insurance claim. Coral Reef later amended its complaint and included a defamation count against [the insurer], Concorde Adjusting, and Stettin.

873 So. 2d at 340-341.

52. The fraud that was raised was a breach of the Concealment Misrepresentation and Fraud provision of the insurance contract, not common law fraud. *See John J. Pappas and Lee Craig, "The Mendacity Clause," For The Defense* magazine, May 2001.

53. 873 So. 2d at 343.

54. 873 So. 2d at 343.

55. Note that in some jurisdictions, a party does not waive the attorney-client privilege by presenting his or her attorneys as a witness to testify regarding the matters

not communicated by the client. In re Powerhouse Licensing LLC, 441 F.3d 467, 472 (6th Cir. 2006).

56. 2012 WL 2430471, at *2 (*emphasis* supplied).

57. 2008 WL 1009719 (S.D. Fla. 2008).

58. John J. Pappas, *"The Begrudged 'Insurance Bad-Faith-Suit' Exception to the Attorney-Client Privilege,"* Mealey's Litigation Report: Insurance Bad Faith, Vol. 22, #26 (May 20, 2008), *citing* John J. Pappas, "*Bad Faith Should Be Difficult To Prove*," Mealey's Litigation Report: Insurance Bad Faith, Vol. 19, #22 (March 21, 2006).

59. 939 So. 2d 1113 (Fla. 4th DCA 2006).

60. 899 So. 2d 1121 (Fla. 2005). In *Ruiz* itself Justice Wells, in a concurring in part and dissenting in part opinion, stated: "I emphasize that the only issue being decided in this case is the discovery of *work-product* in the claims file pertaining to the underlying insurance claim." (*Emphasis* supplied).

61. 939 So. 2d at 1114 (*emphasis* supplied). XL Specialty Ins. Co. v. Aircraft Holdings, LLC, 929 So. 2d 578 (Fla. 1st DCA 2006), is yet another Florida appellate court decision expressly stating that "*Ruiz* does not eliminate the attorney-client privilege." The Florida Fourth District Court of Appeal stated that "the trial court should have conducted an *in camera* inspection of the documents at issue and excluded attorney-client privileged documents relating to the defense of the bad faith claim from its order compelling production" (*emphasis* supplied). *Id.* at 582. There is a possibility, however, that *Aircraft Holdings* only protects the attorney-client privilege as it may address bad-faith issues but not coverage or breach of contract issues. The *Aircraft Holdings* court stated that "[t]he holding of *Ruiz* applies only to work product ? not attorney-client privileged documents," explaining that:

> Reaching its decision, the Court [in *Ruiz*] receded from the portion of its decision in *Kujawa v. Manhattan National Life Insurance Co.*, regarding work product. *Ruiz*, 899 So. 2d at 1131 (stating, "we believe that a portion of our decision in *Kujawa* is both legally and practically untenable;" "We also clarify and, to the extent necessary, recede from our decision in *Kujawa* as explained herein."). . . . [B]ecause the court in *Kujawa* held that the attorney-client privilege applies to discovery in a bad faith action, and is not eliminated, the court in *Ruiz* did not recede from that portion of the opinion, we continue to apply the portion of *Kujawa* relating to attorney-client privilege as controlling precedent. Therefore, we hold that the trial court erred by compelling production of attorney-client privileged documents.

Id. at 583. *Aircraft Holdings* went on to hold that the Florida Bad Faith Statute in no way eliminates the statutorily provided attorney-client privilege. This Florida Appellate Court did note, however, that:

> An insurance company may choose to defend its action by proving it followed the advice of its lawyer when it acted on the claim. If the company defends on that basis, it places the attorney-client communications at issue and thereby waives the privilege. . . . In this case, it is undisputed that XL is not defending on that basis, and therefore did not waive its privilege. . . [t]here is no exception provided for communications between the insurance company and its lawyer in the event a bad faith action is filed. . . Because the legislature did not provide an exception to the attorney-client privilege for a bad faith action in its list of exceptions, we decline to create one. . . [t]herefore, the trial court erred by not giving Section 90.502, the attorney client privilege, full effect.

Id. at 586 n.6.

62. 939 So. 2d at 1114. Judge Polen in his dissent stated:

> [N]umerous courts have addressed this issue and have found that in a bad faith action, no attorney-client privilege extends to protect documents that were created *before* the date of the judgment that gave rise to such claim. *Dunn v. Nat'l Sec. Fire & Cas. Co.*, 631 So. 2d 1103 (Fla. 5th DCA 1993); *see also Allstate Indemnity v. Oser*, 893 So. 2d 675 (Fla. 1st DCA 2005); *Superior Ins. Co. v. Holden*, 642 So. 2d 1139 (Fla. 4th DCA 1994); *Liberty Mutual Fire Ins. Co. v. Kaufman*, 885 So. 2d 905 (Fla. 3d DCA 2004). The holding in *Ruiz* necessarily requires a finding that the rationale in these decisions would apply to a first-party bad faith claim as well as a third-party bad faith claim. Therefore, plaintiff is entitled to all materials contained in Defendant's claims and litigation file up

> to, until and including the date of judgment in the underlying action. (*Emphasis* in original).

939 So. 2d at 1116.

63. Dunn v. Nat'l Sec. Fire & Cas. Co., 631 So. 2d 1103 (Fla. 5th DCA 1993); *see also* Allstate Indemnity Co. v. Oser, 893 So. 2d 675 (Fla. 1st DCA 2005); Superior Ins. Co. v. Holden, 642 So. 2d 1139 (Fla. 4th DCA 1994); Liberty Mutual Fire Ins. Co. v. Kaufman, 885 So. 2d 905 (Fla. 3d DCA 2004).

64. 899 So. 2d 1121 (Fla. 2005). In *Ruiz* itself Justice Wells, in a concurring in part and dissenting in part opinion, stated: "I emphasize that the only issue being decided in this case is the discovery of *work-product* in the claims file pertaining to the underlying insurance claim." (E*mphasis* supplied).

65. 2008 WL 1009719 (S.D. Fla. 2008).

66. 2006 WL 3613760 (S.D. Fla. 2006).

67. 2006 WL 3613760, at *1 (citations omitted).

68. 74 So. 3d 1064 (Fla. 2011).

69. 74 So. 3d at 1068.

70. John J. Pappas, *"The Begrudged 'Insurance Bad-Faith-Suit' Exception to the Attorney-Client Privilege,"* Mealey's Litigation Report: Insurance Bad Faith, Vol. 22, #26 (May 20, 2008), *citing* John J. Pappas, "*Bad Faith Should Be Difficult To Prove*," Mealey's Litigation Report: Insurance Bad Faith, Vol. 19, #22 (March 21, 2006).

71. Hogan v. Provident Life and Accident Ins. Co., 2009 WL 2169850, *4 n.3 (M.D. Fla. 2009) (*citing* Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 391 [Fla.1998]).

72. 2009 WL 2169850, at *5 (*citing, among other cases*, Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 391 (Fla.1998)). A federal court in Smith v. Northwestern Mut. Life Ins. Co. 2011 WL 4336750 (E.D. Wis. 2011), explained why a debtor-creditor relationship exists in the "first-party" context whereas a fiduciary duty exists in the "third-party" context, stating:

> [A]n "insurer owes a duty to exercise good faith in evaluating and negotiating *third party claims* against its insured and may be held liable in tort (commonly referred to as the tort of bad faith) by its insured for a third party judgment in excess of the policy limits in the event it fails to exercise good faith in the performance of its fiduciary obligation." This duty does not extend to [Plaintiff's] first-party claim. "The postulate for this fiduciary relationship is notably absent in claims by an insured against an insurer under policies of property and related types of insurance. Such claims are not controlled by the insurer to the exclusion of the insured nor is the specter of a judgment against an insured in excess of coverage a present danger if an insurer fails to exercise good faith. In first party claims by insureds against insurers under policies affording coverage for loss or damage to property and related types of insurance, the parties occupy a contractually adversary or creditor-debtor status as opposed to standing in a fiduciary relationship."

2011 WL 4336750, at *7 (D.C. Wis. 2011) (*quoting* Duncan v. Andrew County Mut. Ins. Co., 665 S.W.2d 13, 18 (Mo. Ct. App.1983) [*emphasis* in original]). *See also* Pool v. Farm Bureau Town & Country Ins. Co., 311 S.W.3d 895, 907 (Mo. Ct. App. 2010) ("There is no dispute that this was a first party claim by Plaintiffs against their insurer . . . . As a matter of law, the parties' relationship was adversarial, not fiduciary"). In Greene v. Well Care HMO, Inc., 778 So. 2d 1037 (Fla. 4th DCA 2001), a Florida court stated as follows in connection with explaining why, prior to the enactment of Fl. Stat. § 624.155, which is Florida's "bad-faith" statute, first-party bad-faith claims against an insurer were not recognized:

> Before [Florida Statutes] section 624.155 was enacted, first party bad faith claims against an insurer were not recognized. The only relief available on the first party claim was a cause of action for breach of contract, unless the insured could allege an independent tort such as fraud or intentional infliction of emotional distress. . . . These decisions were based in part upon the relationship between the insured and insurer as one of debtor/creditor. On the other hand, Florida common law recognized that where there exists a fiduciary relationship between the parties, such as under the duty to defend under bodily injury liability provisions, and the insurer must exercise good faith in negotiating and effecting a settlement of claims, then a cause of action by the insured for bad faith exists

against the insurer. These were called third party bad faith claims.

The distinction between the first party claims and third party claims was based upon obligations between the insured and insurer. In the duty to defend and settle, the insurer is acting on the insured's behalf and for his or her benefit. If the insurer refuses to settle in good faith, it could result in additional liability to its insured, when the insured turned over control of settlement to the insurer. However, where the insurer failed to pay a claim of its own insured, the relationship was one of debtor and creditor, and the insured was free to sue its insurer for breach of contract for failure to pay the claim.

778 So. 2d at 1037 (citations omitted). *See also* Industrial Fire & Cas. Ins. Co. v. Romer, 432 So. 2d 66, 68 (Fla. 4th DCA 1983) ("The legal relationship existing between the insured and his insurer on claims for collision damages or damages caused by uninsured motorists is that of debtor and creditor in which no fiduciary relationship is present. It would be a strange quirk in the law to hold that each time a debtor fails or refuses to pay demands made upon it by a creditor, the debtor would be liable for both compensatory and punitive damages even though his failure or refusal was motivated by spite, malice, or bad faith.").

73. 2009 WL 2169850, at *4 n.3 (M.D. Fla. 2009) (*citing* Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 391 (Fla.1998)).

74. 2009 WL 2169850, at *5 (M.D. Fla. 2009) (*citing* Allstate Ins. Co. v. Douville, 510 So. 2d 1200, 1201 (Fla. 2d DCA 1987)). Indeed, as explained by the Florida Supreme Court in Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 391 (Fla. 1998), because there is no fiduciary relationship between an insurer and insured in the context of a first party insurance claim, a common law insurance "bad-faith" claim, which is the equivalent of a common law breach of fiduciary duty is not recognized under Florida law in this context. Hogan v. Provident Life and Accident Ins. Co., 2009 WL 2169850 (M.D. Fla. 2009).

75. 2012 WL 692668 (W.D. Ky. 2012).

76. 2012 WL 2430471, at *2 [citation omitted].

77. 2012 WL 2430471, at *2.

78. 111 N.H. 43, 274 A.2d 781 (N.H. 1971). *Dumas* involved a case in which the insured sued its insurer for "bad-faith" in its handling of its defense in a "third-party" case. Dumas sought production of the liability insurance carrier's claim file in the original tort action, a claim file that was indeed prepared at least in part, in behalf of the insured, pursuant to the liability carrier's duty to defend in a "third-party's" suit against him. That "third-party" liability claim file also included mutually acceptable defense counsel's communications, "work- product," and some of the liability carrier's representations to that attorney. As the *Dumas* court stated,

> Defendant argues that such an order invades the privileged communications of the defendant and its counsel. The argument fails to take into account that the attorney it engaged in that case represented both the defendant and the present plaintiff Dumas. '(W)here two parties are represented by the same attorneys for their mutual benefit, the communications between the parties are not privileged in later action between such parties or their representatives.'

111 N.H. at 49, 274 A.2d at 7849 (citations omitted).

79. 49 Misc. 2d 14 (N.Y. Sup. Ct. 1965). The *Groben* case was a similar type of third-party "bad-faith" case involving an excess judgment against the insured. While explaining in detail the facts of the underlying "third-party" liability case, the court in *Groben* unfortunately did not explain its rationale for permitting discovery of the "third-party" liability defense claim file, stating only, "[f]or the guidance of the parties, however, it should be pointed out that it was held in Colbert v. Home Ind. Co. that the objections of privilege[,] work product of any attorney and material prepared for litigation are legally insufficient in a case such as this." 49 Misc. 2d at 16 [citations omitted]. Like *Groben*, the court in Colbert v. Home Ind. Co., 45 Misc. 2d 1093, 259 N.Y.S.2d 36 (N.Y. Sup. 1965), did not explain its rationale for permitting discovery of the "third-party" liability defense claim file. Although it explained in detail the facts of the underlying "third-party liability case, it stated only that "plaintiff seeks to search defendants' files of the underlying negligence actions to ascertain

if there is any evidence therein to support his claim of bad faith on defendants' part." 45 Misc. 2d at 1095.

80. 36 F.R.D. 37 (D.S.C 1964). *Chitty*, the third case cited by *Shaheen* for the proposition that "[f]or discovery requests in first-party cases, because the insurance file is created on behalf of the insured, the entire file is typically discoverable by the plaintiff," also involved a "third-party" liability excess judgment "bad faith" insurance claim. The *Chitty* court stated:

> The papers and writing which [Plaintiff] seeks are not related to or were not prepared by its attorney for the present action between [the liability carrier] and [the Plaintiff]. These papers were prepared in a different action at an earlier time when the same attorney represented both [the liability carrier] and [the Plaintiff]. It has been held that, where two parties are represented by the same attorneys for their mutual benefit, the communications between the parties are not privileged in the later action between such parties or their representatives.

36 F.R.D. at 40-41.

81. 2012 WL 692668, at *3 (e*mphasis* added).

82. 2012 WL 692668, at *3 (*emphasis* added).

83. 900 So. 2d 1121 (Fla. 2005).

84. 631 So. 2d 1103 (Fla. 5th DCA 1993).

85. 2012 WL 692668, at *5 (citations omitted). ■

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