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PENNSYLVANIA LAW UPDATE: THE ATTORNEY-CLIENT PRIVILEGE

On February 23, 2011, the Supreme Court of Pennsylvania held that the attorney-client privilege is a “two-way street” protecting both confidential client-to-attorney communications and attorney-to-client communications that are made for the purpose of obtaining or providing legal advice. Gillard v. AIG Ins. Co., No. 10 EAP 2010 (Pa. Feb. 23, 2011).

The plaintiff in Gillard brought a bad faith claim against his insurer for the handling of his uninsured motorist (“UM”) claim. During discovery, the plaintiff sought production of all of the documents contained in the file for the attorney representing the insurer in the UM litigation. In response, the insurer withheld and redacted documents created by its counsel asserting the attorney-client privilege.

The plaintiff sought to compel the documents and asserted that, based upon the plain language of the statute governing attorney-client communications, the attorney-client privilege in Pennsylvania was a “one-way street” that protected only confidential communications initiated by the client. The insurer asserted that the purpose of the attorney-client privilege was “to foster the free and open exchange of relevant information between the lawyer and his client” and therefore, “both client- and attorney-initiated communications must enjoy protection.” The insurer also asserted that the waiver of the attorney-client privilege that occurs when advice of counsel is asserted in a bad faith claim would be “superfluous were the advice of counsel discoverable from the outset.”

The trial court adopted the “one-way street” approach to the attorney-client privilege, recognizing some allowance for derivative protection of attorney-to-client communications where the attorney’s communication revealed confidential communications already protected by the privilege. The insurer appealed to the Pennsylvania Superior Court, which affirmed the trial court’s opinion in reliance on Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259, 1269 (Pa.Super. 2007) (holding that the attorney-client “protection is available only for confidential communications made by the client to counsel”).

The issue before the Pennsylvania Supreme Court was “whether communications from an attorney to the client may ever enjoy protection from disclosure as an attorney-client communication.” The insurer’s position was that “the purpose of the communications, rather than the direction of flow, best serves the overall interests of justice” and suggested that “all attorney-to-client communications containing advice, analysis, and/or legal opinions” should be protected by the privilege. The plaintiff asserted that “any extension of the attorney-client privilege beyond close derivative protection” would be “inappropriate judicial interference with the prevailing statutory scheme.” The plaintiff also asserted that the legislature’s narrow approach to the attorney-client privilege took into consideration “the adverse impact on the truth-determining process of a broadly applied privilege” and that “public policy favors strict construction of all testimonial exclusionary privileges.”

The Court agreed that, to determine the appropriate scope of the protection afforded by the attorney-client privilege, it was “essential to consider the underlying purpose of the privilege.” The Court found that “client communications and attorney advice are often inextricably intermixed, and we are not of the view that the Legislature designed the statute to require ‘surgical separations’ and generate the ‘inordinate practical difficulties’ which would flow from a strict approach to derivative protection.” Accordingly, the Court held that “the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.”

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