No. 31114 - State of West Virginia ex rel. M. Andrew Brison and Rebecca Stepto v. The Honorable Tod J. Kaufman, Judge of the Circuit Court of Kanawha County, and Deborah Falls, Administratrix of the Estate of Cledith Lee Falls

No. 31115 - State of West Virginia ex rel. Nationwide Mutual Insurance Company and Ash Cowder, Jr. v. The Honorable Tod J. Kaufman, Judge of the Circuit Court of Kanawha County, and Deborah Falls, Administratrix of the Estate of Cledith Lee Falls

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Davis, J., concurring:

In this case, the majority has concluded that, in a first-party bad faith action against an insurer, the attorney-client privilege and work product rule attach to documents contained in an insured claim file and litigation file. I concur in the decision reached by the majority opinion. I have chosen to write separately to address a distinction that courts have made involving first-party bad faith cases against insurers, and the implications of that distinction to the majority's holding in this case.

TWO TYPES OF FIRST-PARTY BAD FAITH ACTIONS AGAINST AN INSURER

"There are different types of first-party bad faith actions." *Palmer by Diacon v. Farmers Ins. Exch.*, 861 P.2d 895, 905 (Mont. 1993). That is, a first-party bad faith action against an insurer may arise in two contexts. First, the first-party bad faith action may arise when an insurer fails to use good faith in resolving a "loss claim" filed by the insured. The second type of first-party bad faith action may arise as a result of the insurer's failure to use

good faith in settling a lawsuit by a third-party the insured harmed, resulting in an "excess judgment" against the insured.[1]

(1) Loss claim. "Generally, insurer and insured are in an adversary relationship whenever there is any claim by an insured for loss under any insurance policy." *State ex rel. Safeco Nat'l. Ins. Co. of America v. Rauch*, 849 S.W.2d 632, 635 (Mo. App. 1993) (citation omitted). In this situation, an insured files a claim for a loss he or she sustained and the insurer either denies coverage, unjustifiably delays payment, or offers an amount the insured deems insufficient to cover the loss. Whichever response an insurer makes places the parties in an adversarial relationship. *See Palmer v. Farmers Ins. Exch.*, 861 P.2d 895, 905 (Mont. 1993) ("In this type of action, the claimant and the insurer are in adverse positions from the outset of the underlying case."). *See also Squealer Feeds v. Pickering*, 530 N.W.2d 678, 684 (Iowa 1995) (same).

As a result of the adversarial posture of a loss claim, most courts permit an insurer to assert the attorney-client privilege and apply the work product rule to documents

[1]*See State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 370 n.17, 508 S.E.2d 75, 87 n.17 (1998) ("There are two types of first-party bad faith actions against an insurer. One such action may arise when the insurer fails to use good faith in settling a claim by someone the insured harmed or injured. In this context, the interests of the insured and insurer are presumptively mutual. However, the second type of first-party bad faith action against an insurer concerns a claim brought by the insured against the insurer, e.g., house burned down. In this second type of first-party bad faith action, the interest of the insured and insurer are actually presumptively in conflict.").

contained in an insured's claim file and any litigation file that the insurer may have generated.[2] *See United Servs. Auto. Ass'n v. Werley*, 526 P.2d 28 (Alaska 1974) (claim for a loss to which attorney-client privilege applies); *Brown v. Superior Court,* 670 P.2d 725 (Ariz. 1983) (claim for a loss to which work product rule applies); *State Farm Fire & Cas. Co. v. Superior Court,* 265 Cal. Rptr. 372 (Cal. Ct. App. 1989) (claim for a loss to which attorney-client privilege applies); *Clausen v. National Grange Mut. Ins. Co.*, 730 A.2d 133 (Del. Super. Ct. 1997) (claim for a loss to which attorney-client privilege and work product rule apply); *Kujawa v. Manhattan Nat'l. Life Ins. Co.,* 541 So. 2d 1168 (Fla. 1989) (claim for a loss to which attorney-client privilege and work product immunity apply); *Hartford Fin. Servs. Group, Inc. v. Lake County Park & Recreation Bd.*, 717 N.E.2d 1232 (Ind. Ct. App. 1999) (claim for a loss to which attorney-client privilege applies); *State ex rel. Safeco Nat'l. Ins. Co. of America v. Rauch*, 849 S.W.2d 632 (Mo. Ct. App. 1993) (claim for a loss to which attorney-client privilege and work product rule apply); *Palmer v. Farmers Ins. Exch.*, 861 P.2d 895 (Mont. 1993) (claim for a loss to which attorney-client privilege and work product immunity apply); *Hamdan v. New York Prop. Ins. Underwriting Ass'n*, 456 N.Y.S.2d 305 (1982) (claim for a loss to which work product rule applied to certain interrogatories); *Evans v. United Servs. Auto. Ass'n*, 541 S.E.2d 782 (N.C. Ct. App. 2001) (claim for a loss to which attorney-client privilege and work product immunity apply); *Boone v. Vanliner Ins. Co.*, 744

[2]A litigation file is usually generated when, for example, an insurer joins a litigation where underinsured/uninsured coverage is involved, or an action instituted to determine whether coverage existed.

N.E.2d 154 (Ohio 2001) (claim for a loss to which attorney-client privilege applies); *Sims v. Travelers Ins. Co.*, 16 P.3d 468 (Okl. Civ. App. 2000) (claim for a loss to which attorney-client privilege applies); *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337 (Tex. App. 1999); (claim for a loss to which attorney-client privilege and work product immunity apply); *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 150 N.W.2d 387 (Wis. 1967) (claim for a loss to which attorney-client privilege and work product rule apply).[3]

(2) Excess judgment. When an insured is sued for injury or harm by a third-party, and an insurance company provides the insured with legal representation, courts have held that the "the insurer initially employs the attorney to represent the interests of both the insured and the insurer." *Jessen v. O'Daniel*, 210 F. Supp. 317, 331- 32 (D. Mont. 1962).

[3]"Because an insurance company has a duty in the ordinary course of business to investigate and evaluate claims made by its insureds, the claims files containing such documents usually cannot be entitled to work product protection. Normally, only after the insurance company makes a decision with respect to the claim, will it be possible for there to arise a reasonable threat of litigation so that information gathered thereafter might be said to be acquired in anticipation of litigation." *Pete Rinaldi's Fast Foods, Inc. v. Great American Ins. Companies*, 123 F.R.D. 198, 202 (M.D.N.C. 1988). "While there are many nuances and differing views, case law exists to support the proposition that a document will be deemed to have been prepared in anticipation of coverage litigation if it is created after: (1) the insured tenders its claim for coverage; (2) it begins to appear that the insurer might deny coverage or reserve its rights; (3) the insurance company engages a coverage attorney in connection with the insured's claim; (4) the insurance company denies coverage; (5) coverage litigation appears imminent; or, (6) coverage litigation is actually commenced." M. Elizabeth Medaglia, et al., "Privilege, Work Product, and Discovery Issues in Bad Faith Litigation," 32 Tort & Ins. L.J. 1, 12 (1996).

See Longo v. American Policyholders' Ins. Co., 436 A.2d 577, 580 (N.J. Super. Ct. Law Div. 1981) ("The attorney represented both the insurer and the insured. Counsel owed the insured the same unqualified loyalty as he would had he been personally retained.").[4] In this situation "an insured and his or her insurer share a common interest, that is, to limit liability in a tort action to within the policy limits." *Flores v. Barretto*, 54 P.3d 441, 451 (Haw. 2002) (Moon, C.J., dissenting). However, it has been observed that "[f]irst-party bad faith cases involving dual representation often arise after a third-party claimant obtains a judgment in excess of policy limits and the insured later sues the insurance company for failure to settle within policy limits." *Palmer v. Farmers Ins. Exch.*, 861 P.2d 895, 905 (Mont. 1993).

In first-party bad faith litigation arising out of a judgment against an insured in excess of policy limits, most courts do not permit the attorney-client privilege or work product rule to be used to prevent an insured from having access to his/her claim file and the litigation file in the underlying action. *See Fortune Ins. Co. v. Greene*, 775 So. 2d 338 (Fla. Dist. Ct App. 2000) (attorney-client privilege and work product immunity do not

[4]"Courts and commentators have failed to reach agreement with respect to whether the insurer is a co-client of defense counsel. In some states, defense counsel is presumed to have two clients, the insurer and the insured. Other states have taken a contrary view and have declared that only the policyholder is a client." Michael F. Aylward, *Insurance Ethics: The Future of the Tripartite Relationship*, SG004 A.L.I.-A.B.A. 217, 224 (2001) (citations omitted). In *State ex rel. Allstate Insurance Co. v. Gaughan*, 203 W.Va. 358, 372, 508 S.E.2d 75, 89 (1998) we adopted the view that "the insurer actually hires the attorney to represent the insured."

apply); *Henke v. Iowa Home Mut. Cas. Co.*, 87 N.W.2d 920 (Iowa 1958) (attorney-client privilege and work product rule do not apply); *Hodges v. Southern Farm Bureau Cas. Ins. Co.*, 433 So.2d 125 (La. 1983) (work product rule does not apply); *Dumas v. State Farm Mut. Auto. Ins. Co.*, 274 A.2d 781 (N.H. 1971) (attorney-client privilege does not apply); *Longo v. American Policyholders' Ins. Co.*, 436 A.2d 577 (N.J. Super. Ct. Law Div. 1981) (attorney-client privilege does not apply); *Colbert v. Home Indem. Co.*, 259 N.Y.S.2d 36 (1965) (work product immunity does not apply); *Schoffstall v. Nationwide Ins. Co.*, 38 Pa. D. & C. 4th 457, 1998 WL 1108681 (Pa. Ct. Com. Pl. 1998) (attorney-client privilege and work product rule do not apply). *See also Silva v. Fire Ins. Exch.*, 112 F.R.D. 699 (D. Mont. 1986) (attorney-client privilege and work product immunity do not apply); *LaRocca v. State Farm Mut. Auto. Ins. Co.*, 47 F.R.D. 278 (W.D. Pa. 1969) (attorney-client privilege does not apply); *Chitty v. State Farm Mut. Auto. Ins. Co.*, 36 F.R.D. 37 (E.D. S.C. 1964) (attorney-client privilege and work product rule do not apply).

The common interest doctrine is usually cited as the reason for not allowing the attorney-client privilege and work product rule to apply in first-party bad faith litigation arising from a prior mutual interest litigation. "[U]nder the common interest doctrine, when an attorney acts for two different parties who each have a common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties." *Waste Mgmt., Inc. v. International Surplus Lines Ins. Co.*, 579 N.E.2d 322, 328 (Ill. 1991). *See Henke v. Iowa Home Mut. Cas. Co.*, 87 N.W.2d 920, 923

(Iowa 1958) ("[W]hen two or more parties consult an attorney for their mutual benefit, the testimony as to the communications between the parties or the attorney as to that transaction is not privileged in a later action between such parties or their representatives."). "The common interest doctrine has been recognized in the insured/insurer context when counsel has been retained or paid for by the insurer, and allows either party to obtain attorney-client communications related to the underlying facts giving rise to the claim, because the interests of the insured and insurer in defeating the third-party claim against the insured are so close that 'no reasonable expectations of confidentiality' is said to exist." *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 797 F. Supp. 363, 366 (D.N.J. 1992) (citation omitted).

(3) The limitation of the majority's holding. The majority opinion appropriately noted that this case "was a first-party bad faith . . . action wherein the interests of the [insured] and the [insurer] were in conflict." In other words, the first-party bad faith action in this case came under the "loss claim" category of first-party bad faith actions, not the "excess judgment" category.[5] The majority's decision to extend the attorney-client privilege and work product rule to the facts of this case was consistent with the rule followed by most courts.

The majority decision did not discuss the "excess judgment" category of first-

[5]The insured in this case sought underinsured coverage.

party bad faith actions. Because of the critical distinction between a first-party bad faith "loss claim" action and a first-party bad faith "excess judgment" action, I do not believe the majority opinion should be interpreted as applying to an "excess judgment" action.

In view of the foregoing, I concur.