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The 6th Circ. Stance On In Re Professionals Direct

Law360, New York (October 29, 2009) -- The Sixth Circuit recently denied an insurer's petition for a writ of mandamus to vacate a discovery order compelling the production of information which the insurer argued was protected from discovery by the work-product and/or attorney-client privileges. In re Professionals Direct Insurance Company, No. 08-4440 (6th Cir. Aug. 24, 2009).

The discovery dispute arose in a coverage litigation between an insured law firm and its malpractice insurer. The insured first provided notice of a potential claim against it on Sept. 1, 2004. Initially, the insurer acknowledged notice of the claim and reserved rights pending its investigation.

Nearly a year after receiving the notice of a potential claim, the insurer sent a second letter again reserving its rights and requesting that the insured provide it with an explanation for the insured's delay in reporting the potential claim.

Several months later, the insurer sent a subsequent letter telling its insured that it interpreted the policy to exclude coverage because the insured failed to give notice of a potential claim against it either before the expiration of the prior policy or in the insured's application for renewal (the "constructive denial").

Approximately six days after sending the constructive denial, the insurer filed a declaratory judgment action in the United States District Court for the Southern District of Ohio against its insured. The insured filed counterclaims against the insurer for breach of contract and bad faith.

During the course of discovery, the insured requested the insurer to produce all documents relating to the insured's bad faith claim. The insurer refused to produce a number of documents that it claimed were protected by the attorney-client and work-product privileges.

The magistrate judge overseeing discovery ordered the insurer to disclose many of the documents and the district court judge upheld the magistrate's decision.

With respect to work product, the magistrate judge found that the documents prepared by the insurer's attorneys after the date on which the insurer was "seriously evaluating a declaratory judgment action" (i.e., the insurer's second letter) were privileged only to the extent that they were prepared because of litigation and ordered the production of documents found to be prepared "because of" the coverage decision and prior to the time the insurer could reasonably anticipate litigation.

The Sixth Circuit agreed with the lower court, finding that only those documents which were prepared in anticipation of litigation (as determined by an in camera inspection) were privileged.

With respect to the documents that the insurer claimed were protected by the attorney-client privilege, the magistrate judge ordered that the privilege was waived as to all those documents produced prior to the constructive denial based upon an Ohio common law exception to the attorney-client privilege.

In 2001, the Ohio Supreme court established a common law exception to the attorney-client privilege for claims file materials that show an insurer's lack of good faith. Boone v. Vanliner, 744 N.E.2d 154 (Ohio 2001).

The insurer argued that the magistrate judge should have evaluated the documents individually to determine whether they contained evidence of bad faith.

The Sixth Circuit, however, held that although some courts have applied Boone more narrowly, it was not clearly erroneous for the magistrate judge to have interpreted it to require the disclosure of all the insurer's pre-denial attorney-client privileged documents in a case in which the insured has alleged bad-faith.

As a result of its finding that the lower court order was not clearly erroneous, the Sixth Circuit denied the insurer's petition for a writ of mandamus.

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