



BAD FAITH LAW IN OHIO



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I. BAD FAITH LAW IN OHIO--AN OVERVIEW

There is surprisingly little you really need to know to understand bad faith law in Ohio. First, Ohio does recognize the tort of bad faith. It is a separate tort and is subject to its own four-year statute of limitations. Second, Ohio only recognizes first-party bad faith. Any first-party claim for property, auto, or liability coverage may be subject to bad faith. First-party bad faith claims may, however, be assigned to others under Ohio law. Ohio does not recognize third-party bad faith in any type of claim or coverage dispute. Third, bad faith law in Ohio is strictly a “creature” of common law and is not governed by statute or code. In fact, the Ohio Unfair Claims Practices Act is not even contained in the Ohio Revised Code (O.R.C.), but instead is found in the much weaker Ohio Administrative Code (O.A.C.). There even remains good case law in Ohio stating violation of the Unfair Claims Practices Act of the O.A.C. may not be used in a civil case to support a claim for bad faith. Fourth, even though Ohio adopted damage limitations as part of tort reform in 2005, there is still no case law in Ohio which addresses whether the tort reform damage caps apply to bad faith claims. Without these restrictions, Ohio has unlimited damage exposure for bad faith.

Perhaps more dangerous than Ohio bad faith law, is the issue of lack of attorney/client privilege protection for insurers and their counsel in claims involving bad faith. In 2001, the Ohio Supreme Court decided the case of *Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3^d 209. In that decision, the Court ruled no attorney-client privilege existed between an insurer and its legal counsel when the tort of bad faith was pled. This decision created such rancor it resulted in a statutory overruling of *Boone* by the Ohio General Assembly in S.B. 117 which became law on April 5, 2007. Although not totally doing away with the *Boone* standard, the new law does place a more restrictive standard on when attorney/client privilege is abrogated.

As we will address more fully, Ohio is still a good state for handling of insurance claims, but carriers doing business in Ohio must be mindful of not only Ohio's current climate of bad faith laws and related rulings such as *Boone*, but also historically where Ohio courts have traveled to reach where Ohio insurance law stands today.

II. A BRIEF HISTORY OF OHIO BAD FAITH LAW

The date was December 30, 1994. On the final business day of the year, the Ohio Supreme Court issued a decision which most people in the property and casualty insurance industry viewed as the equivalent of a nuclear explosion.

The case was *Zoppo v. Homestead Insurance Company* (1994), 71 Ohio St. 3^d 552. From the day the *Zoppo* case was decided through now, the concern of the insurance industry relative to this case has been misplaced. In its simplest reading, the *Zoppo* decision can be distilled down to one sentence:

An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor.

Zoppo Syllabus, Paragraph 1

I have had the privilege of representing insurance carriers and their insureds for 25 years. Whether pre or post *Zoppo*, my advice to the carriers I represent has always been the same: "If you do not have reasonable justification to deny a claim, pay your insured!"

To understand Ohio bad faith law, it is important to understand the *Zoppo* decision in light of the history of Ohio bad faith law. This is something which has been overlooked by most insurance professionals in analyzing the *Zoppo* decision. Although the Ohio Supreme Court, as

constituted in the 1990s, issued many very unfavorable rulings to the insurance industry, the *Zoppo* decision was not one of them.

Ohio bad faith insurance law traces back originally to 1949. In *Hart v. Republic Mutual Insurance Company*, 152 Ohio St. 185, the Ohio Supreme Court actually adopted a standard for bad faith based upon a test of reasonable justification. The same test used in *Zoppo*.

From 1949 until 1962, the Ohio Supreme Court did not again address the issue of insurance bad faith. When the Court did address the issue in *Slater v. Motorist Mutual Insurance Company*, 174 Ohio St. 148, the Ohio Supreme Court once again adopted the reasonable justification standard.

For 21 years, the Ohio Supreme Court again left the area of bad faith insurance law alone. In 1983, in *Hoskins v. Aetna Life Insurance Company*, 6 Ohio St. 3^d 272, the Ohio Supreme Court affirmed its prior rulings in *Hart* and *Slater* by once again stating the reasonable justification standard applied to bad faith Ohio law.

In what would be the final pronouncement by the Court on bad faith before the key decision preceding *Zoppo*, the Ohio Supreme Court in 1988 revisited the issue of insurance bad faith in the case of *Staff Builders, Inc. v. Armstrong*, 37 Ohio St. 3^d 298. Compare what the Court said in 1988 to the *Zoppo* decision in 1994:

An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor.

Staff Builders, supra at 303.

The above decision from the *Staff Builders* case should strike you as almost identical to the language in the *Zoppo* decision. If this is the case, then why did the Ohio insurance industry go into a near panic when the *Zoppo* decision was decided in 1994?

The answer to that question is found in a somewhat obscure case decided by the Ohio Supreme Court in 1992. In *Motorist Mutual Insurance Company v. Said*, 63 Ohio St. 3^d 690, the Ohio Supreme Court for the first time in 43 years (going back to the *Hart* case) set forth a different standard than had ever been used before for Ohio bad faith law. In *Said*, the Ohio Supreme Court stated the following:

A cause of action arises for the tort of bad faith when an insurer breaches its duty of good faith by intentionally refusing to satisfy an insured's claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) an intentional failure to determine whether there was any lawful basis for such refusal.

Said, supra, at Paragraph 3 of the syllabus (emphasis added.)

Undoubtedly, the *Said* decision set forth a much more favorable standard for insurance companies in dealing with bad faith claims. In fact, in many respects the Ohio Supreme Court standard set forth in *Said* made it a virtual impossibility for any insured to ever prevail on a bad faith claim. The *Said* standard required, as an initial element, the insured must prove the insurance carrier intentionally acted toward the insured in denying the claim before a bad faith claim could be sustained. Although I sincerely do not believe any insurance company acted with the belief they had "free reign" to wrongfully deny claims to their insureds, nevertheless, the *Said* standard certainly set forth a very pro-insurance viewpoint of bad faith litigation.

What is remarkable, however, is the *Zoppo* case, which was decided two years after *Said*, was not the monumental watershed in Ohio insurance law most insurance companies felt, or claimed, it to be. The actual decision which deviated from 43 years of established Ohio law was not *Zoppo* but the *Said* decision in 1992. For decades, insurance carriers operated in the State of Ohio under the reasonable justification standard. The *Zoppo* decision in 1994, although expressly overruling the *Said* decision from 1992, actually did nothing more than clarify and restore the standard Ohio courts had used for bad faith litigation for more than four decades.

III. OHIO BAD FAITH INSURANCE LAW SINCE *ZOPPO*

Part of the fear of the *Zoppo* decision was the proverbial floodgates would open for bad faith litigation. An analysis of post-*Zoppo* case filings and jury verdicts has proven the *Zoppo* case has had virtually no direct impact on increasing the number of bad faith claims filed, nor is there any evidence jury verdicts have increased following the 1994 ruling.

Since the *Zoppo* decision, there have been few major pronouncements from the Ohio Supreme Court regarding bad faith law. In 1998, the Ohio Supreme Court decided the case of *Wagner v. Midwestern Indemnity Company*, 83 Ohio St. 3^d 287.

The *Wagner* decision did not set forth any groundbreaking changes in Ohio bad faith law.

Although the reasons why the *Wagner* decision may well be incorrect law for the State of Ohio will be addressed in the next section of this material; from a legal standard perspective, the *Wagner* decision, in some respects, was actually favorable to the insurance industry.

In discussing the issue of making a good faith effort to settle a claim, the *Wagner* court adopted the standard originally set forth by the Ohio Supreme Court in *Moskovitz v. Mt. Sinai Medical Center* (1994), 69 Ohio St. 3^d 638. In so doing, the Ohio Supreme Court in *Wagner*

restated the standard: “subjective claims of lack of good faith will generally not be sufficient.” The specific issue being addressed in the *Wagner* case was whether prejudgment interest should be awarded on the insurance claim where a substantial verdict had been returned for punitive damages and bad faith.

In *Wagner*, the Ohio Supreme Court did set forth a very clear standard implying more than just subjective complaints of bad faith must be present to sustain a cause of action against an insurer under the laws of the State of Ohio. If applied correctly, this standard should mean the burden clearly rests with the plaintiff to bring forth evidence demonstrating the insurer did not have reasonable justification to take the action it did leading to denial of the insured’s claim.

In the *Wagner* decision, the Ohio Supreme Court did publicly state for the first time the Court was acknowledging the *Zoppo* decision set forth a lower standard of proof necessary to sustain an action for bad faith. In *Wagner*, the Court specifically noted:

The reasonable justification standard set forth in Zoppo lessened the standard of proof necessary to show that an insurer acted in bad faith, as proof of actual intent was no longer required. ... It is axiomatic that a standard based on intent imposes a higher burden of proof than one based on reasonableness.

Wagner, supra at 290.

Although applying the more lenient standard set forth by *Zoppo*, when read in its entirety, the Ohio Supreme Court in *Wagner* does still clearly set forth the burden rests upon the plaintiff to bring forth evidence of bad faith to sustain a claim under Ohio law.

IV. A VIEW TO THE FUTURE

Without addressing political ideology, the current Ohio Supreme Court is generally viewed as much more conservative than the Court members who were in the majority on the *Zoppo* and *Wagner* cases. Nevertheless, the more conservative justices who now constitute the majority of the Ohio Supreme Court are, by their very nature, more inclined to view legal issues conservatively, and most conservative judges are strong believers in the legal concept of *stare decisis*. Under this doctrine, it is generally held once a court issues a decision on a point of law, that decision remains valid law and will not be overturned.

As such, it is doubtful the current members of the Ohio Supreme Court would view favorably overturning the prior decisions lawfully issued by the Ohio Supreme Court in *Zoppo* and *Wagner* merely because they may have a different judicial philosophy or ideology regarding Ohio insurance law.

There is a strong probability the *Zoppo* and *Wagner* standards will be with us for many decades to come. Insurance companies and insurance professionals, therefore, must know these rulings and make certain at all times any decision to deny a claim meets the correct legal standard of reasonable justification set forth by the Ohio Supreme Court.

V. ANALYSIS OF THE ZOPPO AND WAGNER CLAIMS

A. Zoppo.

Neither the *Zoppo* nor the *Wagner* case would have reached the Ohio Supreme Court had not issues arisen which led an initial jury to rule in favor of finding bad faith, punitive damages, and extra-contractual liability on the part of Homestead Insurance in *Zoppo* and Midwestern Indemnity in *Wagner*. Although there is no such thing as the “perfect” insurance claim, there is

certainly information to learn regarding Ohio bad faith law from analyzing these two important cases.

The facts of the *Zoppo* case are relatively straightforward and simple. On the morning of October 13, 1988, a bar and restaurant owned by Donald Zoppo was destroyed by fire. There was no doubt the fire was an arson and accelerants were clearly found.

Homestead Insurance provided coverage for the business in the amounts of Fifty Thousand Dollars for the structure and Sixty-Five Thousand Dollars for contents.

In a relatively timely manner, Homestead denied the claim stating, upon their investigation, they believed Mr. Zoppo intentionally set the fire. In part, Homestead based the denial on the fact Mr. Zoppo, they claimed, made material misrepresentations regarding his whereabouts on the night of the fire.

At trial the jury did not agree with Homestead. The jury returned its verdict in favor of Mr. Zoppo awarding him Eighty Thousand Dollars on the breach of contract claim, and One Hundred Eighty-Seven Thousand Eight Hundred Dollars on the bad faith claim. Under then existing Ohio law, the jury also found in favor of Mr. Zoppo for punitive damages, and the trial court judge set the amount of punitive damages at Fifty Thousand Dollars.

The arguments advanced by Homestead at the trial were Mr. Zoppo predominantly had a motive of financial gain for having burned the bar. Homestead agreed to insure the bar for Fifty Thousand Dollars and collected a premium from Mr. Zoppo based upon that amount of value. Homestead tried to argue unsuccessfully to the jury, however, Mr. Zoppo purchased the bar for only Ten Thousand Dollars six months prior to the fire. The jury also heard evidence Homestead had in its file an underwriting report which valued the building at a market value of Ninety-Five Thousand Seven Hundred Ninety-Eight Dollars!

One of the first lessons to be learned from the *Zoppo* case is arguments involving over insurance of a structure can be very difficult to win. Key arguments which always have great appeal to a jury are the fact the insurance carrier agreed to the amount stated in the policy and charged the insured the premium based upon that amount. Although there may be cases where over-insurance of a property is a crucial, and determinative, issue in the case, one of the key lessons to learn from the *Zoppo* decision is these type of arguments generally have very little jury appeal.

Although Homestead claimed Mr. Zoppo had a financial motive for causing the fire, the evidence presented at the trial also showed Mr. Zoppo actually expended quite a bit of money making improvements to the bar prior to the fire. Mr. Zoppo's attorney was able to successfully argue to the jury prior to him being denied coverage by Homestead, Mr. Zoppo actually objected to the decision of his insurance carrier to demolish the building as a total loss as he wanted to rebuild on the site and continue the business as a bar and restaurant. The cumulative affect of this evidence led the jury to believe Mr. Zoppo did not have a financial motive to have burned the business.

The real problem Homestead created for itself, however, was the lack of focus in the investigation on any potential suspect other than Mr. Zoppo.

From the initial reporting of the claim, Mr. Zoppo told Homestead he was hunting in Pennsylvania at the time the fire occurred. The evidence showed, however, Homestead never followed up to verify Mr. Zoppo's whereabouts, and never presented any evidence of Mr. Zoppo not being in Pennsylvania or retaining any third party to set the fire on his behalf. In short, Homestead was not able to provide any evidence at the trial to contradict Mr. Zoppo's alibi.

Perhaps the most damaging evidence to Homestead's denial was the fact several individuals who had previously been ousted from the bar by Mr. Zoppo only weeks prior to the fire had threatened to burn down the bar. Compounding matters further was the fact there was a previous attempt to actually set the bar on fire, which resulted in only very minor damage.

Two of the men Mr. Zoppo had thrown out of the bar bragged after the first fire, and before the second fire, they were responsible for the attempted fire and one witness even testified one of the two individuals thrown out of the bar stated "he would be back to finish the job." Additional evidence was presented at the trial that after the second fire, one of the men ousted from the bar by Mr. Zoppo told a group of patrons at another bar he was responsible for having set the fire which destroyed the Zoppo property.

Homestead, at trial, presented no evidence to refute any of this information and, in fact, their investigator conceded the primary focus of the investigation from the start was centered upon Mr. Zoppo solely. One of the most crucial lessons to learn from this aspect of the case is all evidence must be considered and all reasonable leads should be pursued. A thorough investigation should not be an attempt to prove the insured was at fault, but instead to exonerate the insured. These are crucial aspects of any investigation which, at least according to the evidence presented at trial, Homestead failed to follow in the *Zoppo* case.

Finally, Homestead also overlooked the fact from the evidence at the fire scene it appeared prior to the fire being set there had been a robbery and clear evidence of forced entry into the building. Although in and of itself such findings may not fully exonerate the insured from playing a role in the loss, apparently Homestead failed to take this evidence into account in any respect, and ultimately this evidence was crucial to the jury in deciding either a random

criminal act occurred, or the individuals who had been previously thrown out of the bar returned and set the fire as they threatened to do.

Although it is always fraught with peril to be critical of an investigation in which you are not involved, based upon the reviews which have been written about the *Zoppo* investigation since this case was decided by the Ohio Supreme Court, it does appear Homestead made rather serious errors in focusing the investigation upon Mr. Zoppo and refusing to consider evidence which not only may well have exonerated Mr. Zoppo, but could reasonably have led them to conclude, and even identify, the specific individuals responsible for the arson fire.

The lesson to learn from the *Zoppo* case is the standard to be utilized in claims investigations and to conduct a complete and thorough investigation of the claim, considering all of the evidence in the totality of the investigation. Put simply, the goal of any insurance investigation should be to reach the correct decision regarding the claim whether that decision means the claim is paid or denied.

B. Wagner.

In contrast to the *Zoppo* case, the *Wagner* loss presents a much different set of facts. In *Wagner*, the husband and wife owned a grocery store. On the evening of August 27, 1991, Mr. Wagner waited until all of the other employees left the store and then decided to spray two cans of insecticide throughout the property. After finishing doing this he set the store alarm, locked the door, and within 10 minutes the fire alarm was received. In fact, Mr. Wagner had not even reached his home when the fire was reported.

The initial investigation of the fire was done by the local Fostoria Fire Department and the cause was listed as undetermined. Within a month, Midwestern Indemnity investigated the

fire and concluded it was incendiary. After receipt of the origin and cause report secured by the insurance company, the local Fostoria Fire Department reclassified the fire as an arson.

What is crucial in this phase of the analysis of the facts of the *Wagner* claim, is by November 1991, Mr. Wagner filed his proof of loss well within the time period specified within the policy. The decision, however, by Midwestern Indemnity to deny the claim did not come until nine and one-half months later.

At trial of the case, the jury awarded Mr. Wagner Five Hundred Thousand Dollars for breach of contract and One Million Dollars for bad faith. The jury also awarded Mrs. Wagner Five Hundred Thousand Dollars for breach of contract and Three Hundred Thousand Dollars for bad faith. In addition to these substantial awards, the jury awarded Mr. and Mrs. Wagner punitive damages in the amount of Eight Hundred Thousand Dollars and also awarded the Wagners attorneys' fees and pre-judgment interest.

There is one bright spot in the decision issued by the Ohio Supreme Court in *Wagner* for the insurance industry. As you will note from the above jury award, separate awards for breach of contract were awarded to Mr. and Mrs. Wagner. Although Midwestern did not prevail on the issue of establishing Mr. Wagner had intentionally set the fire, the Ohio Supreme Court did review the issue of the innocent spouse rule under Ohio law in determining whether Mrs. Wagner had any entitlement to coverage under the policy if it were found her husband intentionally set the fire.

The Ohio Supreme Court in *Wagner* stated the following regarding the innocent spouse rule:

Traditionally, older cases automatically denied an innocent spouse the right to recover under an insurance policy if the other spouse had committed

misconduct.... However, modern cases have properly rejected this reasoning and instead have adopted an approach based on contract principles to determine whether the parties intended joint or several coverage.

Wagner, supra, at 291

After analyzing the wording in the Midwestern Indemnity policy, the Ohio Supreme Court majority went on to state:

We find that the contract language clearly and ambiguously contemplated Ruth and Verlin Wagner were jointly covered under the insurance policy and, therefore, she was not entitled to a separate recovery.... Accordingly, we affirm the judgment of the court of appeals and hold that Ruth Wagner was not entitled to a directed verdict as an innocent spouse.

Wagner, supra, at 291.

In many respects, the real import of the *Wagner* decision, since it did not set forth any new legal standard differing from the *Zoppo* case, rests in the Court's ruling regarding the innocent spouse rule and how it is applied by Ohio courts. This is still good law in Ohio, and the issue of whether, or not, an innocent spouse is owed under the policy is now derived clearly from the wording of the policy language.

Unfortunately, however, the Ohio Supreme Court was not nearly so clear, nor favorable, in addressing whether, or not, Midwestern Indemnity did have reasonable justification (the *Zoppo* standard) for denying Mr. Wagner's claim. In the majority opinion, the Court noted the following relative to the evidence of bad faith:

Clearly, the record in this case demonstrates the Wagners presented sufficient evidence to create a jury question on the issue of bad faith. For instance, the

evidence reveals that Mr. Wagner was cooperative and candid during the investigation of the claim, and there is no evidence that he was ever officially questioned or charged with arson. There was also expert testimony from which the jury could conclude that the fire could have been accidentally caused by an electrical spark that ignited the insecticide vapor. Finally, the jury could reasonably have found bad faith from the fact Midwestern waited nearly a full year after its physical investigation had been completed before refusing the claim.

Wagner, supra, at 294.

Although I personally do agree with the Ohio Supreme Court regarding the delay of nine and one-half months being in all probability unreasonable to deny the claim, I do take grave exception with the Court setting forth in any decision from the Ohio Supreme Court the mere fact an insured appeared to be cooperative and candid, or was not officially charged with arson, is sufficient to establish there is no reasonable justification to deny the claim! Furthermore, the mere fact two experts may disagree regarding the cause of the fire should also not be a sufficient basis for an insurer to be found liable for bad faith in the claim investigation process. This is especially true where, in most situations, the insured will not even have an origin and cause expert until litigation is filed after the claim has been denied.

Of great concern to any insurance carrier should be the very cavalier way the majority of the Ohio Supreme Court in *Wagner* ignored their own ruling in *Zoppo* concerning the requirement of the plaintiff to bring forth evidence to support the bad faith claim by showing the insurance carrier lacked reasonable justification for the denial decision.

Not surprisingly, there was a vigorous dissent written in the *Wagner* decision by then Justice Cook which was joined in by Chief Justice Moyer and Justice Stratton. Although these

justices formed only a minority opinion of the Court at that time, consider the following un-refuted evidence before the Court and then decide whether Midwestern had reasonable justification to deny the Wagners' claim:

At trial, Midwestern provided evidence that at the time it rejected the claim it was in possession of information tending to demonstrate that the fire at the Wagners' store had been set deliberately, and that Mr. Wagner possessed both the means and the motive to set the fire. Two separate report--one by an independent consulting firm and another by the Fostoria Fire Department--stated that the fire had been incendiary in nature. There were no signs of a forced entry into the store. And, by his own account, Mr. Wagner locked the store up only minutes before the fire alarm sounded.

Furthermore, Mr. Wagner had serious financial difficulties. He had filed for bankruptcy, failed to pay payroll taxes for the previous year, and owed over One Hundred Thousand Dollars in federal income taxes. Moreover, sales had been declining steadily at the Wagners' store over the last five years and, over the last two to three years, the Wagners had unsuccessfully attempted to sell their business.

Finally, Mr. Wagner twice misrepresented to a Midwestern investigator that he was current on this bills and denied that he was involved in a civil action despite his pending bankruptcy petition. ...

... The Wagners' expert opined that the fire was caused accidentally and that the source of ignition was an electrical spark that reacted with bug spray vapors to cause an explosion. He also testified, however, that his theory of causation

involved a rare phenomenon that is not generally known in fire department circles.

Wagner, supra, at 296 and 297.

I can see no basis under Ohio law where, using the reasonable justification standard, Midwestern Indemnity did not have reasonable justification to deny the Wagners' claim. Nevertheless, this argument fell on deaf ears with the then majority of the Ohio Supreme Court which ostensibly was the same Court which had annunciated the reasonable justification standard in *Zoppo* and affirmed that standard again in the *Wagner* decision. Fortunately, the composition of the Ohio Supreme Court has changed dramatically since the *Wagner* decision in 1998, and I believe it is safe to say the majority of the courts in the State of Ohio, when applying the *Zoppo* and *Wagner* standards, would view the totality of the evidence presented in the *Wagner* case as sufficient for granting of a summary judgment in favor of the insurance carrier on the bad faith claims as presented.

I cannot stress enough, however, the importance of the issue of delay in the claim decision process in the *Wagner* case and in cases continuing to this day. Ohio law does not differ from virtually any other state which requires the insurance carrier to conduct a complete, thorough, independent, and timely investigation of the claim. Unless you can document where the delay is due solely to the lack of action, or refusal to assist in the investigation, by the insured, claims investigations must move forward promptly and a final decision made to reject or pay the claim. You should strive to make a decision no more than six months from the date of the loss occurring.

VI. PERHAPS THE WORST DECISION IN THE OHIO SUPREME COURT'S ENTIRE HISTORY!

Although following *Zoppo* and *Wagner* the Ohio Supreme Court has not issued any new major pronouncements on the legal standards for bad faith, this does not mean the Court has been entirely silent on the issue of bad faith litigation.

In *Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3^d 209, the Ohio Supreme Court singled out insurance companies and denied insurance carriers the right to the privilege of attorney/client confidentiality of communications, which is literally enjoyed by virtually every other business entity and individual in this state. In announcing its decision, the then majority of the Ohio Supreme Court stated in the syllabus opinion as follows:

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.

This unfortunate decision opened the floodgate for disgruntled insureds to simply allege bad faith (with no requirement for any underlying proof) and then request all communications between the insurance carrier and its legal counsel prior to the date of denial of the claim. There is no precedent in Ohio law for any type of similar discovery of attorney/client communications absent evidence showing criminal fraud being present, and even in those cases the party seeking discovery of the materials must bring forth some evidence to show *prima facie* evidence of fraud exists before the attorney/client privilege can be violated. The Ohio Supreme Court saw fit to deny such protections to insurance companies and removed any burden on the plaintiff to have to set forth any evidence other than the mere allegation bad faith has occurred.

The Ohio Supreme Court began its analysis in *Boone* by citing cases from the United States Supreme Court where the attorney/client privilege has been recognized for decades. In *Boone*, the Ohio Supreme Court even states:

The attorney/client privilege exempts from the discovery process certain communications between attorneys and their clients. The privilege has long been recognized by the courts...and “its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interest in the observance of law and administration of justice.”

Boone, supra, at 210.

Notwithstanding of this lofty pronouncement, the Ohio Supreme Court then went on to deny insurance carriers these same rights.

To support its decision, the Court cited its prior ruling in *Moskovitz v. Mt. Sinai Medical Center* (1994) 69 Ohio St. 3^d 638 stating:

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.

Moskovitz, supra, at 661 and *Boone, supra*, at 212.

Although any seasoned claim professional or attorney will tell you every claim where coverage is denied is likely to lead to the filing of litigation, this argument fell on deaf ears with the then-majority on the Ohio Supreme Court:

...We hold that 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. At 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.

Boone, supra, 213 and 214.

Apparently, in the view of the then majority of the Ohio Supreme Court, an insurance carrier never considers the anticipated risk of litigation until after it makes the decision to deny the claim!

The reaction to the *Boone* decision was swift and far-reaching. Even more liberal plaintiff-oriented attorneys and trial judges recognized taking away the long recognized right of attorney-client privilege to one selected business appeared to be going into very dangerous areas of deciding who has the right to protected legal counsel advice. By 2006, the Ohio General Assembly rose to act. Ohio S.B. 217 became law on April 5, 2007, and overruled *Boone* by changing Ohio Revised Code 2317.02 to provide:

The following persons shall not testify in certain respects:

(2) 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 prima facie showing of bad faith, fraud or criminal misconduct by the client.

The effect of S.B. 217 does not eliminate the risk of attorney-client privileged communications, and even attorney testimony, being discoverable in a bad faith claim, however, it does place much more restriction on when such discovery may occur. These additional safeguards include requiring the plaintiff to establish a *prima facie* case of bad faith without having access to the documents or testimony and the court must even then first conduct an *in camera* inspection of the documents before any discovery is permitted.

One significant case, since S.B. 217, is *Goodrich Corp. v. Commercial Union Ins. Co.*, 2008-Ohio-3200 (Ohio App. 9th Dist.; June 30, 2008), which held the insured may not use *Boone* or the amended statute to obtain work product or materials outside of the insurer's own claim file.

When handling any type of first-party claims in Ohio, every insurer and their legal counsel must be aware of and at all times consider the ramifications of *Boone* and S.B. 217 on any claim investigation and all attorney-client communications.

VII. BEYOND *BOONE V. VANLINER*, HANDLING BAD FAITH LITIGATION IN OHIO--BIFURCATION AND PUNITIVE DAMAGE CAPS

The 2001 ruling by the Ohio Supreme Court in *Boone* has been the Court's last pronouncement in any respect concerning bad faith or the production of documents by an insurance carrier in an action alleging bad faith. There are a number of cases currently pending throughout the State of Ohio which may reach the Ohio Supreme Court and give the newly constituted Court the opportunity to again revisit the issue of bad faith law. Rather than speculate on those decisions, however, the important thing is to know how to utilize these decisions to best represent your company when you are faced with a bad faith allegation.

Perhaps because the then majority of the Ohio Supreme Court knew the devastating implications of the *Boone* decision, Justice Douglas, who authored the opinion, did make the following rather cryptic comment in the majority opinion:

Of course, if the trial court finds that the release of this information will inhibit the insurer's ability to defend on the underlying claim, it may issue a stay of the bad faith claim and related production of discovery pending the outcome of the underlying claim.

Boone, supra, at 214.

Although *Boone* was decided in April 2001, it took until November 7, 2003, for a reported decision to occur in Ohio addressing the rights of an insurance carrier when it tries to defend its denial of a claim while simultaneously being forced under the *Boone* decision to turn over the entirety of its attorney/client work product.

In the case of *Garg v. State Automobile Mutual Insurance Company* (2003), 155 Ohio App. 3^d 258, the Court of Appeals of Ohio, Second Appellate District, decided the case which is now most frequently cited by insurance carriers throughout Ohio to request bifurcation of the bad faith claims until the breach of contract claim has been tried.

In the *Garg* case, the facts center upon a warehouse fire where the claim was denied by Grange Insurance which, notwithstanding the caption of the case, was the insurer predominantly responsible for the investigation of the arson fire.

A lawsuit was then filed by Dr. and Mrs. Garg against Grange. Citing the *Boone* case, the plaintiffs sought discovery of all Grange's claim file, including documents normally protected by the attorney/client privilege. Grange opposed the motion and requested the Court to bifurcate the breach of contract and bad faith claims and stay all discovery on the bad faith claim

until resolution of the underlying breach of contract claim could occur by way of settlement or trial.

After addressing the fact the appellate court and trial court are duty bound to follow the decision of the Ohio Supreme Court in *Boone v. Vanliner*, the Court of Appeals put in place a mechanism to protect the insurer as referenced by Justice Douglas in the *Boone* decision. In ruling in favor of Grange, the Second District Court of Appeals stated:

We agree with Grange that the trial court's failure to bifurcate the bad faith claim for trial and to stay discovery on that claim would be grossly prejudicial to Grange and, thus, an abuse of discretion. The Gargs are not entitled to discover Grange's attorney/client communications and attorney work product materials for purposes of their breach of contract and unfair claims practices claims.... To require Grange to divulge its otherwise privileged information prior to a resolution of those other claims would unquestionably impact Grange's ability to defend against them.

Garg, supra, at 266 and 267.

The *Garg* decision remained the primary “remedy” for insurers before Ohio adopted tort reform in 2005. Among the many provisions of Ohio S.B. 80 is an amendment to O.R.C. 2315.21(B) to mandate bifurcation of jury trials involving claims for punitive damages. Interestingly, this provision has been interpreted to include claims for bad faith damages, thereby giving every insurer the right to petition the court for automatic bifurcation of all punitive damage claims. The effect of this is to normally stay all discovery (this remains within the discretion of the court) and jury trial on the bad faith claims until there has been an adverse

finding against the insurer concerning the assertion of breach of the insurance contract. As amended O.R.C. 2315.21(B) now states:

(B)(1) In a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated as follows:

(a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(b) If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the second stage of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

In the spirit, however, of be careful what you wish for because you may get it, our firm has refrained from automatically availing carriers to this “quick fix” provision, favoring instead a

more global view of defense of both the contract and tort claims. Bifurcation of a bad faith claim does not eliminate the issue either in the case or for purposes of any mediation or settlement negotiations. The proverbial bad faith “axe” is still hanging over the case and the carrier.

For this reason, and assuming a thorough and complete investigation was done, we often prefer conducting brief initial discovery and then very quickly at the start of the case moving the court for partial summary judgment on the bad faith claims. If granted, this leaves only the breach of contact claim(s) remaining, thereby limiting the maximum exposure to the insurer to the amount of the claim and taking away the “chance” of a big bad faith verdict for the insured and their attorney.

One of the other elements addressed by the Ohio General Assembly in the 2005 Tort Reform Act is the cap on punitive damages. Under Ohio’s now-reformed tort statute, the maximum recovery for punitive damages is governed by O.R.C. 2315.21(D) which provides:

(D)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.

(2) Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary damages in a tort action:

(a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.

Although tort reform was adopted in Ohio in 2005, there is still no court decision which directly addresses whether Ohio’s punitive damage caps applies to bad faith claims. Our firm

has taken the position, by its very nature, the tort of bad faith is punitive in nature and since the damages awarded for bad faith are beyond the contracted for limits, the only reasonable conclusion is bad faith equals punitive damages and the tort reform limits should apply. We anticipate in the next few years Ohio courts will be compelled to address this issue in a direct and clear manner, however, to date no such decision exists.

In the final analysis, it is highly questionable whether the *Boone* case, the limiting of that decision by S.B. 217, or even Ohio's Tort Reform Act, actually benefits anyone, including the allegedly aggrieved insured. If, ultimately, the effect is to stay the claims for bad faith and bifurcate the case into two separate trials, it hardly seems this is an efficient or cost-effective way for either the plaintiff or defendant to litigate an insurance claim in court. Nevertheless, under the current Ohio legal standards, there are few other options available to an insurance carrier to fully and completely protect itself when allegations of bad faith are being asserted.

VIII. CONCLUSION

The purpose of this summary is to acquaint you with the historical perspectives of Ohio bad faith insurance law and provide you with a greater insight into the crucial decisions which have effected Ohio bad faith litigation over the past decades.

It is my hope, in presenting these cases in their historical context in a sequential order, you will gain a greater insight not only into how the Ohio Supreme Court has viewed bad faith claims in this state, but also how to effectively make certain you and your company do not find yourself unnecessarily embroiled in a bad faith lawsuit.

Remember, the best way to avoid bad faith is to make certain a thorough and impartial investigation of the claim is undertaken. Where reasonable doubts arise, those doubts should be

resolved in favor of finding coverage for the insured. This does not mean, however, your company is obligated to find coverage based upon unreasonable or unrealistic evaluations of what might, or could, have occurred giving rise to the insurance claim. Rather, the standard you should use is exactly the standard espoused by the Ohio Supreme Court in *Zoppo*. Consider all of the evidence and only deny the claim when you are absolutely convinced your company does have reasonable justification to do so.

If you adhere to these simple standards and are always guided by the principle a thorough and complete investigation should lead you to making the correct decision concerning the claim, you will be guided well to handle insurance claims and avoid bad faith liability for many years to come.

Supplemental Ohio Court of Appeals Bad Faith Cases

Cawrse v. Allstate Ins. Co., 2009-Ohio-2843 (1st District)

Burden of Proof

Plaintiff sued Allstate for breach of contract and bad faith for failing to pay for an auto repair. Plaintiff claimed his estranged daughter vandalized and caused damage to his vehicle when he lent it to her. The trial court found the insurer never investigated the reported vandalism, and therefore held in favor of the insured, awarding him damages. The appellate court reversed on the testimony of Allstate's mechanical expert who determined the damage was not collision related. As such, Allstate denied coverage on this basis, and did not have a good faith duty to "investigate" the vandalism claim any further.

Arp v. American Family Ins. Co., 2010-Ohio-2250 (6th District)

Time Period for Suit Against Insurer Waived by Insurer

The insured (Arp) suffered a house fire and made a claim to his insurance company for the loss. The insurance company denied coverage because it claimed the insured did not provide enough documentation for the loss. After the case was dismissed, the insured filed another suit for breach of contract and bad faith. The insurance company filed a motion for summary judgment seeking dismissal of both claims on the basis the second suit was filed outside the contractual limitations specified in the policy. The trial court sustained the motion and Arp appealed.

The appellate court reversed, holding Arp was not precluded from filing his claim by the contractual limitation because the company never denied his claim but continually insisted that additional documentation was necessary to support his claim. The court concluded Arp held out a reasonable hope of adjustment following the company's recognition of his claim, which caused him not to file the suit until after the one-year period. The breach of contract and the bad faith claims were remanded for further proceedings.

Dominish v. Nationwide Insurance, 2010-Ohio-3048 (11th District)

Policy Limitation Provision was Ambiguous

A thunderstorm caused a tree to fall onto the plaintiff's home and damage his roof, attic, and interior. His homeowner's insurance policy contained a "one year from the date of loss limitation of action" clause. After a series of failed communications, the plaintiff waited until two years after the date of loss to file suit against the insurer. The trial court granted summary judgment for Nationwide reasoning the limitation provision was not ambiguous and thus barred the claim.

The appellate court reversed. The court found the language contained in the clause, "any action must be started" was ambiguous because the policyholder could interpret it to mean the initial claim must be presented in one year and did not require a lawsuit to be filed. Further, "action" was undefined in the policy and there was a factual dispute whether the insurer informed plaintiff that he had only a year to file his lawsuit. Finally, the insurer waived the limitation of action provision because it sent the plaintiff a letter stating it would reconsider the payment decision outside the one year limitations period.