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FLORIDA SUPREME COURT UPHOLDS ATTORNEY-CLIENT PRIVILEGE IN BAD FAITH DISCOVERY

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On March 17, 2011, the Florida Supreme Court finally resolved years of speculation, conjecture, and debate regarding the seemingly endless boundaries of permissible discovery of attorney-client communications in the bad faith context. The Florida Supreme Court's decision in *Genovese v. Provident Life and Accident Insurance Company* reaffirmed the sanctity of the attorney-client privilege and specifically conscripted it from falling into the *Ruiz* vortex of discovery in bad faith cases.

Six years prior, in *Allstate Indemnity Company v. Ruiz*, 899 So. 2d 1121 (Fla. 2005) the Florida Supreme Court held that work product materials were discoverable. The *Ruiz* court defined work product materials as materials "contained in the underlying claim and related litigation file material that were created up to and including the date of resolution of the underlying disputed matter and pertain in any way to coverage, benefits, liability, or damages." Recognizing that the underlying claim materials are the evidence needed to determine whether an insurer acted in bad faith, the *Ruiz* court allowed discoverability of work product materials. Since the *Ruiz* decision, various bad faith litigants have attempted to expand the *Ruiz* holding in an effort to discover attorney-client communications arguing that the underlying claim materials, including said attorney-client communications, are the evidence needed to determine whether an insurer acted in bad faith. This effort was exemplified in *Genovese*.

In *Genovese*, the plaintiff, Peter Genovese, brought a bad faith action against his disability carrier, Provident Life and Accident Insurance Company (Provident), after termination of his monthly disability income benefits. After initiating a first-party bad faith action, Genovese, relying on the *Ruiz* decision, requested production of Provident's entire litigation file, including all correspondence and communications regarding Genovese's claims for benefits between the attorneys representing Provident and Provident's agents. The trial court compelled production of all the documents, including the attorney-client communications. On a *writ of certiorari*, the Fourth District Court of Appeal quashed the trial court's order compelling the discovery of attorney-client communications and certified the question of whether the *Ruiz* decision extended beyond work product doctrine to be of great public importance.

In rendering its opinion, the Florida Supreme Court relied upon the discrete purposes of the work product doctrine and the attorney-client privilege and the distinctions between them. The purpose of the work product doctrine is to provide each party with all available sources of proof as early as possible to facilitate trial preparation. Conversely, the purpose of the attorney-client privilege is to encourage full and frank communication between the attorney and the client. The court recognized that the significant goal of the privilege would be severely hampered if an insurer were aware that its communication with its attorney, which was not intended to be disclosed, could be revealed to the insured.

The court also explained that where requested materials may implicate both the work product doctrine and attorney-client privilege, the trial court should conduct an *in camera* inspection to determine whether the requested materials are truly protected by the attorney-client privilege. If the trial

court determines that the investigation performed by the attorney resulted in preparation of materials that are required to be disclosed under the work product doctrine and did not involve the rendering of legal advice, the materials are discoverable.

It is important to note, however, that the *Genovese* decision did not disturb the waiver of the attorney-client privilege upon an insurer's asserting the "advice of counsel" defense. In defending against a first-party bad faith claim, the insurance company may assert the defense of "advice of counsel" to explain why it denied the claim. If that defense is asserted, the privileged communications are deemed to be "at issue" and no privilege would apply. *Eastern Air Lines, Inc. v. United States Aviation Underwriters, Inc.*, 716 So.2d 340, 343 (Fla. 3d DCA 1998).

In the aftermath of the Florida Supreme Court's decision in *Genovese*, the bad faith discovery mantra is: work product documents are discoverable; attorney-client communications… not unless you intend them to be.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Anaysa Gallardo at agallardo@cozen.com or 305.704.5953, or Alicia Curran at acurran@cozen.com or 214.462.3021.