Is the Denial of a Request for Stay of Bad Faith-Related Discovery a Final, Appealable Order?

Colleen A. Mountcastle, Esq.
Gallagher Sharp, LLP

In *Boone v. Vanliner Ins. Co.,* 91 Ohio St.3d 209, 2001-Ohio-27, 744 N.E.2d 154 (2001), the Supreme Court of Ohio held that in an action alleging bad faith denial of insurance coverage an 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. Importantly, the Court cautioned that "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." Unfortunately the Court did not address what happens when a court does not stay bad faith discovery and this has led to a lack of consistency from Ohio's appellate courts on the issue of whether the denial of a request for stay of discovery related to a bad faith claim while a coverage claim is still pending is a final, appealable order.

As discussed below, the Eighth Appellate District has determined that the denial of a request for stay of discovery on a bad faith claim while a coverage claim remains pending is a final appealable order. However other post-*Boone* decisions from the Fourth and Eleventh Appellate Districts have caused confusion over whether an insurer can immediately appeal from such an order. This article discusses the competing appellate decisions on this issue and highlights the lack of a definitive answer to this question and the need for clarity from the Supreme Court of Ohio on this topic.

Denial of a request for stay of discovery on a bad faith claim is a final appealable order in the Eighth District under Devito v. Grange Mut. Cas. Co.

In *Devito v. Grange Mut. Cas. Co.,* 8th Dist. Cuyahoga No. 99393, 2013-Ohio-3435, the plaintiff filed breach of contract and bad faith claims against her insurance companies after denial of coverage for property damage to her home. The insurance companies filed a motion to bifurcate the bad faith claim from the contract claim, and moved to stay discovery of the insurers' claim files until after the coverage claim was resolved. The trial court granted the motion to bifurcate but denied the motion to stay the discovery relating to the bad faith claim. The trial court ordered the trial of the bad faith claim to commence immediately upon conclusion of the trial of the breach of contract claim and ordered discovery to proceed on all issues.

On appeal, the Eighth Appellate District found that an order denying a stay of discovery with regard to attorney-client communications or work-product documents relating to a bad-faith denial-of-coverage claim meets the requirements of R.C. 2505.02(B)(4). The Eighth District mandated a stay of discovery for the bad faith claim until after resolution of the coverage claim. *Devito* reasoned that the risk of prejudice to the defendant insurance company is too great to allow a plaintiff to discover the contents of the insurance claim file before the trial on the coverage claim.

A denial of a request for stay of discovery on a bad faith claim must expressly require the disclosure of attorney-client privileged and work product to be a final appealable order in the Fourth and Eleventh Districts

Devito recognized that that the breach of contract and bad faith claims were interrelated and that allowing discovery to proceed on the bad faith claim would be prejudicial to the insurer's defense of the coverage claim. *Devito* did not require any specificity as to what was required to be produced in the bad faith discovery requests before reaching this conclusion, it simply recognized that the insurer's claims file would include attorney-client privileged communications and work product.

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However, the Fourth and Eleventh Appellate Districts have recently issued decisions finding that when a trial court denies a requested stay of discovery related to a bad faith claim, such an order is not final and appealable unless there is evidence that the requested discovery and/or discovery order *expressly* requires disclosure of an insurer's privileged attorney-client materials and attorney work product relevant to the bad faith claim.

In *Branche v. Motorists Mut. Ins. Co.,* 11th Dist. Lake No. 2014-L-004, 2016-Ohio-3238, decided on May 31, 2016, the insurance company filed a motion to stay and bifurcate the bad faith claim and sought a motion for protective order as to certain discovery requests that sought attorney-client and work product information. The trial court denied the motions to bifurcate and stay discovery, but did not rule on the motion for protective order. On appeal the insurer argued that the denial order was immediately appealable because it "allowed discovery to proceed on plaintiff's bad faith claim over objections of privilege and attorney work-product protection." The Eleventh Appellate District disagreed and dismissed the appeal. The appellate court explained that the trial court's order did not rule on the claims of privilege and work product protection nor did it compel discovery. Rather, the trial court "merely ruled that discovery on the 'bad faith' claim would not be stayed pending the outcome of the breach of contract claim." The appellate court noted that the motion for protective order regarding certain discovery requests remained pending.

In *Nationwide Mut. Fire Ins. Co. v. Jones,* 4th Dist. Scioto No. 15CA3709, 2016-Ohio-513, decided on February 9, 2016, the trial court ordered bifurcation of declaratory judgment/contract claims from bad faith/punitive damages claims, but denied the request for a stay of bad faith-related discovery. On appeal, the insurance company argued that the order denying its motion for a stay of discovery was a final, appealable order. The Fourth Appellate District agreed. The appellate court noted that the trial court's order did not merely allow for the parties to engage in discovery on the bad faith claim, rather it expressly provided for discovery of privileged attorney-client materials, the deposition of the insurance company's trial counsel, and the discovery of attorney work product relevant to the bad faith claim, all prior to the initial stage of trial on the issue of compensatory damages. Citing *DeVito,* the Fourth Appellate District determined that the trial court's order denying the stay of discovery of the insurer's privileged communications and work product was a final, appealable order.

Conclusion

A denial of a request for a stay of discovery relating to a bad faith claim while the coverage claim remains pending meets the criteria under R.C. 2505.02(B)(4)(a) and (b) and should be subject to immediate appellate review. However, this issue is currently unresolved. Until the Supreme Court of Ohio addresses this issue, it is good practice to immediately appeal from an order denying a stay of bad faith discovery because the practical effect of such an order is to require disclosure of the insurer's claims file which most likely contains privileged information. Nonetheless, to be deemed a final appealable order, a trial court's order may have to *expressly* require discovery of privileged attorney-client materials and attorney work product relevant to the bad faith claim or even specifically identify the privileged information and documents to be produced before some appellate courts will deem such an order to be final and appealable.

Colleen Mountcastle is a Partner in Gallagher Sharp's Appellate, Mass Torts and Transportation Practice Groups. She is certified as an Appellate Law Specialist by the Ohio State Bar Association. In her appellate practice, she represents clients in original, post-trial and appellate proceedings in the Supreme Courts of the United States, Michigan and Ohio. She also defends railroad companies, manufacturers and suppliers in cases involving personal injury, wrongful death, occupational injury and product liability. Colleen is a graduate of Case Western Reserve University School of Law. She is a life member of the Judicial Conference of the Eighth Appellate District, and a former chair of the Ohio State Bar Association's Appellate Committee. She is a frequent author and presenter on appellate law.