

PENNSYLVANIA

FISHER v. ERIE INSURANCE: SUPERIOR COURT CLARIFIES WHEN PARTIES MAY APPEAL DISCOVERY ORDERS ABOUT CLAIMS OF PRIVILEGE



The Pennsylvania Superior Court issued an important decision that clarifies when parties may appeal trial court orders compelling in camera review of potentially privileged documents. In *Fisher v. Erie Ins. Exch.*, 2021 PA Super 130 (June 25, 2021) (en banc), the court also clarified a party's burden to object to discovery requests.

The underlying case is an underinsured motorist ("UIM") matter. Helen Fisher suffered injuries after trying to move out of the path of a driverless pickup truck that drifted downhill in parking lot. Helen and her husband, William, filed a UIM claim against Erie Insurance. Erie retained outside counsel to evaluate liability and the Fishers' damages. After the Fishers filed suit, Erie's counsel filed pleadings on behalf of Erie and objections to discovery.

In discovery, the Fishers requested that Erie produce "a complete copy of all documentation reflecting any investigation, evaluation, and/or valuation" by outside counsel regarding the Fishers' UIM claim. Erie objected to this request, alleging that it sought attorney-client privileged material, among other things. Counsel then

produced a privilege log which identified 17 privileged documents, but did not provide the author, recipient, or dates to identify those documents. The log also did not describe the nature or scope of the privilege asserted. The trial court found that the objections and privilege log were insufficient to establish those privileges and ordered Erie to produce the requested documents to the Court for in-camera review. Erie appealed from that order.

The issue on appeal was whether Erie could immediately appeal the trial court's decision ordering in camera review under the collateral order doctrine. A collateral order (1) is separable from and collateral to the main cause of action; (2) is too important to be denied review; and (3) appellate review will be lost if postponed until final judgment. See Pa.R.A.P. 313. This case concerns the third element: whether appellate review of the trial court's order compelling in-camera review would be lost if postponed until the end of the case.

The Superior Court reviewed the burden-shifting framework used to decide privilege claims. A party asserting privilege has the initial burden of proof. A privilege log may help to meet this burden, by



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identifying facts and circumstances supporting the applicable privilege. If sufficient facts establish the privilege, the burden shifts to the requesting party to show that the documents are discoverable because of a waiver or exception to that privilege.

The court found that Erie's objections and privilege log did not provide enough information for the trial court to determine the validity of the objections. Because the objections and privilege log might raise valid objections, the trial court acted properly in ordering in-camera review. In-camera review does not, as a matter of law, waive privilege, and risks do exist when a party must disclose potentially privileged documents to a trial judge. For instance, the Fishers claimed that Erie acted in bad faith when denying their UIM claim. No right to a jury trial exists for bad-faith claims in Pennsylvania state court, so the trial judge acts as factfinder. This could mean that the trial judge would review documents that it might need to disregard at an eventual trial. The court nevertheless found that in-camera review of potentially valid, but incomplete, privilege claims protects parties' right to assert privilege while preventing them from abusing it.

The court also clarified that a party can avert in camera review by responding with clear facts supporting privilege in response to a discovery request that "on its face seeks protected materials." The Fisher court contrasted its situation with the prior decision in *Farrell v. Regola*, 150 A.3d 87 (Pa. Super. 2016). The trial court in *Farrell* compelled in-camera review of psychiatrist-patient and attorney-client privileged material, and it intended to disseminate those documents to the other parties. The Superior Court in *Farrell* held that it could hear an immediate appeal from that order, because the discovery requests and privilege logs "so clearly invoked privilege." The discovery requests and privilege log in *Fisher*, in contrast, did not. So, the *Fisher* court held that Erie could not immediately appeal the order compelling in-camera review. Erie could not meet the collateral order doctrine, and therefore did not have a right to immediate appellate review. However, after the in-camera review, if the trial court ordered disclosure of the disputed documents, the insurer could then appeal.

After *Fisher*, counsel facing discovery requests for potentially privileged material should make specific objections and provide sufficiently detailed privilege logs to establish to a trial court that the requests seek privileged material. Doing so will assist in avoiding orders compelling in-camera review, and lead to quicker appellate review.

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