

Federal District Court in Florida Rejects Use of Attorney-Client Privilege to Shield Claim File Documents in First-Party Bad Faith Lawsuit

Insurance Coverage Alert

Insights for Insurers Alert | 2 min read

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The U.S. District Court for the Southern District of Florida recently expanded the scope of allowable discovery in first-party insurance bad faith actions. [Lender v. Geico Gen. Ins. Co., No. 09-22303-CIV, 2010 WL 3743812 \(S.D. Fla. Sept. 22, 2010\)](#). The insured in the case sued his insurer and an underinsured motorist following the insurer's refusal to pay the insured's \$300,000 underinsured motorist coverage limit. The insured eventually secured a judgment against the insurer for more than the policy limits and settled with the other motorist. The insured then filed suit for bad faith.

A dispute arose between the insured and the insurer over the discoverability of certain documents in the insurer's claim file. Specifically, the insurer objected to the production of two types of documents: (1) those reflecting communications between the attorney and client in the underinsured motorist case; and (2) those reflecting attorney advice in that case. The court recognized that both types of documents were privileged attorney-client communications under Florida law. Nevertheless, it concluded that they must be produced. In doing so, the court expanded upon the ruling in *Allstate Indem. Co. v. Ruiz*, 899 So.2d 1121 (Fla. 2005), where the Florida Supreme Court found that claim file documents otherwise protected by the work product privilege were nevertheless discoverable in first-party bad faith claims.

While the Court's decision in *Ruiz* was limited only to the work product doctrine, the *Lender* court observed that the *Ruiz* Court's rationale was equally applicable to the attorney-client privilege. The district court specifically cited the Supreme Court's finding that "the claim file is 'virtually the only source of direct evidence with regard to the essential issue of the insurance company's handling of the insured's claim,'" and that "there is simply no logical or legally tenable basis upon which to deny access to the very information that is necessary to advance

such action but also necessary to fairly evaluate the allegations of bad faith.”

The court recognized the existence of appellate court precedent post-dating *Ruiz* suggesting that attorney-client communications should remain protected from discovery in bad faith actions. However, it declined to follow such reasoning, and instead adopted the conclusion of a federal magistrate judge that “‘it is apparent from the opinion [in *Ruiz*] that the Court intended to abolish the attorney-client privilege as well as work product immunity from discovery’ in the insurance bad faith context.” The court then held that “the *Ruiz* decision compels the conclusion that the attorney-client privilege has been eviscerated in this specific context,” and ordered the production of all “materials between the insurer and its counsel related to the claim and generated prior to resolution of the underlying dispute.”

Practice Note

In the wake of *Lender*, insurers facing bad faith claims in Florida may be required to produce an expanded amount of material from their claim files, including both documents that would otherwise be covered by the work product doctrine, as well as documents otherwise covered by the attorney-client privilege. This will include documents from the insurer’s claim file or its attorney’s file created between the time of a claim and the resolution of any coverage action that relate to coverage, benefits, liability or damages issues.

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