

## THE DEMISE OF THE ATTORNEY-CLIENT PRIVILEGE IN “BAD FAITH” INSURANCE LITIGATION IN NEW JERSEY HAS BEEN GREATLY EXAGGERATED

BY: MICHAEL J. KOZORIZ

In a recent May 2009 article published by the Defense Research Institute (DRI), entitled *A BAD OMEN: Erosion of Privilege in Bad-Faith Litigation*, the authors all but eulogized the attorney-client privilege in New Jersey in civil actions involving “bad faith” litigation against an insurer. Citing *Allstate New Jersey Insurance Company v. Humphrey*, 2008 WL 382666 (N.J. Super. App. Div. 2008), the authors asserted that the New Jersey Appellate Division adopted a “quite astounding, ‘piercing’ approach” in which the court held that all documents relating to the insured’s alleged bad faith claim, including counsel’s evaluation of discovery, liability, settlement/verdict values, and insurance coverage, were discoverable. With all due respect to the authors, their well-intentioned article overlooked two key aspects of the *Humphrey* decision, discussed below.

### The “Piercing Approach” That Was “Adopted” in *Humphrey* Is Neither New To New Jersey Nor Is It “Quite Astounding”

The “piercing approach” applied by the Appellate Division in *Humphrey* is not an approach to the attorney-client privilege that is new in New Jersey. In 1979, the New Jersey Supreme Court applied such approach in *Matter of Kozlov*, 79 N.J. 232 (1979). *Kozlov* did not involve insurance litigation, but rather contempt proceedings against an attorney who refused to reveal the identity of his client. In short, while in the course of his representation of the unnamed client in an entirely unrelated matter, the client reported information to Kozlov that a juror on a highly publicized criminal case, which resulted in a conviction, had a bias and personal vendetta against the defendant. Kozlov relayed the information to the criminal defendant’s attorney, but he refused to reveal his client’s name even as Kozlov became more and more embroiled in the criminal case’s post-conviction hearings. When Kozlov refused to obey an order by the trial judge to disclose the identity of his client who revealed to him the information pertaining to the biased juror, Kozlov was held in contempt of court. The Appellate Division affirmed the contempt finding.

On appeal, the New Jersey Supreme Court reversed, finding that Kozlov’s dilemma was within the realm of the attorney-client privilege. Reverently referring the attorney-client privilege as an “ancient rule,” “exceedingly important,” and deserving “the continued protection of the courts,” the

Supreme Court held that the privilege is nevertheless not “sacrosanct.” Discussing the criteria necessary for the “piercing” of the privilege, the Court held that there must “be a legitimate need of the party to reach the evidence sought to be shielded . . . be a showing of relevance and materiality of that evidence to the issue before the court . . . [and] be shown . . . ‘by a fair preponderance of the evidence including all reasonable inferences, that . . . the information . . . [c]ould not be secured from any less intrusive source.’” Ultimately, the Supreme Court held that the less intrusive source of summoning the alleged biased juror to answer questions in a hearing before the court would have been the appropriate action to take by the trial court.

Thus, despite the implications of *Humphrey*, discussed below, *Kozlov* is still “good law” in New Jersey regarding the attorney-client privilege. Indeed, New Jersey Court Rule 4:10-2(c) provides that:

a party may obtain discovery of documents . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including an attorney . . . ) **only** upon a showing that the party seeking discovery has substantial 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. In ordering discovery of such materials when the required showing has been made, **the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney** or other representative of a party concerning the litigation. [emphasis added]

Thus, the reported demise of the attorney-client privilege in New Jersey has been quite exaggerated.

### The Unreported And Non-Precedential Decision By The Appellate Division In *Humphrey* Should Not Apply To Bad Faith Litigation Involving “First-Party” Insurance Policies

Significant to the holding in *Humphrey* was the fact that the case involved a liability policy where the insured, in a separate declaratory judgment action, was found to be capable of waiving the attorney-client privilege asserted by the insurer.

Where a declaratory judgment or breach of contract action does not involve a liability policy but rather a claim for first-party benefits, the insured will have no right to waive the insurer's assertion of the attorney-client or work product privileges.

*Humphrey* involved an underlying personal injury case in which several defendants were found liable in connection with an assault. Allstate provided a defense to several of the defendants under a reservation of rights in the underlying action. While the underlying action was pending, Allstate commenced a declaratory judgment action against its insureds and the plaintiff in the underlying action as an interested party, seeking a declaration that it had no duty to indemnify the insureds as a result of the intentional conduct exclusion in the subject homeowners policy. After a judgment was rendered in the underlying action in excess of the Allstate policy limits, the insureds and the plaintiff in the underlying action counter-claimed against Allstate in the declaratory judgment action, seeking bad faith damages for Allstate's failure to settle the underlying action within the policy limits.

Despite the fact that the underlying plaintiff was not a named insured nor an assignee of the insureds' rights against Allstate, he took the lead with respect to prosecuting the insureds' bad faith claims. He demanded that Allstate produce the files that it maintained in connection with the defense of the insureds and the file maintained by Allstate in connection with the ongoing declaratory judgment action. When Allstate refused, asserting attorney-client and work product privileges, both the underlying plaintiff and the insureds moved against Allstate to compel their production, and importantly, the insureds expressed their intention to waive the attorney-client privilege as to the Allstate files pertaining to them.

The Appellate Division affirmed the trial court's decision that Allstate was required to produce those portions of its files relevant to the insureds' bad faith claims. Notably, however, the Appellate Division reigned-in the trial court's ruling and held that Allstate was not required to produce its file pertaining to one of the insureds, who was exonerated in the underlying action and who did not consent to the waiver of the attorney-client privilege. Thus, one can reasonably interpret this decision as placing significant weight on the express waiver of the privilege when considering whether to order production of otherwise privileged materials.

Valid case law continues to exist in New Jersey protecting the attorney-client privilege. See *Rivard v. American Home Products, Inc.*, 391 N.J. Super. 129, 154 (App. Div. 2007) (holding that the attorney-client privilege is not restricted to legal advice, though the privilege is limited to those situations in which lawful legal advice is the object of the relationship,

and that the privilege survives termination of the attorney-client relationship); *LaPorta v. Gloucester County Board of Chosen Freeholders*, 340 N.J. Super. 254, 262 (App. Div. 2001) ("It is not necessary for actual litigation to have commenced at the time of the transmittal of information for the privilege to be applicable"); *Macey v. Rollins Environmental Services (N.J.), Inc.*, 179 N.J. Super. 535, 540 (App. Div. 1981) ("The necessity for full and open disclosure between corporate employees and in-house counsel . . . demands that all confidential communications be exempt from discovery").

## Conclusion

In New Jersey, the long-standing rule remains that in order to validly "pierce" the attorney-client privilege, (1) the seeker of the privileged information must have a legitimate need to reach the evidence or information sought to be shielded, (2) there must be a showing by the seeking party of relevance and materiality of that evidence or information to the issue before court, and (3) it must be shown that the information could not be secured from any less intrusive source. See *Matter of Kozlov*, 79 N.J. 232, 243-44 (1979). As recent as 2007, the Appellate Division cited the three-part test of *Kozlov* favorably in a reported decision. See *Rivard*, 391 N.J. Super. at 155 ("Generally, a document will be deemed to have been prepared in anticipation of litigation when the dominant purpose in its preparation was concern for potential litigation, the prospect of which was objectively reasonable . . . . The fact that the documents sought for discovery 'do not necessarily include legal advice is as a matter of law, irrelevant'").

**Michael J. Kozoriz** is a senior associate in the litigation department of White and Williams LLP. Admitted to practice in the state and federal courts of New Jersey and New York, he has a broad range of experience in insurance coverage and insurance defense matters. Michael can be reached in New Jersey at 201.368.7212, in New York at 212.631.4412, or at [kozorizm@whiteandwilliams.com](mailto:kozorizm@whiteandwilliams.com).

*This alert should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult a lawyer concerning your own situation with any specific legal question you may have.*

© 2009 White and Williams LLP