NEWSSTAND

The Attorney-Client Privilege in Ohio Bad Faith Actions: A Legislative Fix in Doubt

March 2010
Joseph R. Geoghegan

Many insurers with experience defending themselves in lawsuits initiated by their insureds understand that the attorney-client privilege is not absolute. There are several different contexts in which courts will allow parties involved in litigation against insurance companies to view attorney-client communications.[1] Claims of insurance bad faith present perhaps the most serious challenge to the attorney-client privilege, and for many years, Ohio courts have been in the forefront in ordering disclosure of attorney-client communications to litigants asserting insurance bad faith claims.

Under Ohio common law, the protection for some of an insurer's attorney-client communications evaporates whenever a party merely asserts a claim of bad faith against the insurer. No *prima facie* showing of bad faith is necessary before the documents must be disclosed; it is enough that the pleadings contain the phrase "bad faith."

The potential mischief created by such a rule is self-evident. Any incautiously or inartfully phrased communication between insurer and coverage counsel, however innocent, may be seized upon as evidence of bad faith. There is a real threat of such a communication becoming a star trial exhibit, which will only serve to drive up settlement costs.

In 2007, the Ohio legislature attempted to modify Ohio common law by requiring a *prima facie* showing of bad faith before an insurer's attorney-client communications must be disclosed. Unfortunately, while the legislative intent was clear, the amendment to the statute was less so. A recent decision in the Southern District of Ohio interpreting the amended statute indicates that Ohio's broad approach to discovery in insurance bad faith cases may have survived the legislature's attempts to blunt its effect.

***Boone and Moskovitz*: A Doctrine of Broad Disclosure**

In 2001, the Supreme Court of Ohio issued its decision in the case of *Boone v. Vanliner Ins. Co*[2]. In *Boone*, the plaintiff, a truck driver, brought a declaratory judgment action against his insurer when the insurer denied uninsured motorist coverage in connection with an accident. The complaint included a bad faith claim. During discovery, the plaintiff sought access to the insurer's claims file. In response, the insurer filed a motion for a protective order on the basis that (among other things) several of the documents sought were protected by the attorney-client privilege. Following an in camera inspection of the documents, the trial court ordered the insurer to disclose many of the documents containing attorney-client communications.

On the insurer's appeal of the discovery order, Ohio's Tenth District Court of Appeals found that the documents in question were protected by the attorney-client privilege, and reversed the trial court's order that the documents be disclosed. Subsequently, the Supreme Court of Ohio allowed the plaintiff to pursue an appeal of the Court of Appeals' decision.

In a 4-3 decision, the Supreme Court of Ohio reversed the decision of the appellate court and declared that the attorney-client communications in question were not protected by the attorney-client privilege. In its decision, the court relied upon its earlier decision of *Moskovitz v. Mt. Sinai Med. Ctr.*[3] In *Moskovitz*, a successful medical malpractice action, the prevailing plaintiffs sought prejudgment interest under a statute that allowed such interest if the plaintiffs could show that the defendant had not attempted to settle in good faith. The court permitted discovery of the claims file of the defendant's insurer, reasoning that "documents and other things showing the lack of a good faith effort to settle by a party or the attorneys acting on his or her behalf are wholly unworthy of the protections afforded by any claimed privilege."[4] On that basis, the court held in Moskovitz that in all proceedings under the prejudgment interest statute, an insurer's claims file is not protected by the attorney-client privilege.[5]

The *Boone* court found the *Moskovitz* reasoning to be applicable to claims of bad faith denial of coverage. Specifically, the court found that "claims file materials that show an insurer's lack of good faith in denying coverage are unworthy of protection." Therefore, the court held that in an action alleging bad faith denial of 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."[6]

The *Boone* Dissent

The three dissenting justices in *Boone* criticized the majority holding (as well as the *Moskovitz* decision) as "unsupported" and lacking a "reasoned basis." Specifically, the dissent compared the rule espoused by the majority to the crime-fraud exception to the attorney-client privilege. Under the crime-fraud exception, the attorney-client privilege does not protect communications between a client and attorney when made for the purpose of committing or continuing a crime or fraud. The dissent pointed out that in order to overcome the attorney-client privilege based on the crime-fraud exception, a party must demonstrate "a factual basis for a showing of probable cause to believe that a crime or fraud has been committed and that the communications were in furtherance of the crime or fraud."[7] In contrast, the decision in *Boone* requires "no similar *prima facie* showing of bad faith before an insurer is entitled to discover attorney-client communications of the insurer."[8] Rather, an insured "need only allege the insurer's bad faith in the complaint in order to discover communications between the insurer and the insurer's attorney."[9] The dissent went on to note that a number of other jurisdictions had refused to adopt such a sweeping exception to the attorney-client privilege.[10]

In closing, the dissent warned that an insurance company seeking advice from an attorney regarding a coverage issue "will now have to consider the possibility that those communications will be subject to future disclosure in the event that coverage is denied and the insured commences a bad-faith lawsuit."[11]

The Ohio Legislature Attempts to Modify the Rule in *Boone*

Following the decision in *Boone*, in 2007 the Ohio legislature passed a law to modify the section of its evidence statute addressing privileged communications. The Ohio legislature clarified that its aim was to modify the common law rule regarding attorney-client communications adopted by the Ohio Supreme Court in *Moskovitz* and extended in Boone. Specifically, the bill directing the statutory amendment contains the following statement of legislative intent:

SECTION 6. The General Assembly declares that the attorney-client privilege is a substantial right and that it is the public policy of Ohio that all communications between an attorney and a client in that relation are worthy of the protection of privilege, and further that where it is alleged that the attorney aided or furthered an ongoing or future commission of insurance bad faith by the client, that the party seeking waiver of the privilege must make a prima facie showing that the privilege should be waived and the court should conduct an in camera inspection of disputed communications. The common law established in Boone ... Moskovitz ... and Peyko v. Frederick [12]... is modified accordingly to provide for judicial review regarding the privilege. [13]

Even if the Ohio legislature had not addressed *Boone* and *Moskovitz* by name, the bill is clearly designed to address the doctrine espoused by those decisions. The bill's declaration that attorney-client communications are "worthy of the privilege of protection" is a direct echo of, and likely a response to, the statements in *Moskovitz* and *Boone* that attorney-client communications in a claim file that might contain evidence of bad faith are "wholly unworthy" of such protections. In addition, by requiring a party seeking waiver of the privilege to first make a *prima facie* showing of bad faith, the bill appears to respond to the dissent in *Boone* which pointed out that such a *prima facie* showing must be made in order to invoke the crime-fraud exception. Finally, the bill's expression of intent that the court should conduct an "*in camera* inspection of disputed communications" is a clear reference to documents.

Unfortunately, the rule in *Boone* and the blanket discoverability of claim files in bad faith disputes may not have expired with the passage of the new law. While the statement of legislative intent is clear, the actual modifications to the evidence statute are less so. The bill added the following language to the statute:

The following persons shall not testify in certain respects: [14]

An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima facie showing of bad faith, fraud, or criminal misconduct by the client. [15]

The amendment to the statute is ambiguous as to whether its application is restricted to attorney *testimony*, or whether it applies to disclosure of *documents* as well. While the amendment mentions "disclosure of the communications," which seems to refer to documents, the

amendment as a whole may be read as only addressing whether an attorney may be compelled to testify. Due to this ambiguity, in 2008 a federal district court applying Ohio law to an insurance bad faith action ordered the production of documents containing attorney-client communications without requiring a *prima facie* showing of bad faith – in effect, applying the *Boone* doctrine as though the Ohio legislature had not expressly modified it.

The *PDIC* Discovery Order

In 2008, a Magistrate Judge in the United States District Court for the Southern District of Ohio issued a discovery order in an action entitled *Professionals Direct Insurance Co. (PDIC) v. Wiles, Boyle, Burkholder & Bringardner Co.*, LPA, Civil Action No. 2:06-cv-0240 (S.D. Ohio). In PDIC, the plaintiff insurer brought a declaratory judgment action against its insured, a law firm, to resolve a coverage dispute regarding the availability of coverage for a malpractice action under the insured's professional liability policy. The insured counterclaimed for bad faith, and sought production of the claims file. When the insurer objected to producing certain attorney-client communications, the insured moved for a discovery order compelling production of the disputed documents.

The court held that *Boone* required disclosure of attorney-client communications that pre-date the denial of coverage. To the insurer's argument that the amended evidence statute required a *prima facie* showing of bad faith prior to the privilege being waived, the court responded, "On its face, [the amendment] applies only to testimony. It does not mention documents." The court did not address the statement of legislative intent, even though the insurer had cited it in its brief.

The Sixth Circuit Declines to Interpret the Amendment

Following entry of the discovery order, the insurer petitioned the Sixth Circuit Court of Appeals for a writ of mandamus to vacate the order [16]. The Sixth Circuit declined to do so [17], holding that the order of the trial court was not clearly erroneous. However, the Sixth Circuit did not expressly approve the lower court's interpretation of the amendment to Ohio's evidence statute. Rather, the appellate court found that the amendment, which became effective October 31, 2007, did not apply retroactively and thus did not apply to the PDIC litigation, which was filed prior to that date. Finding the amendment inapplicable, the Sixth Circuit declared that "we need not interpret its scope."[18]

An Uncertain Future

To date, the Southern District of Ohio is the only court to interpret the scope of the 2007 amendment to Ohio's evidence code. Unfortunately, due to the ambiguous wording of the amendment, the federal court preserved the rule in *Boone*. If and when an Ohio state court has an opportunity to interpret the amendment, it may choose to give the amendment a more expansive reading and fulfill the intention of the Ohio legislature that the *Boone* doctrine be modified. For now, however, an insurer handling a claim with any connection to Ohio must assume that any communications with its coverage counsel will be subject to disclosure.

[1.] For a more comprehensive examination of the variety of exceptions to the attorney-client privilege, *see* Laurie A. Kamaiko and Sarah D. Katz, *The Eroding Privilege of an Insurer's*

Communications with Its Coverage Counsel, EDWARDS ANGELL PALMER AND DODGE INSURANCE AND REINSURANCE UPDATE, June 2007.
[2.] *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209 (2001).
[3.] *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 635 N.E.2d 331 (1994).
[4.] *Id.*, 69 Ohio St.3d at 661, 635 N.E.2d at 349.
[5.] The court made an exception for communications that go directly to the theory of defense in the underlying case in which the decision or verdict has been rendered.
[6.] The court reasoned that a lack of good faith in determining coverage involves conduct that occurs when coverage is being assessed; therefore, documents post-dating the denial of coverage could not be relevant to the issue and remain privileged.
[7.] *Boone*, 91 Ohio St.3d at 217 (citing, State ex rel. *Nix v. Cleveland*, 83 Ohio St.3d 379, 384, 700 N.E.2d 12 (1998)).
[8.] *Id*.
[9.] *Id*. (emphasis in original).
[10.] *Id*. at 217 and n. 8, citing, *Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288 (D.Mont.1998); *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*, 173 F.R.D. 7 (D.Mass.1997); *Dixie Mill Supply Co., Inc. v. Continental Cas. Co.*, 168 F.R.D. 554 (E.D.La.1996); *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254 (Del.1995); *Aetna Cas. & Sur. Co. v. San Francisco Superior Court*, 153 Cal. App. 3d 467 (1984); *Hartford Fin. Serv. Group, Inc. v. Lake Cty. Park & Recreation Bd*, 717 N.E.2d 1232 (Ind.App. 1999); *Maryland Am. Gen. Ins. Co. v. Blackmon*, 639 S.W.2d 455 (Tex.1982).
[11.] *Id*. at 218.
[12.] Ohio St.3d 164 (1986). *Peyko*, like *Moskovitz*, involved the issue of bad faith failure to settle under the prejudgment interest statute.
[13.] S. 126-117, 2005-06 Regular Session, at 15 (Ohio 2005)
[14.] The introductory clause was part of the statute prior to amendment.
[15.] The amendment is codified at Ohio Rev. Code 2317.02(A)(2).
[16.] The trial judge affirmed the order of the magistrate judge without further analysis of the amendment.
[17.] *In re Professionals Direct Ins. Co.*, 578 F.3d 432 (6th Cir. 2009).
[18.] *Id.*, 578 F.3d at 441.