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This Week's Feature

Ohio Supreme Court Clarifies Long-Debated Discovery Question

by Andrew L. Smith

In December, the Ohio Supreme Court, in *Burnham v. Cleveland Clinic*, Case No. 2015-112, 2016-Ohio-8000, ¶3 (Dec. 7, 2016), issued a ruling, holding that court orders requiring a party to disclose discovery information "plausibly alleged" as protected by the attorney–client privilege are immediately appealable.

The court reasoned as follows:

> An order requiring the production of information protected by the attorney-client privilege causes harm and prejudice that inherently cannot be meaningfully or effectively remedied by a later appeal. Thus, a discovery order that is alleged to breach the confidentiality guaranteed by the attorney-client privilege satisfies R.C. 2505.02(B)(4)(b) and is a final, appealable order that is potentially subject to immediate review.

Id. at ¶2.

Background of Dispute

In *Burnham*, Darlene Burnham brought a personal-injury suit against the Cleveland Clinic and Cleveland Clinic Health System. She allegedly slipped and fell in her sister's hospital room at the clinic after an employee poured liquid on the floor.

During discovery, Ms. Burnham requested production of an incident report that she learned had been created. However, the clinic alleged that the report was not discoverable because it was shielded by various protections, including the attorney–client privilege.

Ms. Burnham filed a motion to compel discovery of the report. The trial court ordered the clinic to provide Ms. Burnham with a privilege log and directed the parties to brief the issue of privilege. Included with the clinic's privilege log, filed under seal, was a copy of the report and an affidavit from the clinic's deputy chief legal officer that claimed that the report was generated as part of its protocol to notify the clinic's legal department of events that might be the basis for legal action. After reviewing the parties' briefs and the privilege log, the court ordered the clinic to produce the incident report. The clinic then filed an immediate appeal.

The appellate court dismissed the action, finding that there was no final, appealable order to review. The appellate court determined that the clinic failed to establish affirmatively that there would be prejudice resulting from disclosure of the incident report sufficient to justify an interlocutory appeal before the underlying personal-injury suit was fully resolved.

Ohio Supreme Court Ruling

The Ohio Supreme Court ultimately concluded that "[b]ecause the Clinic raised a colorable claim that its report was protected by the attorney-client privilege, the court's order compelling disclosure of that report was a final, appealable order." *Id.* at ¶29.

The court was clear to point out that information claimed as protected by the work-product privilege may be treated differently. Indeed, "[t]he attorney-client privilege and the attorney-work-product doctrine provide different levels of protection over distinct interests, meaning that orders forcing disclosure in these two types of discovery disputes do not necessarily have the same result that allows an immediate appeal." *Id.* at ¶15. However, under certain limited circumstances, an order mandating disclosure of information arguably protected by the work-product privilege may still be immediately appealable.

> But the same guarantee of confidentiality is not at risk with an attorney's work product. Any harm from disclosure would likely relate to the case being litigated, meaning that appellate review would more likely provide appropriate relief. This is not to say that compelling the disclosure of an attorney's work product pursuant to Civ. R. 26(B)(3) would never satisfy R.C. 2505.02(B)(4)(b) and require an interlocutory appeal. But it does not necessarily involve the inherent, extrajudicial harm involved with a breach of the attorney-client privilege.

Id. at ¶26.

Importance for the Insurance Defense Industry

This decision is extremely beneficial in the realm of insurance defense and bad-faith litigation, including the often-disputed disclosure of materials, which would include, among other things, claims files, claim log notes, reserve information, claim-handling policies and manuals, underwriting materials, and pre-suit internal reports and investigation reports. Defendants now have the opportunity immediately to appeal adverse-discovery court orders concerning these matters.

Conclusion

In *Burnham*, the Ohio Supreme Court clarified a much-disputed discovery issue. Court orders requiring a party to disclose discovery information "plausibly alleged" to be protected by the attorney–client privilege are, in fact, immediately appealable. Indeed, once "the genie is out of the bottle," the harm is done, justifying an appeal and a second opinion about such a key privilege determination. This discovery bell "cannot be unrung."

However, a number of questions are still unanswered after the *Burnham* decision.

1. *What degree of showing will be necessary to allege protection by the attorney–client privilege to justify the immediate appeal?* The opinion references the terms of art "colorable claim" and "plausibly alleged." However, the court summarily concluded that the report in question was potentially privileged without detailing this determination.

2. *Although there is an automatic right to appeal an order mandating production of discovery information that is arguably protected by the attorney–client privilege, what degree of prejudice or harm will be necessary to justify an interlocutory appeal when the attorney–client privilege is not involved?* What if the appeal is solely based on the work-product privilege, statutory immunity, or even a general confidentiality, proprietary, or trade secret argument? The court did not rule out these possibilities, but it did hint that it will be extremely difficult to justify an immediate appeal when the attorney–client privilege is not in question. Exactly how difficult remains to be determined.

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