

BAD FAITH BLOG

# Florida Merges Third-Party and First Party Bad Faith Discovery Rules

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**Summary:** Maharaj filed a third-party bad faith claim against GEICO on behalf of her son after GEICO insisted that Maharaj sign a release that included objectionable indemnification and property damage clauses to conclude the settlement. After removing the bad faith case to federal court, a discovery dispute arose. The Magistrate Judge partially granted Maharaj's Motion to Compel Production of Documents withheld on privilege grounds.

## *Maharaj v. GEICO*

Maharaj's son and husband were injured by GEICO's insured, Junie Telfort. Maharaj's attorney demanded GEICO tender Telfort's bodily injury liability policy limits to settle the claims. GEICO issued two settlement checks for the policy limits, but also required Maharaj to sign a release, including indemnification and property damage clauses before she would receive the checks. Maharaj refused to sign the release and the underlying case proceeded to trial. The jury in the underlying case returned a verdict in Maharaj's favor for \$6,800,626.90.

Maharaj then filed a third party bad faith claim against GEICO alleging bad faith for requiring her to sign the release with the objectionable clauses. During the bad faith case, a discovery dispute arose regarding the scope of discovery. In Maharaj's Motion to Compel, she sought the court to compel production of GEICO's complete claim file regarding the underlying claim up to the date of judgment, and GEICO's personnel files for specified GEICO adjusters and claim representatives for a three-year period.

GEICO argued the claim files were attorney-client privileged, relying on *Progressive Express Ins. v. Scoma*, 975 So.2d 461 (Fla. Dist. Ct. App. 2007), and that personnel files are both work product and irrelevant to the lawsuit at hand. In response to GEICO's reliance on *Scoma*, Maharaj cited *Baxley v. Geico General Ins. Co.*, 2010 WL 1780796 (N.D. Fla. 2010) stating the attorney-client privilege does not apply because a third-party beneficiary is entitled to discover the insurer's claim files.

The court relied on *Genovese v. Provident Life & Accident Ins. Co.*, 74 So.3d 1064 (Fla. 2011), stating in first-party bad faith actions, attorney-client privileged documents are not discoverable. Further, the court analyzed whether *Genovese* applied to the current third-party action by looking to the Florida Supreme Court decision in *Allstate Indemnity Co. v. Ruiz*, 899 So.2d 1121 (Fla. 2005). *Ruiz* noted Florida Section 624.155 eliminates the distinction between first-party and third-party bad faith actions for discovery purposes.

Once the court determined that first-party and third-party bad faith actions were the same for discovery purposes, it focused on the rationale behind the attorney-client privilege and the work product doctrine. The attorney-client privilege is intended to establish a safe haven for clients to have open and honest communications with their attorneys. Although *Genovese* focused on first-party bad faith actions, and *Ruiz* focused on work product, the court concluded there was no reason to limit the application of the attorney-client privilege to first-party bad faith actions after *Ruiz* eliminated the distinction between the two. The court did not have the independent authority to create the distinction *Ruiz* had eliminated.

After establishing that Telfort's communications with her counsel were protected by the attorney-client privilege, the court analyzed whether GEICO's communication with Telfort's counsel was also protected by attorney-client privilege. Although a third-party claimant may stand in the place of the insured in order to prosecute a bad faith claim, the claimant is not allowed access to attorney-client privileged information unless the insured waives the privilege. The court cited *Scoma's* holding that privileged information exchanged by the insured, its counsel, and the insurer is protected by the attorney-client privilege from a third-party's discovery request.

Telfort had not waived her attorney-client privilege; thus, Maharaj could not obtain those protected communications. Combining the reasoning in *Scoma*, *Genovese* and *Ruiz*, the court recognized Florida's stance on discovery in third-party bad faith claims is the same as in first-party claims.

The court agreed with GEICO's view that four different categories of communication could be privileged: (1) those between the insured and her counsel; (2) those between the insurer and its outside counsel; (3) those between the insurer and its in-house counsel; and (4) those between the insurer and the insured's counsel. Therefore, the court denied Maharaj's Motion to Compel production of attorney-client privileged communications.

To assess whether GEICO's personnel files were privileged, the court focused on the allegations that GEICO acted in bad faith by not removing the portions of the release to which Maharaj objected. Although this bad faith claim was irrelevant to most of the personnel files, Maharaj made a plausible argument for the file of GEICO's adjuster, Matthew Green. In Maharaj's complaint, she established Green's involvement in adjusting her claim was more than incidental or minimal.

The court focused on cases finding personnel files of employees are relevant in bad faith claims only when the employee is directly involved with the underlying claim being litigated. The court, in analyzing other cases filed against GEICO, found Maharaj's complaint only alleged Green mishandled her claim. Accordingly, the court granted Maharaj access to Green's personnel file. However, the court concluded Maharaj did not give a compelling reason to access such highly personal and confidential information in the other personnel files sought. The court highlighted the Florida's Supreme Court's statement that a party cannot go on a fishing expedition through highly private and potentially embarrassing information (which is most likely irrelevant) unless it directly relates to the underlying issue at hand.

In Florida, the courts treat discovery in third-party bad faith claims the same as first-party bad faith claims. In other words, the privileges protecting against the discovery of information and documents are to be applied in the same manner in both kinds of cases. The scope of discovery in third-party bad faith cases will be governed by the complaint, whether the insured waived the privilege(s) asserted, and whether the plaintiff states a compelling argument for the information sought.

By Anthony L. Martin & Lauren Rodriguez

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