

ALERT

Court Orders Insurer to Disclose Communications Between the Insurer and Its Outside Counsel in Discovery Concerning Insured's Bad Faith Claim

May 15, 2012

The United States District Court for the Southern District of Ohio has granted in part and denied in part an insured's motion seeking discovery from its insurer concerning a bad faith claim. The court allowed potential discovery of communications between the insurer and its outside counsel, subject to an in camera review, but rejected any discovery seeking deposition testimony of the insurer's outside counsel. *Chubb Custom Ins. Co. v. Grange Mut. Cas. Co.*, 2012 WL 1340369 (S.D. Ohio Apr. 17, 2012).

In an underlying class action lawsuit, the insured was one of many insurance company defendants that allegedly engaged in certain improper adjustments of first-party claims for bodily injury. The underlying lawsuit ultimately settled with the insured agreeing to pay eligible class members an amount of money representing "specific elements of bodily damages."

The insurer then filed a declaratory judgment action seeking a determination that coverage for the settlement was barred by the "Benefits Due Exclusion" in an insurance company errors and omissions policy. The insured counterclaimed for indemnification, breach of contract and bad faith. In a previous holding in this case, which was reported in the April 2009 *Executive Summary*, the court denied in part the insurer's motion for summary judgment and granted the insured's motion for partial summary judgment. Thereafter, the insurer filed a renewed motion for summary judgment concerning the insured's bad faith claim, in response to which the

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insured filed a motion to conduct additional discovery concerning facts in opposition to the insurer's renewed motion for summary judgment.

In granting the insured's motion to discover certain attorney-client communications between the insurer and its outside counsel, the court relied upon *Boone v. Vanliner*, 91 Ohio St. 3d 209, 744 N.E.2d 154 (2001), which established a common law exception to Ohio's attorney-client privilege in cases involving bad faith claim handling allegations against an insurer, allowing discovery of certain attorney-client communications "related to the issue of coverage that were created prior to the denial of coverage." Citing *Boone*, the court held that "any document that [the insurer] identified on its privilege log as including communications with coverage litigation counsel [from the time the claim was tendered until the date of the filing of its declaratory judgment action], and which was previously withheld or redacted as protected by the attorney-client privilege, may be discoverable under *Boone*, and must be produced by the insurer for an *in camera* review." The court also ordered that the insurer produce documents potentially subject to the work product doctrine for an *in camera* review to determine whether each document was prepared in anticipation of litigation, as required by federal rules.

In addition, the court denied the insured's motion to the extent the insured sought deposition testimony from the insurer's outside counsel. The court held that Ohio Revised Code § 2317.02(A) requires that the insured make a *prima facie* showing of bad faith by the insurer before such testimony concerning attorney-client communications will be compelled. The court held, however, that the insured failed to make such a *prima facie* showing of bad faith based on the insured's admission that it "d[id] not know" if the privileged communications sought would reveal evidence of bad faith. In so holding, the court stated that "[a]lthough [the insured's] speculation regarding what it may find related to the claim of bad faith is enough to warrant this Court's review of the previously redacted documents, such speculation is insufficient to override the evidentiary privilege that ordinarily insulates the testimony of attorneys from the discovery process."

The opinion is available here.