Chipping Away Privilege in Ohio Bad Faith Litigation

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Generally speaking, the coveted attorney-client privilege exempts from the discovery process communications between attorneys and their clients. The privilege has long been recognized by Ohio courts, and its purpose is to encourage full and frank communication between attorneys and their clients, thereby promoting broader public interests in the observance of law and administration of justice. In Ohio the attorney-client privilege is based both in common-law and statute. *See* R.C. 2317.02.

Nevertheless, in the world of bad faith litigation the privilege is **no longer** a blanket exception to discovery, and counsel and claims members alike must be careful to consider what exactly must be disclosed to the opposing party in any bad faith suit. These issues must be accounted for in the underlying claims investigation as well. Counsel must be aware that any email, letter, or other writing during the course of the underlying investigation might very well end up in the hands of the plaintiff's attorney or even blown up as an exhibit for the jury down the road.

So how did this all happen?

The* Boone *Decision

In the landmark decision of *Boone v. Vanliner Ins. Co*., 91 Ohio St.3d 209, 744 N.E.2d 154 (2001), the Ohio Supreme Court addressed the discoverability of otherwise privileged case-file materials in actions alleging the bad faith denial of insurance coverage. The *Boone* court ultimately held:

> *In an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing*

> *attorney-client communications related to the issue of coverage that were created prior to the denial of coverage.*

Id. at syllabus.

The Ohio Supreme Court reasoned "[c]laims file materials that show an insurer's lack of good faith in denying coverage are unworthy of protection." *Id*. at 213. The *Boone* Court inextricably justified the holding by stating, "[a]t that stage of the claims handling, the claims file materials will not contain work product, *i.e.*, things prepared in anticipation of litigation, because at that point it has not yet been determined whether coverage exists." *Id.*

What Does Boone *Mean?*

After *Boone*, it is clear an insurer cannot withhold claims file materials and communications in any form between the insurer and counsel created prior to "the alleged bad faith," which encompasses much more than just an outright denial of coverage. This information cannot be used simultaneously as "a sword and a shield." In other words, an insurer cannot rely on information in defending a bad faith claim without turning that information over in discovery to plaintiff's counsel.

This holds true even if that information would ordinarily be protected by the coveted attorney-client or work-product privileges. For instance, according to *Garg v. State Auto. Mut. Ins. Co*., 155 Ohio App.3d 258, 2003-Ohio-5960, 800 N.E.2d 757, ¶ 24 (2d Dist.), "[u]nder *Boone*, neither attorney-client privilege nor the work-product doctrine protects materials in a claims file, created prior to the denial of the claim, that may cast light on whether the insurer acted in bad faith in handling an insured's claim."

Further, claims-file materials showing an insurer's general lack of good faith **"in processing, evaluating, or refusing to pay a claim"** are unworthy of the protection from discovery. *See, e.g., Unklesbay v. Fenwick*, 167 Ohio App.3d 408, 2006-Ohio-2630, 855 N.E.2d 516, ¶ 16 (2d Dist.); *Stewart v. Siciliano*, 2012-Ohio-6123, 985 N.E.2d 226 (11th Dist.).

While the true scope of potential discovery under *Boone* has yet to be clearly refined, in *Goodrich Corp. v. Commercial Union Ins. Co*., 9th Dist. Nos. 23585 and 23586, 2008-Ohio-3200, the Ninth District clarified that an insured may not use *Boone* to obtain work-product or materials outside of the insurer's own claim file.

What Does "Denial of Coverage" Mean?

In suits between an insured and the insurer, courts have held that material in the claims file is protected only after a claim is denied, because up to that point the insurance company is merely carrying out its contractual responsibilities to the insured. The triggering event for disclosure of claim file materials is the denial of coverage, but what does this mean?

Bad faith allegations are not always as simple as an outright denial of coverage on a certain date. Indeed, courts have held an outright denial of coverage is unnecessary to trigger the

disclosure obligations. *See, e.g., Unklesbay*, 167 Ohio App.3d 408. Ultimately, the critical issue in evaluating the discoverability of otherwise privileged materials is *"whether they may cast light on bad faith on the part of the insurer." Garg*, 155 Ohio App.3d at 265.

The triggering event can be complicated and thus far case law throughout Ohio has not provided any additional definitive guidance. This issue is largely decided on a case-by-case basis and is highly factually dependent. What is clear is that courts generally focus on whether the sought-after information would be helpful/necessary in proving a claim for bad faith, and at what point in time the information was created. The more helpful the information would be, the more likely the court will find prejudice to plaintiff and order production in discovery.

The Necessity of In Camera Review

In determining any discovery dispute involving disclosure of the claims file, the trial court must conduct an *in camera* inspection of all documentation withheld from production, including the insurer's claims file materials, before ordering disclosure. *See, e.g., Stewart v. Sicilano*, 2012-Ohio-6123, 985 N.E.2d 226 (11th Dist.). The *in camera* review is an incredibly important part of the process. As the saying goes, "you can't unring a bell." In *Unklesbay*, the court of appeals held that the trial court abused its discretion in failing to conduct an in camera review of the claims file "because a bad faith claim does not entitle disclosure of **everything** in a claims file." *Id.*

During the time a motion to compel is pending before the court or even a discovery master, it is imperative defense counsel still move the discovery phase forward for issues undisputed by the parties. Do not allow a limited motion to compel to effectively "shut down" all other discovery. If only a portion of the claims file is withheld, provide the remainder of materials to opposing counsel immediately. If depositions of other claims personnel or plaintiff witnesses can move forward, then move forward with gathering testimony. Lastly, always advise the Judge or discovery master that defense counsel is doing everything possible to continue with written discovery, the exchange of documents, and depositions, despite the limited claims file dispute.

The Aftermath

- Under Ohio bad faith law, the attorney-client privilege is not a blanket exception to discovery. An insurer cannot use claims file information and communications as both a sword and a shield in defending a bad faith claim.

- Counsel and claims members alike must be careful to consider what exactly must be disclosed to the opposing party in any bad faith suit.

- These issues must also be accounted for in the underlying claims investigation as well. Otherwise, privileged information can easily end up in the hands of opposing counsel and before a jury if you are not careful in defending an insurance claim from the very beginning of the claims process regardless of when suit is actually filed.

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