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SPECIAL REPORT: INSURANCE LAW

# Recent rulings turn tide; insurers regain some attorney-client privilege

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Recent decisions of Florida courts have eroded an insurer's ability to assert attorney-client and work product privileges in defending bad-faith actions.

In 2005, the Florida Supreme Court restricted an insurer's ability to assert these privileges in bad-faith litigation. But two district courts of appeal recently went against the tide and offered insurers hope.

The 2nd District Court of Appeal ruling in Progressive Express Ins. Co. v. Scoma in May and the 1st DCA ruling in XL Specialty Ins. Co. v. Aircraft Holdings last year could provide insurers some shelter from the discovery storm.

Florida has produced lots of insurance bad-faith litigation. Generally, the term bad-faith action describes a claim brought directly against an insurer alleging the insurer failed to adjust a particular claim in good faith and with due regard for the interests of its insured. Plaintiffs in bad-faith actions invariably attempt to discover an insurer's internal claims materials in an effort to support their claims.

Conversely, insurers seek to protect materials that reveal how they do business. The availability of discovery protections, including the attorney-client and work-product privileges, is of central importance to insurers embroiled in bad-faith litigation.

The viability of an insurer's privilege claim in bad-faith litigation depends in part on whether the action is a first-party or third-party bad-faith action. Coverage for the direct benefit of an injured insured is first-party coverage. A first-party insured can only bring a bad-faith claim under section 624.155, Florida Statutes.

Liability coverage for the defense and/or indemnification of an insured in connection with the claims of an injured third party is "third-party coverage." The insured party accused of committing a tort or the injured third party may bring a third-party bad-faith action under section 624.155 or under common law.

In 2005, in Allstate v. Ruiz, the Florida Supreme Court eviscerated a historical distinction between discovery available in first-party versus third-party bad-faith cases. In doing so it partially receded from its 1989 decision in Kujawa v. Manhattan Nat'l Life Ins. Co.

The Ruiz court reasoned that this discovery distinction is "unjustified and without support under Section 624.155 and creates an overly formalistic distinction between substantively identical claims." The high court then went on to rule that "all materials ... contained in the underlying claim and related litigation file" should be produced in a first-party bad-faith action.

The disputed documents in Ruiz were work product and not attor-

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ney-client privileged documents. Nevertheless, the court seemed to suggest that attorney-client communications are also discoverable. It cited a 1987 3rd DCA case, Fidelity & Casualty Ins. Co. of New York v. Taylor, for the proposition that "consideration of the advice of counsel" is pertinent to the question of insurer bad faith.

At least one federal court, the Middle District of Florida in Cozort v. State Farm Mut. Auto. Ins. Co. in 2005, viewed Ruiz as swallowing up the attorney-client privilege along with the work product doctrine in bad-faith cases.

In the 2006 XL Specialty case, the 1st DCA stemmed the discovery tide by finding that Ruiz had not washed away the attorney-client privilege in Section 624.155 bad-faith claims.

The 1st DCA found that Ruiz did not recede from that portion of the Kujawa opinion holding that the attorney-client privilege applies to discovery in a bad-faith action. The court thus found that Kujawa remains controlling precedent with respect to attorney-client communications.

But the 1st DCA certified the following question to be of great public importance: "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?"

The Florida Supreme Court heard oral argument in the case March 7, and an opinion is pending.

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This past May, the 2nd DCA waded into the discovery waters with Progressive Express Insurance Co. v. Scoma. In Scoma, the court distinguished between: (1) the insurer's communications with its separate counsel; (2) the insurer's communications with joint counsel with the insured; and (3) the insured's communications with joint counsel.

The court held that the insurer's attorney-client privilege with separate counsel retained to represent its own interest is not waived or abrogated in a subsequent bad-faith action brought by a third party.

In reaching this conclusion, the 2nd DCA pointed out that the attorney-client privilege is codified in Section 90.502(2), Florida Statutes. The court also reasoned that since the insured in XL was unable to obtain confidential communications between the insurer and its separate counsel, the insurer's statutory attorney-client privilege is certainly not waived in a bad-faith action brought by a third party who "is not in privity with the insurer and has never been jointly represented."

The 2nd DCA then found that while the insurer presumably could not maintain a privilege as to communications with joint counsel in a bad-faith action filed by the insured, the insurer does not necessarily lose the privilege where a third party files the action.

The insurer's ability to claim such a privilege hinges on: (a) whether the communications were made to joint counsel on a "matter of common interest" such that the insurer could rely upon the communications as confidential with respect to third parties; and (b) whether the third party "stood in the shoes" of the insured as the insured's "successor" or "assignee." If so, then the third party would have access to both the insured's and the insurer's communications with joint counsel.

The 2nd DCA has denied a motion for rehearing en banc in Scoma. But the time to take an appeal has not yet run.

After Ruiz, it appeared the attorney-client privilege was dead in Florida bad-faith litigation. At this point, Ruiz remains binding precedent for all districts. But XL and Scoma have offered some hope to insurers that the attorney-client privilege may yet be available in some bad-faith actions. It remains to be seen whether these rulings will survive and prevail.■

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