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A Quasi-Attorney-Client Privilege--West Virginia's Mislabeled Fiduciary Duty Exception

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A QUASI-ATTORNEY-CLIENT PRIVILEGE? WEST VIRGINIA'S MISLABELED FIDUCIARY DUTY EXCEPTION

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I. INTRODUCTION

Consistent with all other state and federal law, West Virginia recognizes the attorney-client privilege. In *State ex rel. United States Fidelity & Guar. Co. v. Canady*,[1] the Supreme Court of Appeals of West Virginia has adopted the definition of the privilege first enunciated in *United States v. United Shoe Machinery Corp.*[2]

[t]he privilege applies only if (1) the asserted holder of the

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1 460 S.E.2d 677 (W. Va. 1995).

2 89 F. Supp. 357 (D. Mass. 1950).

privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[3]

While West Virginia has traditionally been consistent with virtually all other jurisdictions in interpreting and applying the elements of this commonly recognized definition,[4] the West Virginia Supreme Court recently broke ranks to identify what it described as a "quasi attorney-client privilege."[5] While characterized by the court in *State ex rel. Allstate Ins. Co. v. Gaughan* as a "new privilege," the privilege, in fact, is little more than an adoption of the long-recognized exception to the existing privilege for breaches of fiduciary duty.[6] This mischaracterization clouds an already complex rule that is widely misunderstood and misapplied. It adds confusion where clarity is desperately needed.

Gaughan arose from a personal injury action filed by Carol Thoburn against Timothy Mirandy, who was insured by the Allstate Insurance Company. Thoburn was a passenger in a car that was hit by a vehicle driven by Mirandy. In settlement negotiations, Allstate offered Thoburn the amount of $20,000. Rejecting this offer, Thoburn counter offered for the policy limit of $100,000, which Allstate rejected. At the resulting trial, a jury returned a verdict in favor of Thoburn for $229,500. Thoburn subsequently filed a bad faith settlement claim against Allstate alleging that by refusing to settle the claim against Mirandy, Allstate violated West Virginia. Code section 33-11-4(9).[7]

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3 *Id.* at 358-59.

4 *See* P.R. Rice, Attorney-Client Privilege: State Law (Rice Publishing 1998).

5 *See generally* State ex rel. Allstate Ins. Co. v. Gaughan, 508 S.E.2d 75 (W. Va. 1998).

6 *See generally* Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1968); *see also* P.R. Rice, Attorney-Client Privilege in the United States § 8:22 (Lawyers Cooperative 1993).

7 The record did not identify the specific subsection or subsections of W. VA. CODE § 33-11-4(9) that Thoburn argued to the lower court in support of his proposition. The relevant subsections OF W. VA. CODE § 33-11-4(9) that Thoburn might have argued provide as follows:

> (a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
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> (b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
>
> (c) Failing to adopt and implement reasonable standards for the prompt investi-

In discovery Thoburn demanded that Allstate produce, among other things, documents in the investigative claim file maintained by Allstate relating to the Thoburn action against Mirandy. Although Allstate objected on the grounds that the documents were protected by attorney-client privilege, the Circuit Court ordered Allstate to produce the entire file, including privileged documents. Allstate appealed seeking relief through a *writ of prohibition*.[8] The Supreme Court of Ap-

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gation of claims arising under insurance policies;

(d) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

(e) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(f) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(g) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when such insureds have made claims for amounts reasonably similar to the amounts ultimately recovered;

(h) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application; ...

(m) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

8 W. VA. CODE § 53-1-1 (1994) provides:

> The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceed its legitimate powers.

Because this ruling involved the compelled disclosure of confidential materials that were exempt from discovery, and was a clear legal error resulting from the trial court's substantial abuse of its discretion, the court held that it had jurisdiction to correct the error. *See Canady*, 460 S.E.2d 677 ("Consistent with our prior decisions, we carve out today a specific exception to the general rule: When a discovery order involves the probable invasion of confidential materials that are exempted from discovery under Rule 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure, the exercise of this Court's original jurisdiction is appropriate. The reason for this exception is apparent: If the privilege and/or immunity to keep confidential materials from being delivered to the opponent pursuant to court order is not vindicated before the violation occurs, then this sacred privilege and/or immunity is no privilege and/or immunity at all but a cruel illusion. In short, the attorney-client privilege and work product exception would be lost forever if the offended party is forced to "run the gauntlet" before having an opportunity to seek redress before this Court."); *see* State Farm Mutual Automobile Ins. Co. v. Stephens, 425 S.E.2d 577 (W. Va. 1992).

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial,

peals of West Virginia granted the writ subject to Thoburn's demonstrating a "compelling need" for the privileged materials sought from the file.[9]

II. DISCOVERY OF INSURANCE COMPANY CLAIMS FILES IN THIRD-PARTY BAD FAITH ACTIONS

Gaughan involved a third party bad faith action, as opposed to the more common first-party bad faith action. While these actions are identical in theory—both are premised on the breach of a fiduciary duty owed by the insurance company[10]—in the first-party action the insured (the policyholder) is suing his insurance company. In a third-party bad faith action the insurance company is being sued by the individual who prevailed in the preceding civil action against the insured tortfeasor. Because the third-party action involves a plaintiff to whom the insurance company did not owe a contractual duty under the insurance policy, most state jurisdictions that have addressed the issue have refused to find an implied statutory duty under legislative schemes similar to those in West Virginia.[11] They

> clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Hinkle v. Black, 262 S.E.2d 744 (W. Va. 1979).

9 *See Gaughan*, 508 S.E.2d at 96.

10 This duty was created by W. VA. CODE §§ 33-11-1 to 10. In Jenkins v. J. C. Penny Casualty Ins. Co., 280 S.E.2d 252 (W. Va. 1981), the court held that "[t]here can be little question in reviewing the entire [Unfair Insurance Practices] Act that it is not limited to activities between the insured and the insurance company. Among the unfair claim settlement practices there are a number of broadly worded prohibitions which are equally applicable to third parties as well as insureds." The court went on to explain why a private cause of action by a third-party may be instituted, despite the fact that nothing other than an administrative remedy is provided for in the statute:

> In those situations where a statute has granted a class of persons certain rights and there is no statutory language indicating that the administrative remedies provided in the statute are to be considered exclusive, the United States Supreme Court has found an implied private cause of action. [Cannon v. University of Chicago, 441 U.S. 677, 707 (1979)] . . . .
>
> A further factor . . . is to determine whether the private cause of action is consistent with the underlying purpose of the legislative act. Certainly, in the area of unfair settlement practices, the right to a private cause of action is consistent with the underlying legislative purpose, which is to prevent improper settlement practices. The right of a person injured as a result of an unfair settlement practice to recover damages acts as a deterrent against violations of the act. We conclude that a private cause of action is consistent with the underlying purpose of the act.
>
> Moreover, the legislative policy encouraging prompt settlement of meritorious claims parallels our longstanding judicial policy that encourages compromise and settlement of disputed claims. . . .

Id. at 606-07.

11 The court in Gaughan cited seventeen jurisdictions: Messina v. Nationwide Mutual Ins. Co., 998 F.2d 2 (D.C. Cir. 1993); McFadden v. Liberty Mutual Ins. Co., 803 F. Supp. 1178 (N.D. Miss. 1992), *aff'd,*

have noted that the third-party is not, in fact, injured since he obtained a judgment in excess of policy limits, and, it is generally believed that finding such a statutory duty for the insurer toward the third-party would be inconsistent with the contractual duty that the insurance company owes to the insured. Consequently, third-party bad faith actions generally have not been permitted.

The *Gaughan* Court correctly acknowledged that jurisdictions are split over the applicability of the attorney-client privilege to requests for documents by third-party bad faith plaintiffs.[12] However, the court claimed that the majority view is that third-parties cannot access the files without the consent of the insurance companies.[13] This is a curious claim since the question of the applicability of the attorney-client privilege to discovery requests by a third-party in a bad faith settlement action had been addressed and denied in only one jurisdiction — Montana.[14] Regardless, the *Gaughan* Court found more palatable the approach taken by a Florida court in *Dunn v. National Sec. Fire & Cas. Co.*,[15] where the attorney-client privilege was overridden and access was given to the claim files under a fiduciary duty rationale.[16]

III. THE FLORIDA APPROACH

In *Dunn*, Florida's Fifth District Court of Appeals distinguished between communications in the claim file that were generated before and after the judgment against the insured policyholder that forms the basis of the third-party's action

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988 F.2d 1210 (5th Cir. 1993); Earth Scientists v. United States Fidelity & Guar., 619 F. Supp. 1465 (D. Kan. 1985); Wilson v. Wilson, 468 S.E.2d 495 (N.C. 1996); Dvorak v. American Family Mutual Ins. Co., 508 N.W.2d 329 (N.D. 1993); Herrig v. Herrig, 844 P.2d 487 (Wyo. 1992); Gunny v. Allstate Ins. Co., 830 P.2d 1335 (Nev. 1992); Bates v. Allied Mutual Ins. Co., 467 N.W.2d 255 (Iowa 1991); City of Farmington v. L. R. Foy Const. Co., 816 P.2d 473 (N.M. 1991); O.K. Lumber Co., Inc. v. Providence Washington Ins. Co., 759 P.2d 523 (Alaska 1988); Moradi-Shalal v. Fireman's Fund Ins. Cos., 758 P.2d 58 (Cal. 1988); Morris v. American Family Mutual Ins. Co., 386 N.W.2d 233 (Minn. 1986); Tank v. State Farm Fire & Casualty Co., 715 P.2d 1133 (Wash. 1986); Wilder v. Aetna Life & Casualty Ins. Co., 433 A.2d 309 (Vt. 1981); Kranzush v. Badger State Mutual Casualty Co., 307 N.W.2d 256 (Wis. 1981); Scroggins v. Allstate Ins. Co., 393 N.E.2d 718 (Ill. 1979); Lawton v. Great Southwest Fire Ins. Co., 392 A.2d 576 (N.H. 1978); Farris v. U.S. Fidelity and Guaranty Co., 587 P.2d 1015 (Or. 1978).

As explained in *O.K. Lumber*,

> [t]he fiduciary relationship inherent in every insurance contract gives rise to an implied covenant of good faith and fair dealing. . . . Thus, an insurer has an obligation to investigate claims and to inform the insured of all settlement offers and the possibility of excess recovery by the injured claimant. . . . The insured may sue for damages caused by the insurer's breach of its duty.

O.K. Lumber, 759 P.2d at 525. While the court concluded that "[t]he insured's cause of action for breach of [this] covenant is assignable to the injured third party claimant," it held that independent of an assignment the third party claimant could not sue as a third party beneficiary of the covenant for its breach. *Id.*

12 *See Gaughan*, 508 S.E.2d at 87.

13 *See id.* at 88-89.

14 *See* State ex rel. USF&G Co. v. Montana Second Judicial Dist. Ct., 783 P.2d 911, 913 (Mont. 1989). None of the cases cited in *USF&G* involved third-party plaintiffs initiating actions against insurers.

15 *See* Dunn v. National Sec. Fire & Cas. Co., 631 So. 2d 1103 (Fla. Dist. Ct. App. 1993).

16 *Gaughan*, 508 S.E.2d at 89.

against the insurance company.

A. *Documents Generated Before Judgment*

In third-party bad faith settlement actions under Florida's statutory scheme, the court initially gave the third-party plaintiff access to all materials in the insurance company's claim file that had been created before the judgment that formed the basis for the bad faith settlement claim—that is, the judgment in excess of the policy limits:

> In bad faith suits against insurance companies for failure to settle within the policy limits, all materials in the insurance company's claim file up to the date the judgment in the underlying suit are obtainable, and should be produced when sought by discovery . . . .
>
> 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. The rationale (as discussed above) is because the injured third party "stands in the shoes" of the insured party in a third party bad faith case and the insurer owed a fiduciary duty to its insured.[17]

The *Dunn* decision did not differentiate between the two types of third-party actions for bad faith settlement: (1) statutory actions created by an Unfair Claim Settlement Practices Act, and (2) common law actions arising through the contract obligations of the insurance company—originating on behalf of the insured and assigned to the third-party/judgment creditor who thereafter stands in the insured's shoes as a successor-in-interest. In both situations Florida apparently perceives the third-party as "standing in the shoes" of the insured. Consequently, the discovery rights of third-parties in both types of actions are the same as those that the insured would have had against the insurance company as a joint client in a first-party bad faith settlement action. If the third-party action under the statute in *Dunn* had been seen as an independent third-party claim, rather than one acquired through the insured (joint client of the insurer), an independent basis for overriding the privilege would have had to have been found in order to conclude that insurance company's privilege could not be successfully employed. This is the position from which the *Gaughan* Court created its "quasi" attorney-client privilege.

1. Joint Clients: What Rights to Confidential Communications Do They Possess?

Joint clients are an exception to the principle that disclosure of confidential

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17 *Dunn*, 631 So. 2d at 1109.

communications to a third party waives the privilege protection.[18] All communications between the common attorney and that attorney's clients are presumed to be for the benefit of the joint endeavor. Consequently, no communications in furtherance of that joint representation are confidential vis-a-vis a joint client who is not present at the time of the communication. Therefore, no single joint client can assert the attorney-client privilege in subsequent litigation between themselves to deny either access to or use of those communications.[19] Nothing in the client's case file would be protected by the attorney-client privilege vis-a-vis the insured (policyholder). As a consequence, when the *policyholder* subsequently sues the insurer for bad faith in its failed attempts to settle the claim that resulted in a judgment in excess of the policy limits (what is called a first-party bad faith action), the policyholder has an unfettered right of access to the contents of the file.[20]

2. Successors-in-Interest: What Rights Do They Acquire?

Successors-in-interest are those who acquire their rights from another.[21] A purchaser is a successor-in-interest to the seller relative to the duty of care that was owed to the seller by the manufacturer of the product that the seller originally acquired and conveyed on to the purchaser. The concept, however, extends beyond the conveyance of property. The trustee of a corporate client acquires the privilege rights of the client upon his appointment.[22] After a party obtains a judgment against

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18 The attorney-client privilege is waived by voluntary disclosures to third parties. *See* State ex rel. McCormick v. Zakaib, 430 S.E.2d 316, 319 (W. Va. 1993) ("Even assuming, arguendo, that the original information contained in the three sealed documents was confidential and protected by the attorney-client privilege, Allstate waived this privilege by voluntarily producing the claim files in response to the plaintiff's discovery request."); Marano v. Holland, 366 S.E.2d 117, 132 (W. Va. 1988) (finding attorney-client privilege waived by voluntary testimony of defense-retained psychologists); Bennett v. Bennett, 70 S.E.2d 894, 898-99 (W. Va. 1952) (finding client waived privilege as to subject of attorney's authorization to appear in divorce action by her own testimony about authorization of attorney), *disapproved on other grounds by* Gallaher v. Gallaher, 128 S.E.2d 464 (W. Va. 1962). *See generally* Paul R. Rice, Attorney-Client Privilege: State Law § 9:27 (Rice Publishing 1998).

19 *See* Kirchner v. Smith, 58 S.E. 614, 619-20 (W. Va. 1907) (observing that plaintiffs and defendants together employed attorneys to prepare contract, obtain title, and advise parties and concluding that joint client privilege was therefore inapplicable between parties).

20 *See, e.g.*, Longs v. Drug Store v. Howe, 657 P.2d 412 (Ariz. 1983); Alseike v. Miller, 412 P.2d 1007 (Kan. 1966); Baker v. CNA Ins. Co., 123 F.R.D. 322, 326 (D. Mont. 1988).

21 *See* Catino v. Travelers Ins. Co., 136 F.R.D. 534, 537 (D. Mass. 1991) ("To the extent that Gallagher [the attorney] had an attorney-client relationship with both Nowlan and Travelers and both Nowlan and Travelers were his client, '. . . there can be no privilege on the part of the company [Travelers] to require the lawyer [Gallagher] to withhold information from his other client, the policyholder [Nowlan]'. . . . Since Catino, by virtue of the assignment, now possesses all of Nowlan's rights, there is no attorney-client privilege between Gallagher and Travelers as against Catino, at least for the period of time when Gallagher represented both."); Dickerson v. Superior Court, 185 Cal. Rptr. 97, 99 (1st Dist. 1982) ("Here, the client holding the privilege, ADZ, Inc., was merged into Santa Clara Publishing, Inc. and has ceased to exist. The attorney-client privilege, originally held by ADZ, Inc., is now held by its successor-in-interest, Santa Clara Publishing, Inc."); Texaco, Inc. v. Phoenix Steel Corp., 264 A.2d 523 (Del. Ch. 1970) (the trustee is a successor-in-interest with rights to assert or waive the privilege).

22 *See Texaco*, 264 A.2d 523 (the trustee is a successor-in-interest with rights to assert or waive the privilege).

the insured in excess of policy limits, if the insurance company had failed to negotiate the settlement of the claim in good faith, the breach of duty that the insurance company's bad faith represents constitutes a tortious act giving rise to a common law cause of action on behalf of the insured/tortfeasor. This can place the judgment creditor in the same position as the judgment debtor relative to the insurance company's breach of duty,[23] particularly if the insured/tortfeasor assigns his claim to the party he injured (and who obtained the judgment).[24] The judgment creditor steps into the shoes of the judgment debtor.

B. *Documents Created After the Date of the Judgment*

For documents created *after* the date of the judgment against the policyholder, the *Dunn* Court held that a third-party bad faith plaintiff could gain access only "with a showing of good cause."[25] The third-party was considered a successor-in-interest to the insured policyholder—"'stand[ing] in the shoes' of the in-

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23 The Florida courts have also held that "a plaintiff in a personal injury action who obtained a judgment against a defendant in excess of the defendant's insurance coverage could bring an action for bad faith against the insurance company without an assignment from the defendant insured on the third party beneficiary theory." *See* Boston Old Colony Ins. Co. v. Gutierrez, 325 So. 2d 416, 417 (Fla. Dist. Ct. App. 1976) cert. denied, 336 So. 2d 599 (Fla. 1976) (quoting Thompson v. Commercial Union Ins. Co. of New York, 250 So. 2d 259 (Fla. 1971)). The court in *Gutierrez* went on to say that as a third party beneficiary of the insurance policy, the plaintiff stands in the same posture as the insured. *Gutierrez*, 325 So. 2d at 417. Since he stands in the shoes of the insured, the initial party plaintiff may compel disclosure of the insurer's entire case file. *See also* Dunn v. National Sec. Fire and Cas. Co., 631 So. 2d 1103, 1109 (Fla. Dist. Ct. App. 1993) *pet. granted*, National Sec. Fire & Cas. Co. v. Dunn, 652 So. 2d 1188 (Fla. Dist. Ct. App. 1995) ("In bad faith suits against insurance companies for failure to settle within the policy limits, all materials in the insurance company's claim file up to the date the judgment in the underlying suit are obtainable, and should be produced when sought by discovery.... 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.... The rationale ... is because the injured third party 'stands in the shoes' of the insured party in a third party bad faith case and the insurer owed a fiduciary duty to its insured.").

In *United Servs. Auto. Ass'n v. Jennings*, the court explained:

> Generally, the third party in a third party bad-faith action stands in the shoes of the insured and is entitled, therefore, to discovery of the insurer's entire claims file on the underlying tort claim up to the date of an excess judgment, notwithstanding any objections from the insurer based on the attorney-client or work product privileges. . . . While there is not case law discussing whether this broad scope of discovery is available in a case involving a Cunningham stipulation rather than an excess judgment, we see no reason why the two circumstances should be treated differently.

United Servs. Auto. Ass'n v. Jennings, 707 So. 2d 384, 385 (Fla. Dist. Ct. App. 1998) (per curiam).

24 In Iowa, where third-party bad faith actions are not recognized, the Supreme Court permitted an action to be brought by the judgment creditor on behalf of the judgment debtor who assigned his claim against the insurance company to the third-party. *See* Kooyman v. Farm Bureau Ins. Co., 315 N.W.2d 30 (Iowa 1982). "In Kooyman, the plaintiff, representing the injured party, received from the tortfeasor, as part of a settlement, an assignment of the tortfeasor's claim for bad faith against its own insurance company. Plaintiff then sued the tortfeasor's insurer in an 'excess judgment' action alleging bad faith." Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255, 258 (Iowa 1991).

25 *Dunn*, 631 So. 2d at 1109.

sured party."[26] Therefore, *third-party* bad faith plaintiffs were given the same right of access as the *first-party* bad faith plaintiffs (the insured/policyholders)—upon a showing of "good cause"—a showing that the evidence was necessary to establishing the claim and not otherwise reasonably available.

The court did not indicate why either the insured or a third-party plaintiff should be given access to files created after the fiduciary relationship between those individuals and the insurance company has expired. This part of the decision is particularly troublesome because an insurance company's communications with counsel after that point would focus on the defense of itself, rather than the defense of the insured. Opening the files at this point would preclude the insurance company from effectively defending itself against the insured's charge of bad faith, at a time when there would be neither a mutuality of interests nor joint representation.

IV. THE *GAUGHAN* DECISION

The Supreme Court of Appeals of West Virginia was not prepared to follow the approach outlined by the Montana Court in *USF&G* or the Florida Court in *Dunn*. To follow Montana's "majority" view and deny a third-party bad faith plaintiff access to the insured's claim file would "seriously impede[] a third-party's ability to prove a bad faith claim."[27] On the other hand, treating the third-party like the insured, as the Florida Court did in *Dunn*, and giving her free access to the claim file could "chill open and honest communications," thereby having a devastating 'impact on an attorney's ability to fully advise a client."[28] Therefore, the court in *Gaughan* gave a qualified right of access to the file that seemed identical to the *Dunn* decision, but characterized its decision as being different by "craft[ing] a more practical approach."[29]

In pursuing this intermediate position, the *Gaughan* Court chose to break new ground by creating what the court dubbed a "quasi attorney-client privilege." It applies to communications in an insured's claim file generated on and after the filing date of a third-party's complaint against an insurer—the point at which the *Dunn* Court concluded that the third-party had to demonstrate "good cause" to obtain access. The court explained the parameters of this new privilege:

> We . . . hold that in a third-party bad faith action where an insured has signed a release of his/her claim file to a third-party litigant, an insurer may raise a quasi attorney-client privilege to communication in the insured's claim file. The quasi attorney-client privilege belongs to the insurer, not the insured, and may be waived only by the insurer.
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> Second, we must carefully articulate the parameters of the

26 *Id.*
27 *Gaughan*, 508 S.E.2d at 89.
28 *Id.*
29 *Id.*

quasi attorney-client privilege herein established. As an initial matter, we note that an attempt to protect from disclosure documents in a claim file that were prepared prior to the filing of a third-party's underlying suit against the insured is properly maintained by asserting the work product rule . . . . Consequently, we hold that all communications in an insured's claim file that were generated prior to the filing date of a third-party's underlying complaint against the insured are not protected by the quasi attorney-client privilege. All communications in an insured's claim file generated on and after the filing date of a third-party's complaint against an insured, are presumptively quasi attorney-client privilege communications. Furthermore, we note that prior to the filing of a third-party's underlying suit against the insured, the majority of documents in the claim file would not fulfill the elements required to gain protection under the attorney-client privilege. Conversely, after the filing of the underlying suit, the number of documents subject to the attorney-client privilege radically increases. . . . We therefore hold that where a third-party has obtained a release from the insured giving the third-party access to all communications in the insured's claim file, in order for the third-party to seek discovery of communications in the claim file generated on or after the date the third-party filed his/her complaint against the insured, the third-party must provide some reasonable description of each communication he/she seeks that was generated on or after the date the third-party filed his/her complaint against the insured. In other words, the third-party may not merely request all communication in the claim file generated on or after the filing date of the complaint against the insured. Thereafter, if the insurer raises the quasi attorney-client privilege to such specifically requested communication, the insurer must prove the elements of the traditional common law attorney-client privilege for each communication it seeks to shield from discovery through assertion of the quasi attorney-client privilege. The trial court must then make an independent determination for each communication the insurer seeks to shield from discovery. If the trial court determines that some or all of the specifically requested communication has been shown to satisfy the elements of the traditional common law attorney-client privilege, then such communication is protected from disclosure by the quasi attorney-client privilege. We note, however, that if the insurer fails to establish all the

> elements of the traditional common law attorney-client privilege for any specifically requested communication, such communication must be produced to the third-party.
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> Traditional attorney-client privileged material is virtually undiscoverable under Rule 26(b) of the West Virginia Rules of Civil Procedure. However, applying such complete protection to documents subject to the quasi attorney-client privilege herein created for the unique situation presented by third party-bad faith suits is inequitable. Often, the plaintiff in a third-party bad faith suit has no reasonable means of proving his or her claim without the benefit of certain documents contained in the claim file. In order to temper this unduly harsh result, and to advance the balance between the competing interests of full disclosure of the facts and open attorney-client communication, we hold that a third party may, in some instances, obtain discovery of documents found to be protected by the quasi attorney-client privilege. To obtain such documents, the third-party must show a "compelling need" for each communication that has been found to be protected from disclosure by the quasi attorney-client privilege. To satisfy the quasi attorney-client privilege compelling need test, the third-party must show that (1) the specifically requested protected communication cannot reasonably be obtained elsewhere and (2) that the specifically requested protected communication could reasonably be interpreted by the fact finder as tending to prove an element of the bad faith cause of action or (3) that the specifically requested protected communication could reasonably be used to lead to the discovery of facts that tend to prove an element of the bad faith cause of action. Any protected communication for which the third-party satisfies the quasi attorney-client privilege compelling need test must be produced to the third-party.[30]

While the *Gaughan* Court acknowledged that West Virginia has recognized *third-party* insurance bad faith settlement cases,[31] as well as *first-party* bad faith settlement cases,[32] and that it is agreed that the insured in first-party actions generally has access to all documents in his claim file,[33] the court would not give to the third-party, Thoburn, the same rights extended to the insured, Mirandy, even though Mirandy had given Thoburn a release for the claim file. Further, the court

30 *Id.* at 89-91.

31 *See id.* at 87, n.16.

32 *See id.* at 87, n.14.

33 *See Gaughan*, 508 S.E.2d at 87, n.17.

noted that it was "[p]articularly noteworthy . . . that Ms. Thoburn secured a release from Mr. Mirandy which permitted Ms. Thoburn access to his file,"[34] yet the court never returned to the point to address why it thought the fact was significant. The court's emphasis on this release is particularly curious since the court concluded that the quasi attorney-client privilege belonged exclusively to the insurer, and not to the insured. It is unlikely that the court was suggesting that through the release the insured waived the attorney-client privilege claim protecting the file, since that construction would have made significant portions of the succeeding discussion unnecessary. Concluding that a waiver of the privilege protection was effected through the release also would have been inconsistent with established principles of waiver by joint clients.

When parties jointly retain an attorney, they jointly possess the privilege protection that extended to their discussions with the lawyer. Being a jointly held right, waiver historically has been permitted only with the consent of all joint participants.[35] Since Allstate did not acquiesce, there could have been no waiver. More fundamentally, however, if, as the court noted, the privilege is the insurer's alone, the conduct of the insured toward the file should be irrelevant. Similarly, Mirandy's release could not reasonably be interpreted as an assignment to Thoburn by Mirandy of his claim against Allstate, thereby making Thoburn his successor-in-interest, possessing the same discovery rights that Mirandy would have possessed had he brought the action on his own behalf.

Under the court's interpretation of the Unfair Claim Settlement Practices Act, both Thoburn and Mirandy had the same duty owed to them by Allstate. Therefore, the court's "new" privilege, or modification of the existing privilege, appears to stem solely from the statutorily created duty that has been found to be owed to third-parties by insurance companies when they engage in settlement negotiations. Thus, Thoburn should have had to justify his requested access to the claim file—overriding the attorney-client privilege that protected communications within it—under an exception to the privilege. Instead, the court chose the awkward path of creating a new privilege for this limited situation—a "quasi attorney-client privilege"—that is identical to the old attorney-client privilege in all respects

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34 *Id.* at 86.

35 *See, e.g.*, John Morrell & Co. v. Local Union 304A of United Food and Commercial Workers, AFL-CIO, 913 F.2d 544, 555-56 (8th Cir. 1990); In re Grand Jury Subpoenas, 89-3 & 89-4, 902 F.2d 244, 250 (4th Cir. 1990) ("[W]e hold that all documents that relate to the prosecution of the claim against the Army as to the defense of the Army's counterclaim, and which are subject to the attorney-client or work-product privilege are subject to a joint defense privilege that Subsidiary may not waive unilaterally."); United States v. Stotts, 870 F.2d 288, 290 (5th Cir. 1989) (one criminal defendant cannot present testimony of attorney who would repeat statements by other codefendants protesting the first defendant's innocence when the other codefendants object); Holland v. Island Creek Corp., 885 F. Supp. 4, 7 (D.D.C. 1995) ("[T]he trustees' unilateral disclosure of privileged information without the consent of the joint privilege-holders, BCOA, cannot waive the privilege for the documents."; Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 29 (N.D. Ill. 1980) ("the joint defense privilege cannot be waived without the consent of all parties to the defense."); In re Scranton Corp., 37 F.R.D. 465, 469-70 (D. Pa. 1965) ("[W]here consultation was had by 'several' clients jointly, the waiver should be joint for joint statements, and one could not waive for the disclosure of another's statements.").

(*i.e.*, its elements, how and when it is asserted, who has the burden of persuasion, etc.)[36] except for the fact that it can be overridden by a demonstration of good cause or substantial need.

V. NOT A NEW PRIVILEGE—AN EXCEPTION TO THE OLD

Historically, the attorney-client privilege has been absolute in the protection it affords confidential communications between an attorney and his client. Unless the privilege protection is waived, it provides an absolute protection to confidential communications[37] that even survives the death of the client.[38] Apparently breaking from tradition, the court in *Gaughan* concluded that an insurance company's claim of attorney-client privilege could be overridden by a showing of "good cause" in an action for their alleged bad faith in the settlement of a claim against a policyholder.[39] This inconsistency, however, is more illusory than real. Contrary to the *Gaughan* Court's assertion, the result is consistent, if not identical, to the approach taken by the court in *Dunn*,[40] and both decisions are consistent with an established, and growing body of case law (beginning with the federal decision in *Garner v. Wolfinbarger*[41]), where an exception to the privilege has been recognized for third-party beneficiaries. Those beneficiaries have been permitted to discover confidential attorney-client communications between fiduciaries and attorneys who advised them about matters relating to their fiduciary duties to the discovering beneficiary.

Also consistent with the *Dunn* Court, the *Gaughan* decision did not explain why it was appropriate for the insurance company to be denied, vis-a-vis the insured and his successful victims, the right to have confidential communications with counsel *after* the fiduciary relationship had ended and an adversarial proceedings by the insured, his successor-in-interest or third-party beneficiary had begun. Since the alleged bad faith settlement effort will have occurred before the judg-

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36 *Gaughan*, 508 S.E.2d at 89-90.

37 *See* Hodge v. Garten, 182 S.E. 582, 583 (W. Va. 1935) (stating "[t]here is no rule of law better settled than that an attorney shall not be permitted to divulge any matter communicated to him in professional confidence"); Thomas v. Jones, 141 S.E. 434, 437 (W. Va. 1928) (observing that "the rule strictly followed in this State [is] that communications between client and attorney are privileged and cannot be divulged" unless an exception applies); Woodrum v. Price, 140 S.E. 346, 349 (W. Va. 1927) (noting that it is "well established that communications between lawyer and client are privileged, and are inadmissible upon objection"); Donohoe v. Collett, 105 S.E. 265, 266 (W. Va. 1920) (stating that the "rule of privilege between attorney and client is strict and rigid"); State v. Douglass, 20 W. Va. 770, 780 (1882) (stating that "it is a fundamental principle of the law of evidence, that professional communications made by a client to his counsel, are always to be excluded from the jury") (emphasis in original).

38 *See* State v. Fisher, 27 S.E.2d 581, 583 (W. Va. 1943) (noting that "[i]t is settled law in this State that a communication to an attorney by a client or former client dealing with relation as attorney and client is privileged") (emphasis added). *See also* Swidler & Berlin v. United States, 524 U.S. 399 (1998).

39 *See* State ex rel. Allstate Ins. Co. v. Gaughan, 508 S.E.2d 75 (W. Va. 1998).

40 Florida gives an absolute right of access to all prejudgment attorney-client communications and a right of access to privileged post-judgment communications in a claim file after "good cause" has been demonstrated.

41 430 F.2d 1093 (5th Cir. 1968).

ment, and the communication that would likely establish that bad faith would have occurred during that same time period, the extension of the right of access to privileged communication after this time upon a showing of good cause may pose more of a theoretical threat than an actual one. This is particularly true if the "good cause" requires an assessment of the company's need for effective legal assistance in defending itself.

A. *The Fiduciary Duty Exception*

The source of this fiduciary duty exception to the privilege was *Garner*,[42] a shareholder derivative action in which shareholders sued for the benefit of the corporation as a whole. Subsequently, in *Fausek v. White*, the theory was expanded to nonderivative shareholder actions,[43] and more recently, as discussed *infra*, to numerous other fiduciary situations.

Because the *Garner* Court premised the holding on the common law of trust and fiduciary relationships, rather than on concepts peculiar to corporate law, courts have extended *Garner's* balancing of interests approach when they assess the applicability of the attorney-client privilege beyond the corporate stockholder action. Courts have begun to extend the balancing of interests approach to conflicting interests claims in a variety of fiduciary contexts where the recognition of the privilege would favor the interests of one principal over the other. Examples include a suit by the Secretary of Labor against the former officials of a pension fund for violation of their fiduciary duties;[44] a suit between a limited partner and a general partner in the same general partnership;[45] actions by union members against the union officers;[46] an action by trust beneficiaries against the trust and its trustee;[47] an action by excess insurer against the primary insurer;[48] an action by creditors against the bankruptcy creditor's committee;[49] actions by minority share-

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42 *Id.*

43 *See, e.g.*, Fausek v. White, 965 F.2d 126, 130 (6th Cir. 1992) ("Selox maintains that Garner applies only in shareholder derivative actions and that all policy considerations favor applying the privilege in cases where the plaintiffs act only for their own benefit rather than on behalf of the corporation. . . . Nothing in the language or the reasoning of Garner, as expressed by Judge Godbold, so limits its holding."); Ward v. Succession of Freeman, 854 F.2d 780, 786 (5th Cir. 1988) (rejecting the argument that Garner applies only to derivative suits); Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp. 1357, 1363 (S.D.N.Y. 1983) (holding that the Garner decision is based in part "on the recognition that because of the mutuality of interest between the parties, the faithful fiduciary has nothing to hide from his beneficiary"); Bailey v. Meister Brau, Inc., 55 F.R.D. 211, 213 (N.D. Ill. 1972) ("the attorney-client privilege [does] not bar a shareholder-plaintiff in a derivative suit from discovering the communications between his corporation and its counsel").

44 *See* Donovan v. Fitzsimmons, 90 F.R.D. 583 (N.D. Ill. 1981).

45 *See* Ferguson v. Lurie, 139 F.R.D. 362 (N.D. Ill. 1991); Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp. 1357 (S.D.N.Y. 1983).

46 *See* Mallick v. International Bhd. of Elec. Workers, 749 F.2d 771 (D.C. Cir. 1984); Aguinage v. John Morrell & Co., 112 F.R.D. 671 (D. Kan. 1986).

47 *See* Helt v. Metropolitan Dist. Comm'n, 113 F.R.D. 7, 9 (D. Conn. 1986); Washington Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543 F. Supp. 906 (D.D.C. 1982).

48 *See* Central Nat'l Ins. Co. v. Medical Protective Co., 107 F.R.D. 393 (E.D. Mo. 1985).

49 *See* In re Baldwin-United Corp., 38 B.R. 802 (Bankr. S.D. Ohio 1984).

holders against majority shareholders;[50] and an action on behalf of a corporation against the law firm that represented the corporation.[51] In some state courts the *Garner* exception has been extended to third-party bad faith suits against insurers.[52]

The key element in the expansion of the *Garner* logic has been the mutuality of interests between the fiduciaries and the beneficiaries. As long as this mutuality of interests existed at the time of the communication with counsel, and the subject of the communication was the fulfillment of an expressed or implied fiduciary duty, the beneficiary, and the beneficiary's successor-in-interest, should have a right, upon a showing of need, to access those communications in order to determine whether the fiduciary has fulfilled his legal responsibilities.

B. *The Fiduciary Duty Exception and Gaughan*

While the court's reasoning in *Gaughan* is sound, its "quasi attorney-client privilege" is an awkward characterization of what the court actually recognized. The elements of both the established privilege and the "new" privilege are the same, as is the burden that must initially be borne by the proponent of both privileges. The "new" differs from the "old" only in that it recognizes when good cause has been demonstrated. At the heart of the *Gaughan* Court's reasoning is a recognition of a duty, albeit a statutory duty rather than a contractual or common law one, that the insurance company owed to the insured. Consistent with established principles originating in the *Garner* decision, the *Gaughan* Court did nothing more than recognize that if an insured, or a third-party, to whom an insurance company owes the same statutory duty of good faith and fair dealing, can demonstrate "good cause" or "a compelling need" for the discovery of post-judgment communications, they both should be given the same access to the files in which those communications are contained.

VI. CONCLUSION

The attorney-client privilege is fundamental to an effective attorney-client relationship. Over the centuries the privilege has become highly complex and confusing because of its many wrinkles and machinations. The confusion that has resulted should not be exacerbated by cluttering its landscape with "quasi" labels and applications.

Generally, evidentiary rules should be interpreted and applied in ways that are consistent with their underlying principles. Less conspicuous, but equally important to our jurisprudence, is the need for state courts, to the extent practicable, and consistent with legal precedents and social policies, to make every effort to

50 *See* In re Transocean Tender Offer Sec. Litig. 78 F.R.D. 692 (N.D. Ill. 1978).

51 *See* In re Sunrise Sec. Litig., MDL No. 655 (E.D. Pa. Nov. 17, 1989).

52 *See* P.R. Rice, Attorney-Client Privilege in the United States § 8:22, 635-37 (Lawyers Cooperative 1993).

define the substantive principles of universally recognized rules like the attorney-client privilege as consistently as possible. Such consistency minimizes confusion and accommodates choice of law issues by minimizing their importance.[53] Courts must be conscious of the broader implications of their holdings and their responsibility to accurately place each decision on the complex substantive grid to which it is being added.

53 *See supra* note 51, at §§ 12:1-12:21.