

Florida Court Clarifies That Insurer Need Not Demonstrate Anticipated Litigation In Order To Assert Attorney-Client Privilege

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A Florida federal district court ruled that an insurer is not required to demonstrate that it reasonably anticipated litigation in order to assert attorney-client privilege. *Ranger Construction Indus. v. Allied World Nat'l Assurance Co.*, 2019 WL 436555 (S.D. Fla. Feb. 4, 2019).

In this coverage action, the inadvertent production of several documents led to a dispute as to whether an insurer is entitled to maintain attorney-client privilege over documents if, at the time the attorney was retained or rendered legal advice, the insurer did not reasonably anticipate litigation. The court rejected and clarified a “handful of Florida appellate cases and Southern District of Florida cases” that “have seemingly suggested or ruled that the attorney-client privilege only attaches in the insurance company context when the legal advice was obtained or rendered in anticipation of litigation.” The court explained that attorney-client privilege is governed by Florida statutory law, which requires communications to be “made in the rendition of legal services” without any “anticipated litigation” requirement. *See* Fla. Stat. § 90.502(2) (2018).

Notably, the court expressly agreed with the body of case law that requires “heightened scrutiny” when a corporation (*e.g.*, an insurance company) asserts attorney-client privilege. This heightened scrutiny requires courts to evaluate whether (1) the communication would have been made but for the contemplation of legal services and (2) the content of the communication relates to legal services, as opposed to business or non-legal activities. However, the court “flatly rejected” the assertion that this heightened inquiry includes an anticipated litigation requirement.

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