

# The Supreme Court Holds, With A Significant Caveat, That Documents Protected By Attorney-Client Privilege Are Not Discoverable In A Statutory First-Party Bad Faith Action

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On March 17, 2011, the Florida Supreme Court released *Genovese v. Provident Life and Accident Insurance Co.*, Case No. SC06-2508, answering the following question the Fourth District Court of Appeal certified to be one of great public importance: Does the Florida Supreme Court's holding in *Allstate Indemnity Co. v. Ruiz*, 899 So.2d 1121 (Fla. 2005), 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? Limiting its decision to the certified question, the Court answered the certified question in the negative and approved the portion of the Fourth District's decision precluding the discovery of attorney-client privileged materials in a statutory first-party bad faith action. The Court noted that in *Ruiz*, the Court held that in first-party bad faith actions brought pursuant to section 624.155, Florida Statutes, work product materials were discoverable. However, attorney-client privilege and the work product doctrine are two distinct concepts with different purposes. In particular, the attorney-client privilege is provided for in section 90.501, Florida Statutes, and, therefore, materials protected by the privilege are not discoverable unless a statutory exception to the privilege applies. In so holding, the Court cautioned and Justice Pariente, in a specially concurring opinion in which Justices Lewis, Labarga and Perry concurred, emphasized that cases may arise where an insurer has hired an attorney to both investigate the underlying claim and render legal advice. In those cases, the materials requested by the insured may implicate both the work product doctrine and the attorney-client privilege.

Therefore, when a claim of privilege is asserted, the trial court should conduct an in-camera inspection to determine whether the sought-after materials are 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.

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