

INSURANCE AND REINSURANCE

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This article reviews a recent decision of the Lackawanna County Court of Common Pleas. In the decision, Judge Terrence R. Nealon considers the application of the work product doctrine to mental impressions and conclusions created prior to the commencement of legal action. Specifically, this Opinion evaluates whether work product created before a law suit has begun may be deemed protected under the rules of procedure as having been prepared "in anticipation of litigation." This is a novel issue in Pennsylvania and may have considerable impact on the discoverability of work product in the future for all litigants, including insurance carriers and their agents.

The Work Product Doctrine – When is a Mental Impression Created “in anticipation of litigation”?

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On October 5, 2011, the Court of Common Pleas for Lackawanna County in Church of Forgotten Souls d/b/a Heaven Help Us Thrift Store v. NGM Insurance Co., et al., No. 10 CV 7078 (Oct. 5, 2011), issued an opinion extending the protections of the work product doctrine to materials prepared by the agent of an insurance company prior to the commencement of a lawsuit. Historically, the temporal scope of the work product doctrine is an issue that has benefitted from only minimal judicial analysis and consideration. In fact, at the time the NGM opinion was entered, the Court remarked, “our research has disclosed only a single decision addressing the time issue advanced by the plaintiff in its work product argument . . .” At its core, NGM is an examination of the evolving tri-partite relationship that exists between an insurer, insured and legal counsel and the intermingling of these relationships with the protections of the work product doctrine and to a lesser extent, the attorney client privilege.

CHURCH OF FORGOTTEN SOULS V. NGM INSURANCE CO.

The NGM litigation was precipitated by flood damage to Plaintiff’s property. NGM, the insurer in this matter, retained the Paladin Adjustment Group (“Paladin”) to investigate and adjust the property loss claim. While the judicial opinion does not explicitly set forth the circumstances, it is evident that coverage was disclaimed. Thereafter, on October 4, 2010, Plaintiff initiated an action against NGM and Lloyd’s London, asserting claims for breach of contract and bad faith relative to an occurrence of flood damage. Once the action was in suit, Plaintiff served Paladin with discovery requests seeking its “complete claims file.” NGM objected to this discovery and ultimately this matter was argued before a Special Trial Master who ordered that Paladin

must “produce its entire file and . . . redact any documents protected by the attorney client privilege or the attorney work product doctrine.”

NGM appealed the decision of the Special Trial Master on the following two bases: (1) the Order did not afford protection to the mental impressions or opinions of Paladin, as a representative of NGM, regarding the merit or value of the property damage claim; and (2) NGM was entitled to the protection of the attorney client privilege with respect to materials exchanged between itself and counsel.¹ While Plaintiff conceded that Paladin’s mental impressions may be protected, this protection existed only to the extent that the impressions/opinions were formed or documented subsequent to the initiation of the action on October 4, 2010.

THE COURT’S DECISION

Work Product Doctrine

Under Pennsylvania Rule of Civil Procedure 4003.3, “discovery shall not include disclosure of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.”

Pennsylvania Courts have held that this protection is akin to the attorney client privilege, but broader insofar as it “protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation.” Rhodes v. USAA Casualty Insurance Company, 21 A.3d 1253, 1260 (Pa. Super. 2011). Importantly, Rule

¹ Also at issue was whether NGM and Lloyd’s were entitled to privilege relative to a joint defense agreement. The Court determined that there was a joint defense, and accordingly, materials exchanged between the parties were shielded under the umbrella of the attorney client privilege where applicable.

4003.3 extends this protection to non-attorneys as well and states:

[w]ith respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa.R.Civ.Pro. 4003.3.

Based on the above, the operative question to be considered in extending the work product protection is whether there is a temporal limitation for when material may be deemed "in anticipation of litigation".

The NGM Plaintiff argued that Paladin's work product is discoverable if it was prepared prior to the commencement of the litigation. In examining whether the work product doctrine may be applied before a lawsuit is initiated, the NGM Court referred to Mueller v. Nationwide Mutual Insurance Co., 31 D & C. 4th 23 (Alleg. Co. 1996). In Mueller, subsequent to the entry of an arbitration award in her favor, the Plaintiff filed a bad faith action against her insurer and sought to discover "the entire claims file" up to the date on which the bad faith litigation commenced. In denying this discovery request, Judge R. Stanton Wettick held as follows:

[Plaintiff] contends that the final sentence of Rule 4003.3 does not apply until she filed suit because these documents could not have been prepared in anticipation of litigation. I

reject this contention because Rule 4003.3 protects any mental impressions, conclusions, or opinions respecting the value or merit of a claim or defense.

Id. at 30.

With Judge Wettick's ruling as the only precedent to touch on this issue previously, the NGM Court concluded that Paladin was not required to turn over its work product to the extent that it was prepared in anticipation of litigation, even if prepared prior to commencement of the lawsuit. In spite of this ruling, the Court opined that any impressions Paladin documented regarding the value of Plaintiff's claim that were created before litigation was contemplated remain discoverable. However, once it was evident that litigation was possible, the work product shield was in effect. Specifically, the Court stated, "[o]nce questions developed regarding ownership of the property, the plaintiff's insurable interest, . . . or other purported reasons for the insurers' denial of the plaintiff's claim, litigation was clearly envisioned by the defendants and any conclusions expressed by Paladin" after that point are protected.

Attorney Client Privilege

Also at issue in NGM was whether the communications from NGM to its counsel were protected by the attorney-client privilege. The attorney-client privilege has deep historical roots and indeed is the oldest of the privileges for confidential communications in common law. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). "It is designed to foster confidence between attorney and client, leading to a trusting, open dialogue." Slusaw v. Hoffman, 861 A.2d

269, 273 (Pa.Super. 2004). This policy, which enforces the free-flow of communication, also applies in the world of insurance claims.

Looking back at judicial precedent, in O'Brien v. Tuttle, 21 Pa. D. & C.3d 319 (Alleg. Co. 1981), the Court considered the exchange of information between an insured, an insurer and their mutual legal counsel. The Tuttle Court concluded that “the law recognizes a joint representation by a common attorney for the mutual benefit of two or more parties and thus, in this situation, extends the attorney-client privilege to any communication among the parties and their counsel in order to permit the free flow of information necessary to foster the open attorney-client dialogue essential for proper representation of the parties.” Id. at 321-22. Moreover, in order to successfully defend a claim, the insured must be able to disclose to the insurer the circumstances surrounding the claim. Id. at 322. Ultimately, the Court found that the attorney-client privilege existed between all of the parties based upon the tripartite relationship between the insured, insurer and legal counsel. Id. at 327.

The application of the attorney-client privilege was later expanded upon in the landmark Pennsylvania Supreme Court decision, Gillard v. AIG Insurance Company, 15 A.3d 44 (Pa. 2011), which is cited by the NGM Court in support of its decision to extend the attorney client protection to communications between NGM and its counsel. In Gillard, the Court considered specifically whether communications from an attorney to a client were protected. Traditionally, courts enforced a strict interpretation of the privilege statute and held that only communications from client to counsel were afforded the attorney-client privilege. The Gillard Court, in issuing a

contrary legal precedent, concluded 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.”

In NGM, this precise issue was considered as it relates to the exchange of information between attorney and client. Relying upon the decision in Gillard, the NGM Court summarily dismissed Plaintiff’s argument that privilege did not exist with respect to communications between NGM and its counsel and offered that “NGM may redact or withhold any materials reflecting confidential communications from NGM to its counsel or from its counsel to NGM.” In this manner, the recent decision in Gillard was directly applied in NGM and complemented the Court’s expansion of the work product protections with a continuation of the liberal application of attorney-client privilege as established in Gillard.

FUTURE IMPACT

The privilege concept is a fundamental building block of the adversarial system. Its roots date back centuries and are vital to efficient legal representation. In the context of an insurance claim, when there are multiple parties sharing information relative to a loss, the question of what materials are afforded privilege protection is an area of the law that continues to evolve.

With the Gillard opinion, the Supreme Court of Pennsylvania clearly stamped its notion of privilege regarding communications between attorney and client for all to see. As it relates to the work product doctrine and its future, that remains cloudy. In light of the decision handed down in NGM, an insurance carrier can theoretically argue that the work of its

agents, well in advance of legal action, is protected. The only caveat here is that this work must be completed in anticipation of litigation – this sentiment presents the question of when is something completed in anticipation of litigation? Is it at the first notice of a claim or does it occur when the coverage is disclaimed . . . or is it a grey area in between?

The real danger is that litigants will seek the work product shield disingenuously and simply state that all work is prepared in anticipation of litigation. The consequences of this position, however, are likely to lead to increased motions practice and substantial time in discovery court to debate the applicability of privilege to mental impressions created in advance of litigation. Courts will have to define just how remote a lawsuit can be before permitting this protection to a party. In the meantime, however, NGM unequivocally stands for the proposition that mental impressions of parties, and their agents, may be protected prior to the commencement of a legal action if they were prepared in anticipation of suit.

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