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Discovery of Claims File Materials in Bad Faith Cases: the Florida Experience

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Dennis Wall is a sole practitioner with a unique practice. For thirty-three (33) years, his expertise and knowledge in Insurance Coverage and Bad Faith have led attorneys and companies across the United States to retain his services as an Expert Witness, Counsel and Consultant concerning Insurance Questions.

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The present Florida experience with Work Product Immunities and Attorney-Client Privilege claims concerning discovery of claim file documents in bad faith cases begins with *Allstate Indemnity Co. v. Ruiz,* 899 So. 2d 1121 (Fla. 2005). In its decision in this first-party bad faith case, the Florida Supreme Court confronted issues "concerning application of work product privilege," it said. *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d at 1122. In that case, the Supreme Court of Florida concluded that it would no longer distinguish among discovery rules in first-party or third-party (liability insurance) cases. With the enactment of a single Florida "bad faith" statute in Fla. Stat. § 624.155, there was no longer any ground upon which to distinguish discovery in any "bad faith" cases, according to the supreme court in *Ruiz.* (That basis for decision would come to be silently rejected by the supreme court in Genovese.) The Court ruled: "There simply is no basis upon which to distinguish between first- and third-party cases with regard to the rationale of the discoverability of the claim file type material." *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d at 1129.

However, the Supreme Court's *Ruiz* decision left many Courts, counsel and clients confused. Their confusion centered on *whether this new reordering of discovery of claims file materials destroyed the Attorney-Client Privilege in first-party bad faith cases*, which in Florida can only be brought under the bad faith statute. *In third-party bad faith cases*, the attorneys involved in the case usually represent the policyholder or other insured, and in basic and simple terms, the materials generated by those lawyers and found in the insurance company's claim file simply cannot be

shielded from discovery in bad faith cases in Florida.

Moreover, in third-party bad faith cases, ordinarily all claim file materials up to the date of judgment in the underlying case are discoverable regardless of Work Product Immunity and, unless the insurance company has retained counsel for strictly legal advice concerning its claims handling, regardless of Attorney-Client Privilege considerations up to that time as well, and for good reason: When judgment is entered against the insured in the underlying case, the underlying case is over for all practical purposes and, again for all practical purposes, any reporting to the insurance company from the provided defense counsel is over in the ordinary case, too.

To many observers, it seemed that in *Ruiz*, the Florida Supreme Court was trying hard to make its analogy to discovery of claim file materials in third-party bad faith cases, fit the question of discovery of claim file materials in first-party bad faith cases, particularly when the *Ruiz* Court held as follows:

> Consistent with the analysis outlined, we hold that in connection with evaluating the obligation to process claims in good faith under section 624.155, 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 pertain in any way to coverage, benefits, liability, or damages,* should also be produced in a first-party bad faith action. *Further, all such materials prepared after the resolution of the underlying disputed matter and initiation of the bad faith action* may be subject to production upon a showing of good cause or pursuant to an order of the court following an in-camera inspection.... However, we caution that where the coverage and bad faith actions are initiated simultaneously, the courts should apply existing tools, such as the abatement of actions and in-camera inspection, to ensure full and fair discovery in both causes of action.
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> However, when the underlying claim for benefits has been resolved, all files pertaining to the underlying dispute which produced the alleged bad faith are discoverable as in traditional common law third-party bad faith cases for failure to settle third-party claims.

Ruiz, 899 So. 2d at 1129-30. [Emphasis added.]

The *Ruiz* holding was extended to compel production of other insureds' claims files in *Mayfair House Association v. QBE Insurance Corp.,* 2010 WL 472827 (S.D. Fla. February 5, 2010). In that case, a one-Count Complaint alleged statutory Bad Faith in QBE's denial of windstorm coverage for damages allegedly caused by Hurricane Wilma. The plaintiff in that first-party case, Mayfair, alleged that QBE violated Florida's bad faith statute, Section 624.155, which provided at the time, and which still provides, that any person may bring a civil action against an insurer when such person is damaged by certain conduct of its insurance company, including:

> Not attempting in good faith to settle claims, when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests; ....

Mayfair House Association v. QBE Insurance Corp., 2010 WL 472827 *1 (S.D. Fla. February 5, 2010). Mayfair also advanced claims in this Federal Court action that QBE violated several provisions of Florida's Unfair Claim Settlement Practices Act, Fla. Stat. § 626.9541(1)(i), which in turn are made actionable bad faith by the terms of Section 624.155.

The plaintiff "sought production of QBE's claim file in the underlying coverage dispute with Mayfair House, together with the claim files of other insured condominium associations who also litigated windstorm damage claims against QBE arising out of Hurricane Wilma." The U.S. District Court affirmed a Magistrate-Judge's Order compelling the production, but for different reasons stated by the U.S. District Judge.

The District Judge applied the *Ruiz* holding to mean that "the Florida Supreme Court *effectively eliminated the attorney client privilege as a discovery shield in bad faith insurance litigation between an insured and its insurance company with respect to all materials generated prior to resolution*

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of the underlying disputed matter." *Mayfair House Association v. QBE Insurance Corp.*, 2010 WL 472827 *3 (S.D. Fla. February 5, 2010). [Emphasis added.]

Further, the Federal Court held that the Attorney-Client Privilege was nonexistent in other cases to the extent that the claims files maintained by the same insurance company on claims of other policyholders and insureds would not prevent their discovery in the bad faith case at bar:

> [T]his court finds *Ruiz* also informs the discoverability of *other* insured claims files which relate to and illuminate the manner in which the company handles claims of its other policyholders in the general course of its business—an issue directly bearing on the company's punitive damage liability exposure under statutory language authorizing recovery of such damages where the company's bad faith claims practices occur "with such frequency as to indicate a general business practice." § 624.155(5), Fla. Stat. (2007).
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> Thus, although for reasons different than those stated by the magistrate judge, the court affirms the provision of the omnibus discovery order which compels complete production of the specified other insured claim files with respect to all file materials created up to and including the date of resolution of the underlying disputed matter.

Mayfair House Association v. QBE Insurance Corp., 2010 WL 472827 *4 (S.D. Fla. February 5, 2010).

Not very long ago, in fact on St. Patrick's Day of this year, the Florida Supreme Court clarified this area of discovery. The Supreme Court's decision came in "a statutory first-party bad faith action" involving terminated "disability income" benefits: *Genovese v. Provident Life & Accident Insurance Co.,* 2011 WL 903988 *1 (Fla. March 17, 2011). In that case, the Court silently overruled its focus in *Ruiz* on the single statute that confers both third-party and first-party "*bad faith*" causes of action (in addition to the still extant cause of action for third-party bad faith at common law in *Florida*).

Instead, in *Genovese* the Court wrote little about the cause of action and instead focused its written opinion on the bases of the Work Product Immunity and of the Attorney-Client Privilege rather than on the existence of a single statutory cause of action:

> Therefore, 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 injured 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.
>
> Although we conclude that the attorney-client privilege applies, we recognize that cases may arise where an insurer has hired an attorney to both investigate the claim *and* render legal advice. Thus, the materials requested by the opposing party may implicate both the work product doctrine and the attorney-client privilege. Where a claim of privilege is asserted, the trial court should conduct an in camera inspection to determine whether the sought-after materials are truly protected by the attorney-client privilege. If the trial court determines that the investigation performed by the attorney resulted in the preparation of materials that are required to be disclosed pursuant to Ruiz and did not involve the rendering of legal advice, then that material is discoverable.

Genovese v. Provident Life & Accident Insurance Co., 2011 WL 903988 *4 (Fla. March 17, 2011). [Italics by the Supreme Court of Florida.] The *Genovese* decision has already been followed by a Florida State intermediate appellate court in a case involving similar discovery issues. *State Farm Florida Insurance Co. v. Puig*, 2011 WL 1008266 *2 - *3 & *2n.1 (Fla. 3d DCA March 23, 2011).

CONCLUSION

The tempest is at an end. The waves of discovery flow in familiar patterns. Attorney-Client Privileges have been greatly restored in first-party bad faith cases —at least those cases pending in Florida State Courts.

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