In Ohio, the law generally prohibits an attorney from testifying about a communication made to the attorney by a client or about the attorney’s advice to a client unless the client affirmatively waives this privilege. However, the Ohio Legislature recently passed Senate Bill 117 which creates an exception to this privilege in bad faith litigation. This new legislation became effective on April 6, 2007.

Prior to SB 117, the discoverability of attorney-client communications in the bad faith arena was governed by the Ohio Supreme Court’s decision in Boone v. Vanliner (2001), 91 Ohio St. 3d 209. Under Boone and its progeny, claimants are entitled to claim file materials containing attorney client communications related to the issue of coverage that were created prior to the denial of coverage. Boone, at syllabus.

SB 117 modifies this holding by amending Ohio’s Revised Code to waive the attorney-client privilege for communications related to an attorney’s “aiding or furthering an ongoing or future commission of bad faith by a client that is an insurance company.”

As a practical matter, the passage of SB 117 raises several questions regarding whether or not SB 117 limits or expands the holding in Boone. In reality, it does both.

First, while SB 117 is to be applied prospectively (or on a going forward basis) there is no language in the statute itself to suggest whether or not this new waiver of the attorney-client privilege is to be applied to lawsuits filed after its enactment, or to communications occurring after the enactment. Insurers and their attorneys should argue SB 117 can only apply to actual communications occurring after the effective date of the statute. However, those seeking discovery in bad faith actions will likely argue that the law should be applied to bad faith lawsuits filed after the effective date of the statute regardless of when the communications occurred.

SB 117 also contemplates a broader scope of discovery than that articulated by the Boone Court. As noted above, Boone allows for the discovery of a pre-declination claims file. SB 117 contains no such limitations and arguably could expand the scope of discovery to include post-declination communications.

The good news is that under SB 117, claimants cannot gain access to privileged communications unless they can make a prima facie showing of “bad faith, fraud, or criminal misconduct by the client.” R.C. § 2317.02(A)(2). Stated differently, claimants must now offer actual evidence to support their allegations of bad faith before seeking privileged communications. This more stringent requirement imposes a greater burden on the party seeking waiver than the Boone standard which required nothing more than the mere allegation of bad faith to render claims material discoverable.

In Ohio, an insurer can exhibit bad faith in a variety of ways, including refusing to pay a claim without “reasonable justification,” delaying the processing of a claim, making an unreasonably low settlement offer, and exhibiting foot-dragging in the claims handling and evaluation process. With the passage of SB 117, a claimant who can make a prima facie showing of any of this type of conduct can now seek discovery of previously privileged attorney-client communications between the insurance company and its attorneys.

While practitioners and insurers are left to speculate as to exactly how the provisions of SB 117 will be put into practice, one fact remains certain - the nature of bad faith discovery in Ohio is about to change. Now, more than ever, insurers must be cognizant of the fact that they no longer enjoy the full protection of the attorney-client privilege in this State. Both practitioners and their insurance company clients must avoid even the appearance of bad faith in the claims adjusting process as well as address bad faith claims proactively at the very early stages of litigation in order to avoid this new statutory waiver of the attorney-client privilege.

If you have questions about Senate Bill 117 or its application to a particular case or claim, feel free to contact any of our Insurance Coverage/Bad Faith attorneys, who will be glad to insist you.