

Third-Party Bad Faith Litigation - Insurers' Attorney-Client Privilege and Work Product Doctrine Protections Limited by Tripartite Relationship in Underlying Liability Action

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In what may be the continuation of a trend toward the erosion of the attorney-client privilege and work product doctrine in bad faith litigation, another court has held that an insurer's communications with defense counsel retained for the insured in an underlying liability suit are discoverable and not subject to the attorney-client privilege or work product doctrine in a subsequent third-party bad faith lawsuit, this time under Georgia law. *Camacho v. Nationwide Mut. Ins. Co.*, No. 1:11-CV-03111-AT., 2012 WL 6062029 (N.D. Ga., Dec. 3, 2012); *see also In re XL Specialty, et al.*, 373 S.W.3d 46 (Tex. 2012) (communications between counsel for insurer and employer in workers' compensation administrative case not privileged in subsequent bad faith lawsuit). In *Camacho*, the U.S. District Court for the Northern District of Georgia (the District Court) rejected the insurer's attorney-client privilege and work product doctrine arguments, (1) holding that the joint defense/common interest exception to the attorney-client privilege applies except for communications solely between the insurer and the insurer's in-house claims counsel, (2) ordering the production of the insurer's entire claims file despite the work product doctrine, subject to the redaction of only the mental impressions, conclusions, opinions or legal theories of the insurer's in-house counsel and insurer's claims representatives handling the file regarding the litigation, and (3) ordering the depositions of the insurer's personnel to proceed.

UNDERLYING FACTS

Jesus Camacho, the surviving spouse of Stacey Camacho, and Lajeane Nichols, as administratrix of the estate (plaintiffs), filed a state court wrongful death suit against Seung C. Park (Mr. Park), insured by Nationwide Mutual Insurance

Company (the insurer), that ultimately resulted in a verdict in excess of policy limits against Mr. Park. Mr. Park assigned to plaintiffs his claims against the insurer for negligent and bad faith failure to settle the claim within policy limits. Plaintiffs, standing in the shoes of Mr. Park, filed a third-party bad faith suit against the insurer in the Northern District of Georgia, based on diversity jurisdiction.

Mr. Park's settlement with plaintiffs, which included the assignment, also stated he agreed to waive any attorney-client privilege he had with defense counsel and any work product doctrine he had with respect to the records, thoughts, activities and communications in the possession of the insurer or the law firms hired by the insurer. He also gave his full authority to plaintiffs and their attorneys to interview all the insurer's claims professionals and the law firms the insurer hired to represent him.

INSURER ORDERED TO PRODUCE COMMUNICATIONS WITH COUNSEL

The District Court applied the joint-defense exception to the attorney-client privilege and concluded that the insurer and/or its in-house counsel's communications with outside counsel hired to defend Mr. Park in the underlying wrongful death action were not protected by the attorney-client privilege. Despite the District Court's recognition that no Georgia court has expressly held the joint defense exception to the attorney-client privilege applies where the same attorney represents both the insurer and the insured in the underlying liability action, the District Court primarily based its decision on the following:

1. Georgia courts recognize the joint-defense exception in other circumstances. The District Court looked to *Peterson v. Baumwell*, 414 S.E.2d 278, 280 (Ga. App. 1992), *Waldrip v. Head*, 532 S.E.2d 380 (Ga. 2000), and *Spence v. Hamm*, 487 S.E.2d 9 (Ga. App. 1997), wherein the Georgia Court of Appeals and the Georgia Supreme Court each upheld the joint defense exception to the attorney-client privilege where the attorney jointly represented two or more clients whose interests became adverse in subsequent litigation. In such situations, the attorney does not have an attorney-client relationship with either of the joint parties.

2. Other jurisdictions apply the joint-defense exception in the insurance litigation context. The District Court looked to the North Carolina Court of Appeal's underlying reasoning in *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 617 S.E.2d 40 (N.C. Ct. App. 2005), where the appeals court ultimately concluded the tripartite attorney-client relationship existed among the insured, the insurer and the lawyer retained by the insurer to represent the insured, and, therefore, the joint-defense exception applied to insurance litigation such that communications between the insurer and the insured in the underlying action are not privileged. The District Court found additional support from other jurisdictions where courts determined the attorney-client privilege inapplicable in the context of an insured's claim for a third-party bad faith against its insurer – namely, *Cozort v. State Farm Mutual Auto Ins. Co.*, 233 F.R.D. 674 (M.D. Fla. 2005) (the entire claims file from an underlying coverage lawsuit is discoverable under Florida law in a bad faith action, as there is no privilege or limitation with respect to such materials); and *Henke v. Iowa Home Mut. Cas. Co.*, 87 N.W.2d 920 (Iowa 1958) (holding the communications between an insurer and the attorney employed by the insurer to defend the insured were not privileged because the defense attorney represented both parties).

Like the *Bourlon* court, the District Court stopped short of a blanket application of the joint-defense exception in subsequent bad faith litigation. Rather, the court found the attorney-client privilege still attaches to and protects those communications unrelated to the defense of the underlying action, as well as those communications regarding issues adverse between the insurer and the insured. Specifically, “[c]ommunications that relate to an issue of coverage ... are

not discoverable ... because the interests of the insurer and its insured with respect to the issue of coverage are always adverse.” *Id.* at *3 (citations omitted). The District Court further allowed the attorney-client privilege to attach to the insurer's communications with its own in-house claims counsel, as there is no presumption that in-house counsel would represent the interests of the insured as opposed to the insurer. *Id.* Nevertheless, the District Court held that, where in-house counsel communicated with outside defense counsel, or where the insurer communicated with in-house counsel in the presence of outside counsel, the joint-defense exception would still apply and such communications were discoverable. *Id.* at *3-4.

INSURER ORDERED TO PRODUCE ITS ENTIRE CLAIMS FILE

The District Court rejected the insurer's work product assertion, e.g. that its claims file was not discoverable since it was prepared in anticipation of litigation. While recognizing that in third-party liability cases the claims file is prepared in anticipation of litigation and thus the work product doctrine is generally applicable, the District Court applied the “substantial need” analysis regarding the work product doctrine's application in a bad faith lawsuit. Accordingly, the District Court ordered the insurer to produce its entire claims file, subject to limited redactions of the mental impressions, opinions or legal theories of counsel and/or insurance representatives handling plaintiffs' underlying claim. The court based its holding primarily on the following three principles:

1. Substantial Need. Fed. R. Civ. P. 26(b)(3)(A)(ii), protects from discovery “documents ... prepared in anticipation of litigation or for trial by or for another party or its representative” unless the requesting party “shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”¹ While recognizing that a liability insurer's file for a third-party claim is largely in anticipation of claims and possible litigation, and, therefore, not discoverable, the court relied on its decision in *Underwriters Ins. Co. v. Atlanta Gas Light*

¹ Unlike the substantive and state law governed attorney-client privilege, the scope of the work product doctrine's protection is a procedural matter governed by federal law in a diversity action such as this.

Co. that recognized a plaintiff's need for the information in the insurance company's claims file in a third-party bad faith claim is substantial since the file information is often the only reliable indication of whether the insurer acted in bad faith. 248 F.R.D. 663 (N.D. Ga. 2008). In further support of its analysis, the District Court cited other federal decisions in third-party bad faith actions that held, based on the facts before the court, the claims file was so integral to proving bad faith that the insured was able to meet the "substantial need" burden necessary to overcome the insurer's work product doctrine assertion. See, e.g., *Brown v. Superior Court*, 670 P.2d 725 (Ariz. 1983) (Finding "in an action such as this[,] the need for the information in the [claims] file is not only substantial, but overwhelming.") (internal citations omitted); *Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288, 293 (D. Mont. 1998).

2. Time Frame and the Totality of the Circumstances.

The insurer withheld a portion of its claims file, asserting that the relevant time period for the bad faith claim was limited to the date of the underlying claim's inception until the date of the insurer's refusal of the offer to settle within policy limits. In essence, the insurer argued the file material after its rejection of the within-policy-limits settlement demand was not relevant to plaintiffs' bad faith claim. The District Court wholly rejected this argument, finding no actual authority for the position. Rather, the District Court explained that the proper inquiry is whether there was a reasonable valuation at each stage of the underlying lawsuit, and that bad faith liability depends on the totality of the circumstances. The District Court, therefore, ordered the production of the entire claims file, including those materials after the insurer's refusal of plaintiffs' demand (subject to its previous limitations).

3. Plaintiffs' Substantial Need Still Does Not Justify Disclosure of Mental Impressions of Attorneys or Other Representatives.

Although the District Court ordered the production of the insurer's entire claims file based on plaintiffs' substantial need for the information in the context of bad faith litigation, the court was clear that it would still allow the insurer to redact those documents specifically relating to the mental impressions of its attorneys and representatives. Nevertheless, the District Court emphasized the well-known principle that the work-product doctrine is not a generic protection for blanket application. The court allowed the redaction of only the portions of the insurer's file necessary to protect against disclosure of its legal strategies in the underlying lawsuit.

CONCLUSION

The *Camacho* decision may bring heightened challenges for insurers in bad faith actions in the 11th Circuit. In an underlying liability suit, insurers must remain mindful of its tripartite relationship with its insured and outside defense counsel, as well as the long term effects of such a relationship in potential subsequent bad faith litigation.

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:

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