CARLTON FIELDS

New Work Product Privilege Opinion

April 17, 2009

On April 15, 2009, the Fourth District Court of Appeal released its opinion in Neighborhood Health Partnership. Inc. v. Peter F. Merkle, M.D., P.A., No.4D08-3213 (April 15, 2009) (Not final until disposition of timely filed motion for rehearing), which addresses the work product privilege. In Merkle, a Health Maintenance Organization ("HMO") sought to avoid production of certain documents on the basis that they constituted protected work product. The documents at issue, prepared by the HMO and its consulting firm, analyzed how the HMO should respond to an inquiry by the Florida Agency for Health Care Administration ("AHCA") with regard to how the HMO's policy of reimbursing providers of emergency medical services complied with section 641.513(5), Florida Statutes. The documents contained discussions as to how the HMO arrived at the rates they were paying non-contract providers. Ultimately, AHCA determined it had no jurisdiction over the matter. Following AHCA's decision, non-contract providers brought a class action suit against the HMO, arguing they were entitled to a higher rate reimbursement. The providers requested the production of the documents at issue. The Fourth District denied the HMO's petition for certiorari, agreeing with the trial court's determination, following in camera review, that the documents were not protected work product. The Fourth District reasoned that the HMO misconstrued Southern Bell Telephone & Telegraph Co. v. Deason, 632 So. 2d 1377 (Fla. 1994), in that Deason does not support the proposition that "a mere routine request for information by a regulatory agency justifies presumptive work product protection for any document on which the regulated industry company's lawyer has cast an eye," because regulatory disciplinary litigation was well under way when the documents at issue in Deason were generated. In contrast, the Fourth District found that when the HMO's documents where created, AHCA was not considering an adversarial disciplinary proceeding on the matter. The court found that the documents were prepared in the ordinary course of business and there was no basis for the HMO to anticipate adverse agency action. The Fourth District went on to clarify its decision in Cotton States Mutual Insurance Co., 444 So. 2d 595 (Fla. 4th DCA 1984), noting that it was not intended to impose a heightened standard for claims of work product protection. The court explained that Cotton States concerned a claim of bad faith by an insured against the insurance carrier and that the carrier had no basis to assert a privilege of nondisclosure as to the

claim file at issue. Nevertheless, the Fourth District also recognized that "claims of privilege or protection by corporations are generally subject to stricter scrutiny." (citing Deason, 632 So. 2d at 1383) (recognizing that "to minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny"). The Fourth District concluded by stating that the work product privilege was never meant to apply to ordinary, routine, business-as-usual communications and at a minimum "requires that a specific litigation matter can be reasonably anticipated as a result of an occurrence or circumstance - - such as an act giving rise to the accrual of a cause of action. It was never designed to protect the normal business activities of an industry against general regulatory oversight and enforcement - - outside of specific disciplinary action by the agency."

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