

**DECIPHERING THE INSURANCE CARRIER’S THOUGHT PROCESS:
TO WHAT EXTENT DOES THE ATTORNEY-CLIENT PRIVILEGE AND
WORK-PRODUCT IMMUNITY SHIELD FROM DISCLOSURE
OTHERWISE DISCOVERABLE EVIDENCE IN BAD FAITH
LITIGATION?**

**Jason S. Mazer¹
Cary D. Steklof**

Preface

Even though the Supreme Court of Florida recently explored the outer limits of the attorney-client privilege in the context of first-party bad faith discovery, this area arguably remains largely uncharted territory. For years, the extent of discovery into the insurance carrier’s claim and litigation files remained unclear. And, Florida courts employed different rules depending upon whether a first- or third-party bad faith claim was at issue. In *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005), however, the court eliminated any conceptual distinction between permissible discovery in first- and third-party bad faith litigation and expressly held that the work-product immunity did not protect claim file materials created prior to the date of resolution of the underlying disputed matter. This ruling inevitably thrust to the fore questions concerning the discoverability of documents that may offer the most compelling indicia of whether the carrier acted in good or bad faith: communications between the carrier and its counsel.

Seizing on *Ruiz*’s rationale that different discovery rules should not be applied to substantively identical causes of action, some courts viewed the decision as suggesting that attorney-client communications in a carrier’s claim file ought to be equally discoverable in a first-party bad faith case. But, the Florida Supreme Court – amidst anything but unanimity –

¹ Mr. Mazer is a shareholder with Ver Ploeg & Lumpkin, P.A. and resident in the firm’s Miami office. Mr. Mazer regularly represents individual, corporate and municipal policyholders, as well as third-party claimants, in complex insurance coverage and bad faith litigation against insurance carriers. Mr. Mazer may be reached at (305) 577-4849 or via email at JMazer@vpl-law.com. Mr. Steklof is an associate attorney with VPL’s Miami office.

appeared to reverse course in *Genovese v. Provident Life & Accident Ins. Co.*, 2011 WL 903988 (Fla. Mar. 17, 2011). *Genovese* holds that the attorney-client privilege applies in first-party bad faith litigation, but cautions that the privilege is far from absolute. This article endeavors to pick up where *Genovese* leaves off, and predicts that there is far greater opportunity to discover the carrier's attorney-client communications in bad faith litigation than initially meets the eye.

Part I examines Florida's historical distinction between first- and third-party bad faith cases leading up to *Ruiz*; Part II analyzes *Ruiz* and its rationale; Part III mildly critiques *Genovese* and offers suggestions for future litigation; and Part IV surveys various approaches in other jurisdictions to waiver of the attorney-client privilege through the "at-issue" doctrine.

I. Florida's Prior Disparate Treatment of First- and Third-Party Bad Faith Claims

There are two contexts that may give rise to a bad faith action against an insurance carrier: first- and third-party. In Florida, an action for third-party bad faith was recognized as early as 1938. See *Auto. Mut. Indem. Co. v. Shaw*, 184 So. 852 (Fla. 1938). "Third-party bad faith actions arose in response to the argument that there was a practice in the insurance industry of rejecting without sufficient investigation or consideration claims presented by third parties against an insured, thereby exposing the insured individual to judgments exceeding the coverage limits of the policy while the insurer remained protected by a policy limit." *Ruiz*, 899 So. 2d at 1125 (citing Stephen F. Ashley, *Bad Faith Actions* § 1:01 (1995)). Insureds were left personally responsible for the amount of the judgment in excess of policy limits absent any actionable remedy, and this concern prompted courts to recognize an insurance carrier's obligation of good faith and fair dealing. *Ruiz*, 899 So. 2d at 1125. By agreeing to defend its insureds in litigation,

insurers had the power to settle and foreclose an insured's exposure or to refuse to settle and leave the insured exposed to liability in excess of policy limits. This placed insurers in a fiduciary relationship with their insureds similar to that which exists between an attorney and client. Consequently, courts began to recognize

that insurers owed a duty to their insureds to refrain from acting solely on the basis of their own interests in settlement.

State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58 (Fla. 1995) (citations omitted).

By contrast, Florida courts did not historically “recognize a corresponding common law first-party action that would protect insured individuals and enable them to seek redress of harm against their insurers for the wrongful processing or denial of their own first-party claims for failure to deal fairly in claims processing.” *Ruiz*, 899 So. 2d at 1125. “Florida courts had refused to recognize the tort of first-party bad faith because the type of fiduciary duty that exists in third-party actions is not present in first-party actions and the insurer is not exposing the insured to excess liability.” *Laforet*, 658 So. 2d at 59. This disparity existed notwithstanding the very same incentive for a carrier to deny an insured’s first-party claim for her own loss as applies to a claim presented by a third party against an insured. *Ruiz*, 899 So. 2d at 1126. “In both contexts, the insurer’s ultimate responsibility could not exceed the policy limits in the absence of a viable bad faith cause of action.” *Id.*

The Florida Legislature eliminated the distinction in 1982 by enacting FLA. STAT. § 624.155, which adopted and implemented a model act delineating certain unfair and deceptive practices in the business of insurance promulgated by the National Association of Insurance Commissioners. The Civil Remedy Statute, or “bad faith statute” as it is colloquially known, not only codified common law third-party bad faith, but expanded the cause of action to recognize an insurer’s duty of good faith in the first-party context. *Opperman v. Nationwide Mut. Fire. Ins. Co.*, 515 So. 2d 263, 266-67 (Fla. 5th DCA 1987).

While the enactment of § 624.155 provided policyholders with a cause of action for extra-contractual damages when their own claims are not handled in good faith, Florida courts continued to draw inappropriate distinctions with respect to permissible discovery. In third-party

actions for failure to settle a claim, Florida courts held policyholders (and third-party judgment creditors alike) entitled to discovery of the insurer's *entire* claim and litigation files notwithstanding objections of attorney-client privilege and work product immunity. *See, e.g., United Servs. Auto Ass'n v. Jennings*, 731 So. 2d 1258, 1260 (Fla. 1999) (holding that neither attorney-client privilege nor work product immunity protected documents from underlying claim through date of stipulated judgment); *Allstate Indem. Co. v. Oser*, 893 So. 2d 675, 677 (Fla. 1st DCA 2005) ("no attorney-client or work product privilege ordinarily extends to protect documents that were created before the date of the judgment that gave rise to such a claim"); *Dunn v. Nat'l Sec. Fire & Cas. Co.*, 631 So. 2d 1103, 1109 (Fla. 5th DCA 1994) ("Discovery of the insurer's claim file and litigation file is allowed in a bad faith case over the objections of the insurer that production of the file would violate the work product or attorney-client privilege."); *Superior Ins. Co. v. Holden*, 642 So. 2d 1139, 1140 (Fla. 4th DCA 1994) (noting the well-entrenched exception to the attorney-client privilege in third-party bad faith cases); *Cont'l Cas. Co. v. Aqua Jet Filter Sys., Inc.*, 620 So. 2d 1141, 1142 (Fla. 3d DCA 1993) (finding third-party plaintiff entitled to "the entire litigation file of the insured's counsel from the inception of the lawsuit until the date that the judgment was entered in the underlying action"); *Koken v. Am. Serv. Mut. Ins. Co.*, 330 So. 2d 805, 806 (Fla. 3d DCA 1976) (same).

But, the rule permitting discovery of materials contained in claim and litigation files in third-party bad faith actions was not consistently applied to the insurance company's claim file in first-party bad faith cases. This inconsistency resulted from the Florida Supreme Court's erroneous characterization of the nature of the parties' relationship in first-party actions as being adversarial in *Kujawa v. Manhattan Nat'l Life Ins. Co.*, 541 So. 2d 1168 (Fla. 1989). The *Kujawa* court held that "an adversarial, not a fiduciary, relationship existed between the parties"

in the first-party context where a policyholder submits a claim for her own covered loss, and that “the legislature in creating the [first-party] cause of action did not evince an intent to abolish the attorney-client privilege and work product immunity.” *Id.* at 1169. The Florida Supreme Court recently concluded that *Kujawa’s* rationale cannot be squared with § 624.155’s mandate “that insurance companies act in good faith and deal fairly with its insureds regardless of the nature of the claim presented, whether it be a first-party claim or one arising from a claim against an insured by a third party.” *Ruiz*, 899 So. 2d at 1127.

II. Harmony Revisited: *Ruiz* and Temporary Clarity in the Realm of First-Party Bad Faith Discovery

Ruiz presented the Florida Supreme Court with the opportunity to re-evaluate *Kujawa* and address the disharmony in discovery available to first- and third-party bad faith claimants. Citing § 624.155, the *Ruiz* court rejected the notion that disparate discovery is appropriate within the context of substantively identical claims:

Any distinction between first- and third-party bad faith actions with regard to discovery purposes is unjustified and without support under 624.155 and creates an overly formalistic distinction between substantively identical claims.” *Ruiz*, 899 So. 2d at 1128.

Driving the court’s analysis was an appreciation of the principle that was stood on its head in *Kujawa*: in the first-party context, the insurer stands in a fiduciary – *not* an adversarial – relationship with its insured. As the decision recognizes, this is precisely what the bad faith statute demands:

[S]ection 624.155 very clearly provides first-party claimants, upon compliance with statutory requirements, the identical opportunity to pursue bad faith claims against insurers as has been the situation in connection with third-party claims for decades at common law. The Legislature has clearly chosen to impose on insurance companies a duty to use good faith and fair dealing in processing and litigating the claims of their own insureds as insurers have had in dealing with third-party claims. Thus, there is no basis to apply different discovery rules to the substantively identical causes of action.

Id. Maintaining a distinction between first- and third-party discovery is not only antithetical to the statute’s purpose, it hinders first-party bad faith claimants from obtaining discovery that is perhaps the most persuasive indicia of bad faith:

[W]e conclude that to continue to recognize any such distinction would not only hamper but would impair the viability of first-party bad faith actions in a manner that would thwart the legislative intent in creating the right of action in the first instance. Just as we have concluded in the context of third-party actions, we conclude that the claim file type material presents virtually the only source of direct evidence with regard to the essential issue of the insurance company’s handling of the insured’s claim . . . Given the Legislature’s recognition of the need to require that insurance companies deal fairly and act in good faith and the decision to provide insureds the right to institute first-party bad faith actions against their insurers, there is simply no logical or legally tenable basis on which to deny access to the very information that is necessary to advance such action . . .

Id.

In electing to recede from *Kujawa* because it “unnecessarily produced the application of artificial and disparate discovery rules,” the court notably relied on *Fid. & Cas. Ins. Co. of New York v. Taylor*, 525 So. 2d 908 (Fla. 3d DCA 1987) – a decision that unequivocally held the underlying work product materials and attorney-client communications to be discoverable in a first-party bad faith action. The *Taylor* court aptly acknowledged that a first-party bad faith claim “is totally indistinguishable from the familiar ‘bad faith’ failure to settle or defend a third party’s action against a liability carrier’s insureds.” *Id.* at 909. Just as in the third-party context, “the pertinent issue is the manner in which the company has handled the suit including its consideration of the advice of counsel so as to discharge its mandated duty of good faith.” *Id.* at 910. This reasoning ultimately led the court to conclude that the entire claim file is properly discoverable in a first-party bad faith dispute.

While *Ruiz*’s rationale appeared sufficient to bring finality to the scope of discovery in first-party bad faith actions, its holding expressly addressed only one half of the privilege debate:

work product materials. Notwithstanding the court's broad language, the specific documents at issue were narrowly confined to those for which work product immunity was claimed. Accordingly, the court ultimately ordered that "all materials, including documents, memoranda, and letters, contained in the underlying claim and related litigation file material that was created up to and including the date of resolution of the underlying disputed matter and pertain in any way to coverage, benefits, liability, or damages, should also be produced in a first-party bad faith action." *Ruiz*, 899 So. 2d at 1129-30. The court further pronounced that "all such materials prepared after the resolution of the underlying disputed matter and initiation of the bad faith action may be subject to production upon a showing of good cause or pursuant to an order of the court following an in-camera inspection." *Id.* at 1130.

To be certain, *Ruiz* confirms a policyholder's ability to obtain underlying work product documents in a first-party bad faith case. As a practical matter, its holding invited future debate over the discoverability of attorney-client communications housed in the carrier's claim file. While insurers earnestly accepted that invitation in *Genovese*, a close analysis of the court's opinion reveals it did little to resolve the dispute.

III. Reversion to Discord in *Genovese*

Despite *Ruiz*'s expansive language, carriers predictably argued that the decision did not apply to attorney-client communications during the claim process or coverage litigation. Some courts elected not to interpret *Ruiz* broadly, and declined to extend its holding to require the production of attorney-client privileged documents. *See, e.g., XL Specialty Ins. Co. v. Aircraft Holdings, LLC*, 929 So. 2d 578 (Fla. 1st DCA 2006) (holding that attorney-client privilege applies in first-party bad faith lawsuits preventing plaintiffs from obtaining attorney-client material generated in the underlying insurance coverage case). Other courts, however,

acknowledged that *Ruiz* “did use sweeping language to suggest that it would allow documents traditionally protected by attorney-client privilege to be discoverable in bad faith litigation once the underlying case was completed.” *See, e.g., Nowak v. Lexington Ins. Co.*, 2006 WL 3613760 (S.D. Fla. June 22, 2006) (“The Florida Supreme Court’s broad language in *Ruiz* claiming it would not apply different discovery rules to first- and third-party claims and its approval of *Taylor*, which clearly disavowed the attorney-client privilege, is a ‘persuasive indication’ that the Supreme Court is likely to disagree with the First DCA in *XL Specialty*.”). Amidst judicial discord and the apparent uncertainty in the aftermath of *Ruiz*, the fate of attorney-client communications in first-party bad faith cases was ripe to be decided in *Genovese*. What was actually decided, however, is open to debate.

A. *A Decision Leaving Open More Questions than it Answers*

In *Genovese*, the plaintiff brought a statutory first-party bad faith action against Provident Life and Accident Insurance Company after it terminated his monthly payments under an individual disability policy. After commencing the bad faith suit, the policyholder requested production of Provident’s entire litigation file, including all correspondence and communications made between the attorneys representing Provident and its agents regarding the claim for benefits. The trial court issued an order compelling production of the documents, and Provident subsequently filed a petition for *writ of certiorari*, asking the Fourth District Court of Appeal to quash the trial court’s order. The Fourth DCA granted the petition as to the communications covered by the attorney-client privilege, relying on its earlier decision in *Liberty Mut. Fire Ins. Co. v. Bennett*, 939 So. 2d 1113 (Fla. 4th DCA 2006), and the First DCA’s decision in *XL Specialty Ins. Co.* The Fourth DCA also certified the following question to the Florida Supreme Court as one of great public importance:

Does the Florida Supreme Court's holding in *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005), relating to discovery of work product in first-party bad faith actions brought pursuant to section 624.155, Florida Statutes, also apply to attorney-client privileged communications in the same circumstances?

Id. at *1.

The Florida Supreme Court said no, and held that attorney-client privileged communications are not discoverable in a first-party action – except under certain circumstances. The court backtracked on its broad language in *Ruiz* and rejected the argument that its holding applied to attorney-client privileged communications in first-party bad faith actions:

In *Ruiz*, we held that in first-party bad faith actions brought pursuant to section 624.155, work product materials were discoverable. At the outset, the first sentence of our opinion in *Ruiz* makes it clear that the only issue involved in that case was the work product doctrine . . . [B]ased on a reading of our language in *Ruiz*, it is clear that the only issue being decided in *Ruiz* was the discovery of work product pertaining to the underlying claim in first-party bad faith actions.

Id. at *2. The court juxtaposed the contours of each privilege. The work product doctrine is governed by Florida Rule of Civil Procedure 1.280(b)(3), which specifically provides that a party may obtain discovery of documents prepared in anticipation of litigation “upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Fla. R. Civ. P. 1.280(b)(3). The court reasoned that “[b]ecause the underlying claim materials are ‘necessary to advance [a first-party bad faith] action . . . [and] evaluate the allegations of bad faith,’ the materials fall within the confines of the exception to the work-product doctrine, and thus are discoverable.” *Genovese*, 2011 WL 903988, at *3 (quoting *Ruiz*, 899 So. 2d at 1128-29).

“On the other hand, the attorney-client privilege, unlike the work-product doctrine, is not concerned with the litigation needs of the opposing party.” *Genovese*, 2011 WL 903988, at *3

(citing *Quarles & Brady, LLP v. Birdsall*, 802 So. 2d 1205, 1206 (Fla. 2d DCA 2002) (“[U]ndue hardship is not an exception, nor is disclosure permitted because the opposing party claims that the privileged information is necessary to prove their case”)). Rather, the purpose of the attorney-client privilege is to “encourage full and frank communication” between the attorney and client. *Genovese*, 2011 WL 903988, at *3. “Moreover, we note that there is no exception provided under section 90.502 that allows the discovery of attorney-client privileged communications where the requesting party has demonstrated need and undue hardship.” *Id.* While this is a rather uncontroversial observation, the Florida Supreme Court recognized that there are circumstances in which attorney-client communications would *not* be entitled to protection in a first-party bad faith action.

First, the court noted that “cases may arise where an insurer has hired an attorney to both investigate the underlying claim and render legal advice.” *Id.* at *4. In this instance, “the materials requested by the opposing party may implicate both the work product doctrine and the attorney-client privilege,” in which case “the trial court should conduct an in-camera inspection to determine whether the sought-after materials are truly protected by the attorney-client privilege.” *Id.* “If the trial court determines that the investigation performed by the attorney resulted in the preparation of materials that are required to be disclosed pursuant to *Ruiz* and did not involve the rendering of legal advice, then that material is discoverable.” *Id.* Simply put, an insurance carrier cannot assign a claim investigation to someone with a *juris doctor* and cloak either the facts or her mental impressions concerning the claim with privilege.

Second – and central to the continuing debate on this issue – the court acknowledged that its opinion “is not intended to undermine any statutory or judicially created waiver or exception to the [attorney-client] privilege.” *Id.* For example, “under the ‘at issue’ doctrine, discovery of

attorney-client privileged communications between an insurer and its counsel is permitted where the insurer raises the advice of its counsel as a defense in the action and the communication is necessary to establish the defense.” *Id.* See *Coates v. Akerman, Senterfitt & Eidson, P.A.*, 940 So. 2d 504, 510 (Fla. 2d DCA 2006); see also *Savino v. Luciano*, 92 So. 2d 817, 819 (Fla. 1957) (“[W]hen a party has filed a claim, based upon a matter ordinarily privileged, the proof of which will necessarily require that the privileged matter be offered in evidence, we think that he has waived his right to insist, in pretrial discovery proceedings, that the matter is privileged.”). Remarkably absent from the court’s opinion, however, is any consideration of the extent to which other statutory exceptions to the attorney-client privilege might justify discovery of communications between a carrier and its counsel during a claim investigation (or even coverage litigation) in a subsequent first-party bad faith case. Indeed, one such exception invariably recognized in the third-party context is equally applicable to first-party cases: the common interest exception.

B. The Proper Role of the Common Interest Exception in First-Party Bad Faith Discovery

In a bad faith case, there may be no more persuasive evidence of the carrier’s good or bad faith than its communications with counsel. The attorney-client privilege is, of course, not inviolable. It is a creature of FLA. STAT. § 90.502 and, like so many rules, it has exceptions. Particularly relevant to any bad faith claim – whether first- or third-party – is § 90.502(4)(e), which provides:

There is no lawyer-client privilege under this section when . . . [a] communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

FLA. STAT. § 90.502(4)(e) (2011).

In a third-party bad faith case, the justification for allowing discovery of attorney-client communications during the underlying claim or litigation derives precisely from the common interest exception to the privilege. The common interest is borne from the fiduciary duty owed by the carrier to defend its policyholder pursuant to the tri-partite relationship, and legal advice sought by the insurer in investigating the claim, liability, damages, and even coverage implications must ultimately serve the benefit of the policyholder as well as his or her insurer. And, of course, the carrier's obligations must be exercised in good faith and with due regard for the policyholder's interests. *See* § 624.155. Given this relationship, Florida courts have had no trouble concluding that a carrier is barred from raising the attorney-client privilege in a subsequent third-party bad faith action. *See Liberty Mut. Fire Ins. Co. v. Kaufman*, 885 So. 2d 905, 908 (Fla. 3d DCA 2004) (noting that the fiduciary relationship between a liability insurer and its policyholder bars application of the privilege). By enacting § 624.155, the Florida Legislature established similar duties of good faith and fair dealing to policyholders in first-party cases. One need look no further than *Ruiz* for this uncontroversial proposition: "The Legislature has mandated that insurance companies act in good faith and deal fairly with insureds regardless of the nature of the claim presented, whether it be a first-party claim or one arising from a claim against an insured by a third party." *Ruiz*, 899 So. 2d at 1127.

The fact that advice of counsel serves a common interest even in the first-party context is not a theoretical confabulation – it can be found directly in the bad faith statute. An insurer may be subject to extra-contractual damages for "[n]ot attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and *with due regard for her or his interests.*" *See* FLA. STAT. § 624.155(1)(b)(1) (2011) (emphasis added). The statute extends these pre-existing common law

duties to first-party claims. Because any legal advice sought by the carrier must be intended to make the correct decision concerning the availability of coverage under the insurance policy, it is necessarily enlisted on behalf of both the policyholder seeking coverage and her insurer. The common interest exception to the attorney-client privilege is thus equally applicable in a first-party bad faith claim.

Any doubt that the advice of counsel serves a common interest can be dismissed with a simple demonstrative. Assume a policyholder makes a claim for property damage under her homeowner's policy. The carrier, unsure as to the interpretation and application of a policy exclusion, solicits a legal opinion as to the availability of coverage for the claim. The notion that the resulting communications between carrier and counsel serve anything other than the common interest of the insurer and policyholder was jettisoned by *Ruiz* when it rejected *Kujawa's* conception that submission of an insurance claim engenders an adversarial process. To the contrary, insurance carriers are charged with conducting claim investigations "fairly and honestly toward its insured and with due regard for her or his interests." Since the legal advice is necessarily sought for the mutual benefit of the policyholder and the carrier in reaching the correct coverage decision, there is no principled basis for the common interest exception not to apply in subsequent bad faith litigation between the parties. A policyholder should be able to discover whether the carrier (a) followed counsel's advice to deny the claim; (b) disregarded counsel's advice that the claim is covered and denied it anyway; or (c) declined coverage for an inappropriate reason unrelated to counsel's legal advice on the merits. After all, insurance carriers hold our premium dollars in trust to be paid in the event of fortuitous, covered loss. And, just like where a trustee seeks legal advice for her own benefit and that of the beneficiary, the common interest exception to the attorney-client privilege applies in a lawsuit between those

parties. *See* Restatement (Third) of The Law Governing Lawyers § 84 (2000). The same result should obtain where a policyholder makes a claim for her loss and the carrier needs a legal opinion on the availability of coverage.²

Even where the carrier denies coverage and formal litigation ensues, the solicitation of legal advice by the insurer is *still* for the common interest of the insured. Though this may seem counterintuitive, insurance carriers readily agree that their good faith obligations to their policyholders continue even after litigation has commenced. And Florida courts hold that an insurance carrier's litigation conduct is admissible evidence in a bad faith case. *See Home Ins. Co. v. Owens*, 573 So. 2d 343, 344 (Fla. 4th DCA 1991) (citing *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520 (11th Cir. 1985)). In making a determination of whether an insurer has acted fairly and honestly toward its insured and with due regard for the insured's interests, the Florida Supreme Court has recognized the relevant factors to include: "efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds"; "the substance of the coverage dispute or the weight of legal authority on the coverage issue"; and "the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage." *Laforet*, 658 So. 2d at 63. Though largely inapplicable to most other litigants, an insurance carrier must act with due regard for its policyholder's interests, even after litigation is commenced. The common interest exception to the attorney-client privilege thus applies from the moment a claim is made through the time the coverage dispute is resolved. Any conclusion to the contrary conjures the outdated and ill-conceived "adversarial relationship" espoused in *Kujawa*. The relationship between a policyholder and her insurance company during a claim investigation or coverage litigation is not meant to be adversarial, however, and § 624.155 so confirms.

² Similarly, a policyholder should be entitled to discover coverage counsel's file in third-party bad faith litigation.

The *Genovese* concurrence – which was joined by four of the seven Florida Supreme Court Justices – astutely recognizes that “an attorney’s interaction with the insurer during the time that the decision is being made to pay or deny the claim is often an important consideration in determining the critical issue of whether the insurer has acted in good faith in handling the claim.” *Genovese*, 2011 WL 903988, at *5. The court further acknowledged that while it strived in *Ruiz* to “level the playing field in the critical area of discovery between first- and third-party bad faith cases,” it does not have “the independent authority to abrogate the statutory attorney-client privilege, even in the context of bad faith claims.” *Id.* Experienced litigants should not ask Florida courts to do so. Instead, we suggest that a policyholder’s ability to discover communications between the carrier and its counsel in a first-party bad faith action is squarely embedded in the common interest exception to the privilege. *Genovese* left that door ajar.

IV. An Alternate Path to the Same Discovery: Waiver and the “At-Issue” Doctrine

As noted in *Genovese*, under Florida’s “at issue” doctrine, “the discovery of attorney-client privileged communications between an insurer and its counsel is permitted where the insurer raises the advice of its counsel as a defense in the action and the communication is necessary to establish the defense.” *Genovese*, 2011 WL 903988, at *4. This approach, however, is only one of many that have been employed across the country. We briefly discuss how this thorny issue has been addressed in jurisdictions outside Florida.

In determining whether a litigant has waived the attorney-client privilege, courts will generally employ some version of one of three general approaches. As explained by the Court of Appeals of New Mexico in *Pub. Serv. Co. of N.M. v. Lyons*, 10 P.3d 166 (N.M. Ct. App. 2000):

The first of these general approaches is the “automatic waiver” rule, which provides that a litigant automatically waives the privilege upon assertion of a claim, counterclaim, or affirmative defense that raises as an issue a matter to which otherwise privileged material is relevant. The second set of generalized

approaches provides that the privilege is waived only when the material to be discovered is both relevant to the issues raised in the case and either vital or necessary to the opposing party's defense of the case. Finally, several courts have recently concluded that a litigant waives the attorney-client privilege if, and only if, the litigant directly puts the attorney's advice at issue in the litigation.

Id. at 171 (quoting *Frontier Ref., Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 699-700 (10th Cir. 1998)). The middle-of-the-road majority approach can be found in *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975), which considered the circumstances of a waiver in connection with a prisoner's civil rights claim against prison officials. In order for the prisoner to prevail, the ultimate inquiry – remarkably similar to bad faith litigation – was “whether the defendant state official acted in good faith, *i.e.*, whether he acted reasonably, in light of all the circumstances, and without malice.” *Id.* at 578. The plaintiff accordingly sought discovery of legal advice rendered to the defendants by the Washington Attorney General in an effort to show that prison officials acted in bad faith. Because the defendants asserted a good faith immunity defense, the plaintiff argued they “have *ipso facto* waived the attorney-client privilege to the extent the privilege would protect information relevant to that defense from disclosure.” *Id.* at 580. The *Hearn* court set forth the following oft-cited test:

All of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege would have been manifestly unfair to the opposing party. The factors common to each exception may be summarized as follows: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

Id. at 581. The *Hearn* approach has been adopted in a number of cases. *See, e.g. Lyons*, 10 P.3d 166.

The decision in *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851 (3d Cir. 1994) exemplifies the restrictive view on waiver. *Rhone*, like *Hearn*, was not a bad faith case, but is equally instructive. *Rhone* found the *Hearn* analysis to be of “dubious validity,” and instead posited that a waiver occurs only where “the client has made the decision and taken the affirmative step in the litigation to place the advice of the attorney in issue.” *Id.* at 863. The court further observed that “advice is not an issue merely because it is relevant, and does not necessarily become an issue merely because the attorney’s advice might affect the client’s state of mind in a relevant manner. The advice of counsel is placed in issue where the client then asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney-client communication.” *Id.* The *Rhone* court was concerned with providing certainty and predictability for the client about the circumstances under which the privilege could be waived, and is distinct from *Hearn* in that it leaves to the client “the decision whether or not to waive the privilege by putting the attorney’s advice in issue.” *Id.* This approach has also been adopted by numerous courts. *See, e.g., Mortg. Guar. & Title Co. v. Cunha*, 745 A.2d 156 (R.I. 2000); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51 (Conn. 1999); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 199 F.R.D. 677 (N.D. Okla. 2001).

Finally, certain courts have more liberally found waiver of the privilege. In the middle of that spectrum is *Tackett v. State Farm Fire and Cas. Ins. Co.*, 653 A.2d 254 (Del. 1995), where the Supreme Court of Delaware in a first-party bad faith action found that a waiver of privileges may be implied:

In the context of the attorney-client privilege, waiver rests on a rationale of fairness, i.e., disclosure of otherwise privileged information by a client under circumstances where it would be unfair to deny the party an opportunity to discover other relevant facts with respect to that subject matter.

Id. at 259. While the *Tackett* court found that “a party cannot force an insurer to waive the protections of the attorney-client privilege merely by bringing a bad faith claim,” it recognized that where “an insurer makes factual assertions in defense of a claim which incorporate, expressly or implicitly, the advice and judgment of its counsel, it cannot deny an opposing party an opportunity to uncover the foundation of those assertions in order to contradict them.” *Id.* Partial disclosure of otherwise protected facts, however, is not enough. “Implicit waiver also requires that the partial disclosure place the party seeking discovery at a distinct disadvantage due to an inability to examine the full context of the partially disclosed information. In the usual situation, the opposing party will have no alternative source for obtaining the concealed information if the privilege is upheld.” *Id.* at 260. The court thus found that an implied waiver exists where an insurance company defends an action in such a way as to “implicitly” indicate reliance by the insurance company upon the advice of its counsel. Proof of this pudding is often found where the carrier’s corporate representative cannot explain the basis for a coverage declination (typically because the denial letter was penned by counsel).

Toward one end of the liberal spectrum is the narrower case for implied waiver enunciated by the Supreme Court of Arizona in *State Farm Mut. Auto Ins. Co. v. Lee*, 13 P.3d 1169 (Ariz. 2000). The *Lee* court found a waiver because “advice of counsel was part of the basis for Defendant’s position that was taken,” and “advice of counsel . . . is impliedly one of the bases for the defense Defendants maintain in this action . . .” *Id.* at 1173. Since State Farm’s agents evaluated the law, and as part of that evaluation were informed by counsel, “what State Farm knew about the law obviously included what it learned from its lawyers.” *Id.* at 1175.

We conclude that under the *Hearn* test, in cases such as this one in which the litigant claiming the privilege relies on and advances as a claim or defense a subjective and allegedly reasonable evaluation of the law – but an evaluation that

necessarily incorporates what the litigant learned from its lawyer – the communication is discoverable and admissible.

Id. *Lee* cited *Tackett* with approval, and rejected the narrower “at issue” cases such as those discussed above.

At the opposite end of the liberal spectrum is *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154 (Ohio 2001). In this first-party bad faith action before the Ohio Supreme Court, the insurance company contended that certain documents were protected from discovery by the attorney-client privilege and work product doctrine. That Court disagreed, holding that all documents generated or received prior to the denial of coverage should be produced: “Documents and other things showing lack of a good faith effort to settle by a party or the attorneys acting on his or her behalf are wholly unworthy of the protections afforded by any claim to privilege.” *Id.* at 157. The Ohio Supreme Court thus held that in an action alleging bad faith denial of insurance coverage, “the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage.” *Id.* at 158. These documents were simply deemed undeserving of protection.

The foregoing does not constitute an exhaustive survey of the various approaches to the at-issue doctrine. Indeed, some jurisdictions have not spoken and others have elected instead to pioneer their own variations to the test. *See State ex rel. Allstate Ins. Co. v. Gaughan*, 508 S.E. 2d 75 (W.Va. 1998) (opting for a “quasi attorney-client privilege” and imputing principles of the “substantial need” showing under the work product doctrine to the attorney-client privilege). In jurisdictions where the scope of discovery in bad faith litigation remains unsettled, the “at-issue” doctrine is a powerful tool for experienced counsel.

V. Conclusion

Despite the veneer of finality offered by the Florida Supreme Court in *Genovese*, the scope of discovery in first-party bad faith cases remains subject to debate. Florida's common interest exception to the attorney-client privilege is integral to principled discourse on the topic. Florida's bad faith statute unquestionably obligates carriers to perform their claim handling responsibilities in good faith with due regard for its policyholder's interests – no matter the insurance or type of claim at issue. Whether defending a policyholder against a third-party claim or investigating a policyholder's claim for her own loss, any legal advice sought by the carrier is, by definition, for the mutual benefit of the parties to the insurance policy. The carrier's obligation, simply put, is to arrive at the correct coverage determination, acting fairly and honestly with due regard for the policyholder's interest. Where a carrier is alleged to have breached that duty, the common interest exception to the attorney-client privilege should permit the policyholder access to communications between the carrier and counsel made prior to the declination of coverage or, in Florida, the conclusion of coverage litigation.

Even where courts may refuse to apply the common interest exception in first-party bad faith litigation, a thorough understanding of the at-issue doctrine offers an alternate path to the same discovery. Proficiency with these approaches and corresponding motions in limine is indispensable, as the bad faith case is largely won or lost before ever setting foot in the courtroom.