



■ Dapper, Baldasare, Benson, Behling & Kane, P.C. ■

Four Gateway Center ■ 10th Floor ■ 444 Liberty Avenue ■ Pittsburgh, PA 15222-1225
T 412.456.5555 ■ F 412.456.2109 ■ www.d3bk.com

BAD FAITH UPDATE

Judge Nealon of the Court of Common Pleas of Lackawanna County recently confirmed that Pennsylvania Rule of Civil Procedure 4003.3 protects a claim professional's mental impressions, conclusions or opinions respecting the value or merits of a claim or defense when prepared in anticipation of litigation, regardless of whether a lawsuit has yet been filed. See Church of the Forgotten Souls v. NGM Ins. Co., Docket No. 10-CV-7078 (Lackawanna Cty. Oct. 5, 2011.)

In Church of the Forgotten Souls, NGM Insurance Company retained Paladin Adjustment Group to investigate and adjust a property loss claim filed by the insured. When the parties were unable to resolve the claim, the insured filed a lawsuit asserting breach of contract and bad faith. The insured then served a subpoena upon Paladin for its complete claim file. The insurer filed a Motion to Quash and a Motion for a Protective Order.

The court observed that Pa. R. Civ. P. 4003 states "with 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 the claim or defense or respecting strategy or tactics." The court explained that a party's representative includes any non-lawyer who "has a tie to a party which might require or occasion participation in decisions respecting the value or merit of a claim or defense, or respecting strategy or tactics." The court held that Paladin qualified as NGM's representative, based upon the insured's allegations that an agency relationship existed between Paladin and NGM.

Further, Rule 4003.3 does not contain a temporal limitation for when material may be deemed prepared in anticipation of litigation. The court found only a single decision addressing the timing issue, a Court of Common Pleas of Allegheny County decision in which Judge Wettick held that mental impressions, conclusions or opinions respecting value or merit of a claim or defense could be prepared in anticipation of litigation prior to the filing of a lawsuit. See Mueller v. Nationwide, 31 D.&C. 4th (Alleg. Co. 1996). The court noted that "once questions developed regarding the ownership of the property, the plaintiff's insurable interests, material misrepresentations in the application process, policy exclusions or other purported reasons for the insurer's denial of the plaintiff's claim, litigation was clearly envisioned by the defendants." Accordingly, the court held that Paladin was not required to disclose its mental impressions respecting the value or merit of the insured's claims or the insurer's defenses, or strategy or tactics to the extent that those opinions were prepared in anticipation of litigation or trial, even before the filing of the lawsuit.

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