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DISCOVERY OF LITIGATION AND CLAIMS FILES
IN SUBSEQUENT SUIT BY THE INSURED

Liberty Mutual Fire Insurance Co. v. Kaufman
Liberty Mutual Fire Insurance Co. v. Bennett

In two new decisions, Florida courts have further defined when your litigation and claims files may not be protected by the attorney-client privilege and work product doctrine. Florida's Third and Fourth District Courts of Appeal have recently narrowed insurers' ability to assert the privilege and doctrine in the tripartite relationship.

In Liberty Mutual Fire Insurance Co. v. Kaufman, 29 Fla. Weekly D2116b (Fla. 3d DCA September 22, 2004), Florida's Third District Court of Appeal held that (i) an insured is entitled to discover attorney-client communications made between the insurer and claims counsel during the course of representation; (ii) an insured is entitled to discover work product related to the defense of covered claims where the insurer has denied coverage; and (iii) an insured is entitled to discover work product related to claims counsel's performance in the underlying litigation where claims counsel's performance is at issue in a later-filed claim by the insured.

Kaufman involved an insured's claims for breach of contract and bad faith against an insurer, alleging that the insurer failed to provide liability coverage for damages awarded in the underlying litigation, and that it failed to provide an adequate defense for the insured. At issue in the appeal was whether the insurer's claims and litigation files maintained in the underlying litigation were protected by the attorney-client privilege and work product doctrine.

The Third District Court of Appeal held that the attorney-client privilege attached to communications between the insurer and its own in-house counsel related to the handling of the underlying litigation, but that it did not attach to communications between the insurer and claims counsel on the same issue. In so holding, the court reasoned that "when an insurer accepts the defense of obligations of its insured, certain interests of the insured and the insurer essentially merge. Such common interests bar, among other things, the attorney-client privilege from attaching to communications among the attorney, the insurer, and the insured." The court recognized that this fiduciary relationship continues to exist even where the parties' interests become adversarial during the course of the litigation unless there is a "clear line of demarcation separating" the time at which the interests were unified from the time at which the interests diverged.

Significantly, the court rejected the insurer's contention that the normal insured/insurer fiduciary relationship ended when the insurer issued a reservation of rights letter informing the insured that it would only provide coverage for certain claims in the underlying litigation and that it was reserving the right to deny coverage altogether. The court held that the letter did not denote an adversarial relationship between the parties, but rather merely reflected the performance of the insurer's recognized duty to inform the insured of its rights and obligations under the policy.

With respect to the work product doctrine, the court held that work product related to claims counsel's performance in the underlying litigation and work product related to the defense of claims covered under the policy was not protected. However, work product related to the claims for intentional acts that were not covered by the policy was protected from disclosure.

Similarly, in Liberty Mutual Fire Insurance Co. v. Bennett, 29 Fla. L. Weekly D2190a (Fla. 4th DCA September 29, 2004), the Fourth District Court of Appeals considered the issue of when work product immunity attaches to work product created in the underlying litigation. The Fourth District held that work product immunity did not attach to work product created in the underlying litigation until the point at which it became clear in the underlying litigation that future litigation between the insurer and insured was imminent. The insurer argued that the defining point in the litigation was when the insured demanded settlement and threatened a bad faith claim against the insurer. The court held that even at that point, litigation was not imminent – that it only becomes imminent after the insurer actually forwarded the file to outside counsel to defend the bad faith claim.

Note, however, that the holding in Bennett could be indirectly overruled in the near future by the Florida Supreme Court. The Fourth District's holding is Bennett was predicated on the prior decision in Cotton States Mutual Ins. Co. v. Turtle Reef Associates, Inc., 444 So. 2d 595 (Fla. 4th DCA 1991), where it held that the work product doctrine attaches at the point where litigation is not just merely likely, but "imminent." The Florida Supreme Court has granted review of a case from the Fifth District Court of Appeals to resolve a conflict between the Fourth and Fifth District Courts of Appeal on this issue.