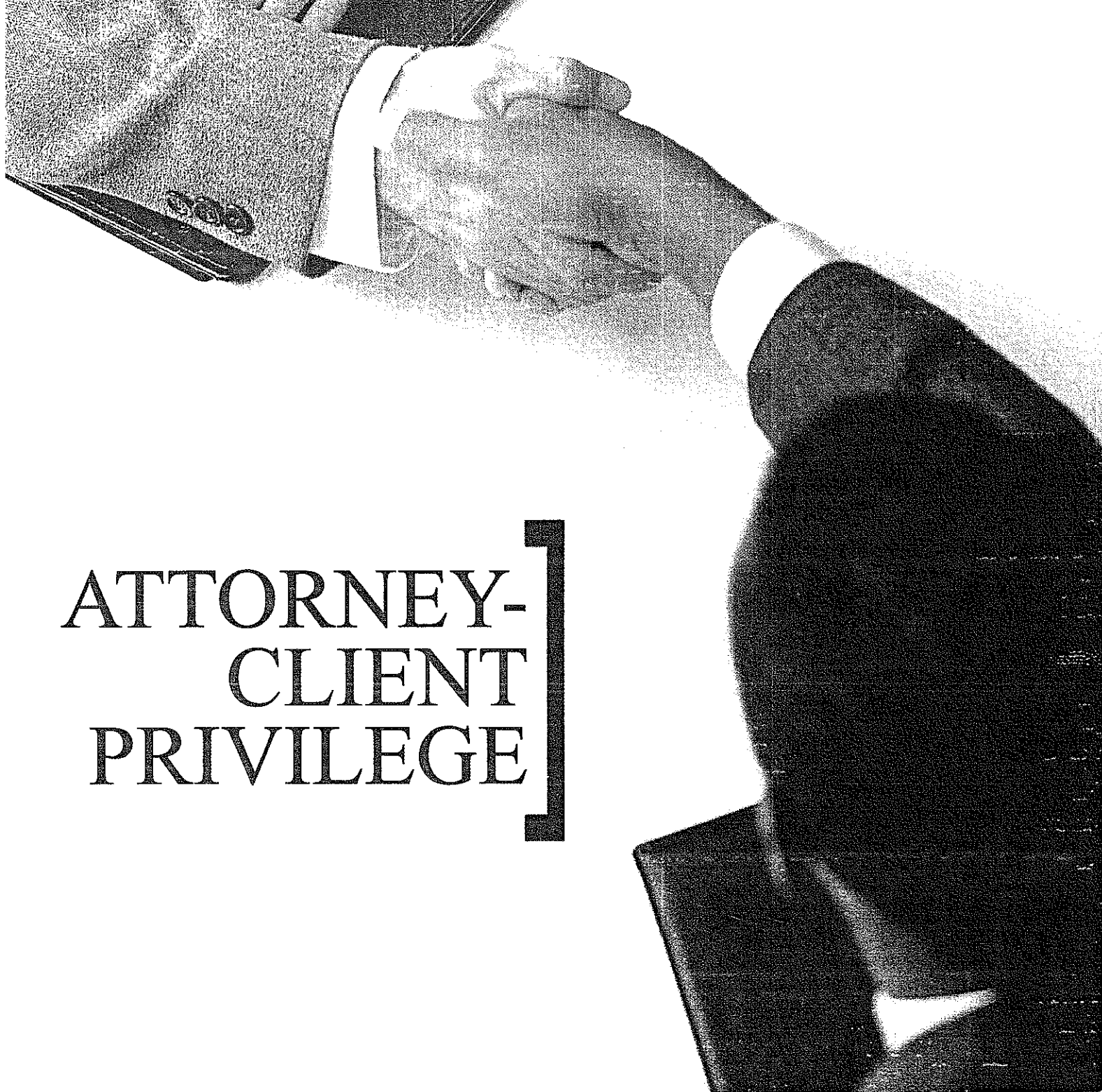


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ATTORNEY- CLIENT PRIVILEGE]

Insurance Bad Faith and the Attorney-Client Privilege

By Michael Sean Quinn

One of the major legal developments of the last third of the 20th century was the development of a law of first-party insurance bad faith. It has evolved in two forms. First, there is the common law tort. In general, it permits policyholders to recover against first-party insurers that deny or delay claims unreasonably. How unreasonable the insurer must be to be liable varies from jurisdiction to jurisdiction. Few jurisdictions—if any—assimilate the tort of bad faith to negligence, but there are similarities. How could it be otherwise given the centrality of the concept of *reasonableness* to both torts?

A second development in the law of first-party insurance bad faith has been statutory. Many jurisdictions have statutes, often derived from the Model Code of the National Association of Insurance Commissioners, which proscribes unfair settlement practices. Those include such conduct as “failing to attempt in good faith to effectuate prompt, fair, and equitable settlement of a claim with respect to which the insurer’s liability has become reasonably clear[.]”

The law of first-party insurance bad faith developed against the background that older tort policyholders and their assignees had and have against third-party insurers that were defending claims. In many jurisdictions, if a defending liability

insurer failed to settle covered claims within policy limits, when it had the opportunity to do so, and its conduct was unreasonable, the insurer could find itself liable for the entire judgment taken against the insured in the case it was defending (or, at least, for the covered claims). This tort, of course, is alive and well. Unlike the law of first-party bad faith, the standard in third-party bad faith is often explicitly said to be negligence.

Obviously, both first and third-party insurers can’t have significant liability for adjustment foul-ups.¹ Consequently, insurers will need legal advice—at least sometimes—in complying with their adjustment obligations and in avoiding bad faith.

Attorney-Client Privilege

The gist of the attorney-client privilege is pretty much the same in all jurisdictions, although it varies in detail. These details can matter in some cases. Testimonial privileges contravene the fundamental principle of jurisprudence: that the public has a right to every person’s evidence. Consequently, testimonial privileges are strictly construed, and they are “accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”²

In essence, the attorney-client privilege belongs to the client, and it

protects from disclosure, either in trial or in discovery, communications between a client and his lawyer that are made in confidence and made “for the purpose of obtaining or providing legal assistance for the client.”³ If a communication is not made for the purpose of providing legal assistance, then it is not privileged.⁴ The attorney-client privilege protects disclosure even after the death of the client.⁵ A *communication* is any conveyance of information.⁶ Communication is in confidence if the communicating person reasonably believes that no one will learn the contents of the communication except someone covered by the privilege.⁷ Persons protected by the privilege include agents of the client so long as the scope of the agency involves dealing with the lawyer and agents of the lawyer, the scope of whose agency includes receiving information, processing it, or acting on it. Organizational clients, such as insurance companies, may be protected by the privilege, as are natural individuals.⁸ The attorney-client privilege is the oldest privilege for confidential communications to be found anywhere in the common law.⁹

The attorney-client privilege is subject to several exceptions. The client may not invoke the privilege in a context in which the client is attacking the lawyer, e.g., for malpractice.¹⁰ The privilege does not apply to a communication that occurs in the context of a client consulting a lawyer “for the purpose, later accomplished of, retain-

ing assistance to engage in a crime or fraud or aiding a third person to do so[.]”¹¹ In addition, the privilege does not apply if a client originally obtains legal advice for some legitimate purpose, but later puts it to criminal or fraudulent use.¹²

Most significantly, for the purpose of discussing the relationship between the attorney-client privilege and the law of insurance bad faith, if a client injects a lawyer’s assistance or a lawyer-client or client-lawyer communication into issue in a civil dispute, not involving the lawyer but involving the client as a party, the privilege is most likely thereby extinguished. The *Restatement* is quite clear on this point at § 80(1)(a) as a general matter:

The attorney-client privilege is waived for any relevant communication if the client asserts as to a material issue in a proceeding that . . . The client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client’s conduct[.]

Comment *b* for § 80 says that this exception is “based upon considerations of forensic fairness[.]” The *Reporter’s Note* for Comment *b* states that there are three approaches to § 80(1):

- [1] The first approach *radically* holds that, *whenever* a party seeks judicial relief, the party *impliedly* waives the privilege. . . . [2] A second approach would attempt to balance the need for disclosure against the need for protecting the confidentiality of the client’s communications on the facts of the individual case. . . . [3] The third approach avoids the extremes of the *over-inclusive automatic-waiver* rule or an *indeterminate ad hoc* balancing

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approach. Instead it focuses on whether the client asserting the privilege has *interjected* the issue into the litigation and whether the claim of privilege, if upheld, would deny the inquiring party access to proof needed fairly to resist the client’s own evidence on that very issue. [Emphasis added.]

The *Restatement* adopts the third approach.

It might be a good idea to point out in passing that the “my-lawyers-told-me-it-was-OK defense is time-tested.” These words come from Tom Mills, a Dallas, Texas, criminal defense lawyer, who does a fair amount of white-collar criminal defense work. He points out that prosecutors in white-collar crime cases are “typically required to prove the defendant has ‘intent to violate the law.’” Often, prosecutors are required to prove *willfulness*. This defense has now become extremely important in the context of the Enron case.¹³

For obvious reasons, if an insurance company seeks to defeat liability in a bad faith case of any kind by saying “*What we did was reasonable because we sought and obtained legal advice and then acted upon it,*” the insurance company will be bound by § 80(1)(a). From a forensic point of view, it would hardly be fair to permit an insurance company to rely upon this defense and then permit it to refuse to produce the attorney’s communiqué or—for that matter—the client’s communications with the attorney. First, the policyholder-litigant should be able to check to see whether the insurer is telling the truth. Second, the policyholder litigant should be able to test whether the insurer’s transaction with the attorney was within the realm of reasonable. The insurer must have given the attorney a reasonable account of its dispute with the policyholder, and the attorney’s advice must itself be reasonable, generally speaking, under the cir-

cumstances. If an insured leaves out significant facts when it asks for advice, or if a lawyer fails to consider significant case or statutory law, the fact that legal advice was sought and received may well be either irrelevant or inculpatory.

The attorney-client privilege can be waived, if proper objections are not made when the communications are sought. It can also be waived by disclosure of the communication outside the context of litigation. Thus, the *Restatement* distinguishes between *exceptions* to the privilege and *waivers* of the privilege. At the same time, note that *Restatement* § 80(1), which expresses an exception to the privilege, proceeds in terms of the idea of waiver. The reason is that the attorney-client communications between an insurer and its lawyer may well be privileged, until a bad faith suit is brought and the insurer makes a decision to use the fact of legal advice as a defense in the bad faith case. Hence, there was a time at which the communication was privileged, a later time at which it was not. The transition sounds like a waiver.¹⁴

The “we-got-legal-advice” defense has been wellknown for some time in bad faith cases,¹⁵ although it has been subject to some critique.¹⁶ One doubts that if the legal advice defense is expressly realized, then the attorney-client communications thereby are made available to the policyholder in discovery and for testimonial purposes.¹⁷ The outer limits of this well-known doctrine, however, as with almost any legal doctrine—are subject to some blurriness, and recently two significant cases have explored these limits.

The Lee Case

In *State Farm v. Lee*,¹⁸ the issue pertained to implied waiver. State Farm denied coverage systematically, across the board, to a whole range of claimants. *Lee* was a class

action. The plaintiffs sought the discovery of claims files and other documents. State Farm resisted production, in part, because of the attorney-client privilege.¹⁹

Importantly, State Farm had not expressly injected the advice of counsel defense into *Lee*, and that absence set up the case. The trial judge accepted

State Farm's avowal that it would not advance an express reliance on advice-of-counsel defense. He concluded further that State Farm would not be relying on the objective reasonableness of the decision to deny [coverage]. Instead, [the trial judge apparently determined that] State Farm was defending plaintiffs' claim by asserting that its claims managers held a subjective good-faith belief that their decision to deny [coverage] was reasonable under what they knew about the state of the law as it then existed. . . . The judge evidently believed that what State Farm knew included advice of counsel because that was part of the basis for the defense.

According to the Arizona Supreme Court, the trial judge apparently believed that what State Farm knew included the advice it had received from counsel. The trial judge therefore concluded that "State Farm had impliedly waived the attorney-client privilege when it *put at issue* the subjective, *legal* knowledge of its managers after they sought and received legal advice." The Arizona Supreme Court held that the trial judge did not abuse his discretion in coming to these conclusions.

The Arizona intermediate-level appellate court had disagreed with the trial judge as to whether State Farm had performed the affirmative act of including advice of counsel at issue. The intermediate-level court therefore had found an abuse of discretion and had reversed the trial court. In affirm-

The courts adopt a kind of doctrine of implied waiver for insurers in bad faith cases.

ing the trial court, the Arizona Supreme Court vacated the opinion of the court of appeals, and adopted State Farm's own characterization of its position:

[State Farm's] defense has both objective and subjective components because the defense necessarily mirrors [the] plaintiffs' claims, which themselves have both objective and subjective components. Once again, State Farm asserts that its conduct was objectively reasonable and subjectively reasonable and in good faith because of what its policies, the statute and the case law actually said (and not what State Farm's lawyers said they said), *and because of what its personnel actually knew and did* (not what State Farm's lawyers told them to do).

While the trial judge saw State Farm's defense entirely in terms of subjective reasonableness, State Farm itself thought that objective reasonableness also was involved. The Supreme Court sided with State Farm.

The whole idea of *subjective reasonableness* bears reflection. We must confess that we are not sure what the phrase means. If a belief is reasonable only if a reasonable person would hold the belief, then all measures of reasonableness involve intersubjectivity and, therefore are not merely subjective. We suspect that the true distinction here is between *the reasonableness of a process in acquiring a belief* and *the static reasonableness of a belief given the evidence*. Perhaps the idea of *subjective reasonableness* pertains to the reasonableness of a belief given what the believer takes his evidence to be. Even this con-

cept of reasonableness, however, has an objective component. The question would be whether a reasonable person could believe what the believer believed, given what he took the evidence to be. Obviously, this idea involves a subjective component (i.e., believing), but the assessment of reasonableness is objective.

Under Arizona law, State Farm is liable for insurer bad faith "if the evidence shows its employees could not or did not reasonably believe that the first-party . . . claims could be rejected within the bounds of the law." This does not require that they be right. It only requires that they be reasonable. Surely, said the court, communications to and from lawyers are "very relevant and material" to the question of: "[W]hat information could be more important to determining that these employees and managers actually knew and reasonably believed that the advice they obtained from counsel with respect to the validity of a [policyholder] claims?"

Relevance, of course, is not enough. A litigant must also put the fact of the advice into play in the case at hand. Surely State Farm did exactly that, said the Arizona Supreme Court. State Farm claimed that it had a reasonable evaluation of the law. Clearly, any such evaluation of the law "necessarily incorporates what the litigant learned from its lawyer," asserted the court. That makes any communication from the lawyer bearing on the problem discoverable and admissible. Thus, according to the Arizona Supreme Court, an insurer need not say "We were reasonable in denying the claim because we relied on the advice of



counsel." It need only say "We were reasonable because our interpretation of the law was reasonable."

Unquestionably the insurer previously sought and received legal counsel. Any other decision, according to the court, would permit an insurer litigant to use the attorney-client privilege as a sword, and not just as a shield.

The court's argument bears some scrutiny. Suppose a person claims that a belief of his is reasonable, given the evidence. Does it matter one iota how he came to acquire the belief? Suppose he acquired the belief as the result of witchcraft. If the belief is reasonably relevant to the evidence, then the believer's belief is reasonable, even if he acquired it in an irrational manner. Thus, from the point of view of justification, as opposed to process, conformity to evidentiary standards is what is important, not genesis.²⁰

That State Farm sought legal advice has bearing on the subjective reasonableness of its position, as well as on its objective reasonableness. According to the court, objective reasonable turns, in part, on the extent of the insurance investigation:

A litigant cannot assert a defense based on the contention that it acted reasonably because of what it did to educate itself about the law, when its investigation of and its knowledge about the law included information it obtained from its lawyer and then use the privilege to preclude the other party from ascertaining what it actually learned and knew.

On the basis of this reasoning, the court announced the following rule:

Where . . . an insurer makes factual assertions in defense of a claim which incorporate, expressly or implicitly, the advice and judgment of its counsel, it cannot deny an opposing party "an opportunity to uncover the foundation for those assertions in order to contradict them."

This rule, of course, "does not create a rule of per se waiver of the attorney-client privilege in insurance bad faith cases." It does create a rule, however, that where "an insurer makes factual representations which implicitly rely upon legal advice as justification for non-payment of claims, the insurer cannot shield itself from disclosure of the complete advice of counsel relevant to the handling of a claim."²¹

There were dissenting opinions. One justice contended that State Farm had not asserted that the legal advice it received was relevant to its understanding of the law. State Farm did not use the *fact* that it had received legal advice in issue. The only issue it presented was whether its understanding of the law—whatever its origins—was reasonable. There was also a second dissenting opinion, which mainly agreed with the first one. The second dissenter wrote separately only to emphasize the degree to which he believed the majority opinion undermined the attorney-client privilege. This justice is concerned that all sorts of communications between attorneys and clients will now be waived. He suggests, for example, considering a plaintiff in a personal injury case who is claiming pain and suffering damages. Could such a plaintiff be found to have waived the attorney-client privilege if his knowledge of his rights derives, at least in part, from conversations with counsel? Surely not, implied the second dissenter, and yet the majority—on its facial language—seems to have implied the opposite.

The second dissenting justice suspects that the majority's holding in *Lee* turned upon the fact that it involved a first-party insurance bad faith claim. He does not seem to be terribly uncomfortable with this idea. Rather, he seems concerned about the uncertainty and potential abrogation that the broad rule adopted by the majority has created. There is a deep issue of jurispru-

dence lurking in the wings here. It is a fact of legal life that insurance contracts are treated differently than other contracts, although courts are open to arguments from general contract law, especially if the insurance law is silent, obscure, or problematic for some reason. At the same time, one wonders how differently insurance companies, as business institutions, should be treated from other institutions. Of course, they already are subject to the law of bad faith, when many other businesses are not. The question then becomes, should that difference be extended to the law governing the attorney-client privilege? One wonders if insurance companies should be treated that differently. Why are questions of insurers' efforts to avoid bad faith less worthy of protection than those of others?²²

Some lawyers consider the *Lee* decision to be problematic. There is a difference between *what* a client believes, *what* a lawyer says to her client, and the *fact* that a client has talked to an attorney at all. The *Lee* case may well conflate these three distinct ideas. More significantly, if *Lee* may fail to distinguish the reasonableness of a process of forming a belief from the reasonableness of the ultimate belief, that could be a significant distinction.

The Boone Case

The Ohio Supreme Court has taken a somewhat different and broader approach to dealing with the attorney-client privilege in the context of insurer bad faith. The decision in *Boone v. Vanliner Insurance Company*²³ depends to a considerable extent upon the reasoning and scope of a previous decision of the Ohio Supreme Court pertaining to limits on the attorney-client privilege in the context of an Ohio statute regarding awards of prejudgment interest in medical malpractice cases.²⁴ The issue before the court in *Boone* was



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“whether, in an action alleging bad faith denial of insurance coverage, the insured is entitled to obtain, through discovery, claims-file documents containing attorney-client communications and work product that may cast light on whether the denial was made in bad faith.”

The setup of the issue followed a not unusual pattern. An employee of a policyholder sought recovery on a policy under which he was an insured, or nearly the equivalent of an insured. Vanliner Insurance denied the claim, and the employee filed suit. Subsequently, Vanliner reversed its rights on the coverage issue, but the employee-plaintiff proceeded with a bad faith case. Vanliner sought to avoid producing many parts of its claims file, on the grounds of privilege. It asserted the attorney-client privilege and the work-product doctrine. The trial court ordered the insurer to submit its files for in camera inspection. The claims file consisted of over 1,700 documents. The trial court found that 175 of the documents were protected from discovery and ordered the insurer to produce the rest. The insurer appealed the trial court's order with respect to 30 documents. The court of appeals ordered that one of those be disclosed in its entirety but accepted the insurer's argument that the remaining 29 were privileged either in whole or in part. The cause then came before the Ohio Supreme Court.

In *Moskovitz*, the Ohio Supreme Court had previously held that “[d]ocuments and other things showing the lack of a good

faith effort to settle by a party or the attorneys acting on his behalf or her behalf [as is mandated by an Ohio statute] are *wholly unworthy* of the protection afforded by any claimed privilege.”²⁵ Boone sought to extend the rule in *Moskovitz* to as equally applicable to an insurance bad faith claim. He argued “that claims file material showing an insurer's lack of good faith and determining coverage are *equally unworthy* of protection.” In contrast, Vanliner Insurance suggested that the *Moskovitz* rule does not apply in the context of an insurance bad faith claim. Vanliner argued that when the question was limited to judgments—indeed, only those judgments regulated by an express Ohio statute.²⁶

The Ohio Supreme Court sided with Boone. “Our ruling in *Moskovitz* did not turn on the status of the underlying claim, but rather upon a recognition that certain attorney-client communications and work-product materials were *undeserving of protection*, i.e., materials ‘showing the lack of a good faith effort to settle.’”²⁷ Thus, the Ohio Supreme Court rejected the narrow interpretation of *Moskovitz* submitted by Vanliner.

The court also rejected concern about the relationship between the coverage/bad faith case in the underlying case. Vanliner had argued that it never waived the privilege and that causing legal advice to be turned over in a coverage case when the underlying case still is pending would discourage insurance companies from getting legal opin-

ions, and would unfairly disadvantage insurance companies in the underlying cases. The supreme court majority was not persuaded. It pointed out that the coverage case could be stayed until after the *underlying* case was resolved. In addition, it posited that the principle it was constructing had nothing to do with the *waiver* of the privilege. Rather, it had to do with an *exception* to the privilege. The supreme court concluded that the rationale underlying *Moskovitz* is applicable to allege bad faith denials of coverage, as it is fit to failures to negotiate in medical malpractice cases. Significantly, “claims file materials that show an insurer's lack of good faith and denying coverage are *unworthy of protection*.” (Emphasis added.)

The Supreme Court of Ohio, however, did not completely endorse the action of the trial court. It held that only communications that occur before coverage is denied should constitute exceptions to the privilege. Communications received from or sent to an attorney after a denial of coverage do not fit within the paradigm. The more precise rule the supreme court appears to have enunciated was this: “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 and [which] were created prior to the denial of coverage.” One should note that the supreme court's rule is restricted to insurance bad faith cases.

To some extent, Boone's victory

may have been a pyrrhic one. For reasons that are not crystal clear from facts outlined in the opinion, the Ohio Supreme Court ordered that only four documents be produced without redactions. It is not clear how many documents were ordered produced but with redactions. Certainly, Boone's victory was not a significant one by page count. Then again, it's not quite clear which documents were ordered produced. A key document may have been ordered produced. The logic of the opinion suggests that the coverage opinion had to have been released, and that may have been the one Boone wanted. Moreover, looking at the totality of the circumstances—that is, starting from the beginning of the insurer's refusal to turn over documents—Boone's victory may have been anything but pyrrhic.

There was also a dissenting opinion in which three judges joined (making the opinion a close 4-3 decision). Hence, by any standard, the decision in *Boone* was a close one. The minority believed that the wholesale exception to the "attorney-client privilege" created by the majority was neither principled nor warranted by precedent. Minority judges simply could not understand how an insurer could engage in a "full and frank communication" with its attorneys in light of the majority opinion. As a result, they expressed concern that the new exception would fail to "promote broader public interests in the observance of law and the administration of justice."²⁸ In addition, the minority observed that under the rule in *Boone*, all a policyholder has to do in order to get the insurer's claim file, including advice from its attorneys, is to plead bad faith. The dissenting justices thought this was overreaching. They also thought that the "unworthy-of-protection" argument was fundamentally inconsistent with the very purpose of the attorney-client privilege. Why, the

dissent asked rhetorically, should we suppose that insurers should not be able to have open and honest dialogue with their attorneys? The rule in *Boone*, said the dissent, will discourage insurers from consulting with attorneys or—at least—will discourage them from getting careful, written, formal opinions.

Both *Lee* and *Boone* are proving controversial among practicing lawyers. Significantly, as discussions are conducted in cases, at the office, on the street, and at CLE functions, two lines of critique are often heard.

Concluding Observations and Queries

One of the themes of these cases is that if an insurer wishes to establish that its view of the law was reasonable, and hence that it may not be guilty of bad faith, it must be willing to show in discovery and at trial everything that it had in its possession that probes the reasonableness of its denial or delay. Thus, the courts adopt a kind of doctrine of implied waiver for insurers in bad faith cases. One could wonder if this is a good idea. Formerly everywhere, and in most places now, pretty much all client attorney consultations were out of bounds when it came to litigation inquiries.

Of course, it is worth remembering that the advice-of-counsel defense is easily subject to manipulation and it is both cumbersome and expensive to disprove. On the other hand, from the insurer's point of view, coverage opinions—even quite good ones—are hardly ever perfect, so they may be subject to misleading attack in trial.

Underlying the decisions in *Arizona* and *Ohio* may be some judicial intuition that the insurer-insured relationship is much more like a fiduciary relationship than any other kind. Then again, fiduciaries have a right to some private legal advice immune from the review of those with whom they have a fiduciary relationship.

Obviously, this is an area of the law that will develop slowly, even glacially. At the same time, it will develop and it will change. No doubt many reading this article will participate in forging those changes. ■

Notes

1. Lee Craig, *The Thirteen Adjurations of Good Faith Claims Handling*, 24 INS. LITIG. RPT. 120 (March 8, 2002).

2. *Trammel v. United States*, 445 U.S. 40, 50-51 (1980).

3. American Law Institute, *RESTATEMENT OF THE LAW (THIRD): LAW GOVERNING LAWYERS*, 68(4) (2000). (Hereafter cited internally as *RESTATEMENT*.)

4. This is the part of the accusation made against criminal defense attorney Lynne Beth Stewart in April 2002 by the United States. Prosecutors allege that she and three others have been helping Sheik Omar Abdel-Rahman pass messages to the media and pass messages to other people in terrorist groups that he formerly led. Stewart is accused primarily of violating a special administrative measure known as SAM, imposed on Adbel-Rahman, limiting his access to the mail, media, telephone and visitors to prevent him from further plotting against U.S. interests. Stewart was required to sign the SAM to continue contact with her client. She allegedly violated the SAM by conspiring with Adbel-Rahman's interpreter to pass messages to an Islamic group leader in New York and a former head of the London-based Islamic Observation Center. Molly McDonough, *Lawyer Charged with Aiding Terrorists*, www.abanet.org/journal/ereports/a12stewart.htm (April 12, 2002). For Ashcroft's news conference disclosing the prosecution, see United States Department of State: International Information Programs, *Four Indicted for Aiding Convicted Terrorist Ashcroft Announces*, <http://usinfo.state.gov/topical/pol/terror/02040903.htm>.

5. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).
6. RESTATEMENT § 69.
7. RESTATEMENT § 71.
8. RESTATEMENT § 73. Although privileges are strictly and narrowly construed, there is an exception. The concept of an agent as applied to the attorney-client privilege is broader than the concept of an agent in the law of agency. Thus, the person working for an attorney and receiving confidential information may technically be an independent contractor—as opposed to a true agent—but, if the scope of her employment includes receiving information from clients, the privilege will be preserved as to that person.
9. *United States v. Zolin*, 491 U.S. 554 (1989).



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10. RESTATEMENT § 83.
11. RESTATEMENT § 82(a).
12. RESTATEMENT § 82(b).
13. Miriam Rozen and Brenda Sapino Jeffreys, *What Happens When Andy Fastow Starts Fighting Back*, LAW. COM. (March 7, 2002) (www.law.com).

14. Waiver is a complex, multifaceted legal concept. It does not have an unambiguous meaning in the law. This proposition is true even though most cases define waiver as the deliberate or intentional and knowing relinquishment of a (known) legal right. See E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* 154-62 (1998). Thus, there may not be a stable distinction between the concept of waiver and the concept of exception.

15. Michael Sean Quinn, *The Advice-of-Counsel Defense: A Response to Fischer*, 72 TEX. L. REV. 1487 (1994).

16. James M. Fischer, *Should Advice of Counsel Constitute a Defense for Insurer Bad Faith?*, 72 TEX. L. REV. 1447 (1994).

17. *Hearne v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). See 8 JOHN H. WIDMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 2388 at 855 (McNaughton Rev. Ed. 1961).

18. 18 P.3d 1169 (Ariz. [en banc] 2000).

19. The precise issue in *Lee* was State Farm's denial of certain stacking claims in the UM/UIM context. State Farm denied stacking requests based upon an antistacking provision in its policy form. The class action was triggered when the Arizona Supreme Court determined that State Farm's policy language did not comply with the statute permitting insurers to prohibit stacking. The exact substantive issue at stake is irrelevant to considerations of the attorney-client privilege. Any claim denial would work. Significantly, the documents State Farm sought to protect filled "five privilege logs"

and covered "communications with fifteen law firms."

20. This mistake is often called the "genetic fallacy." See MADSEN PIRIE, *THE BOOK OF THE FALLACY: A TRAINING MANUAL FOR INTELLECTUAL SUBVERSIVES*, 85-86 (1985). See also DAVID HACKETT FISCHER, *HISTORIAN'S FALLACIES: TOWARDS A LOGIC OF HISTORICAL THOUGHT*, 155-57 (1970).

21. At this point, the Arizona Supreme Court relies upon *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259-60 (Del. 1995), which is in turn relying upon other cases.

22. See Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995).

23. 744 N.E.2d 154 (Ohio 2001).

24. See *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331 (Ohio 1994), cert. denied, 513 U.S. 1059 (1994). (As with the *Lee* case in Arizona, the precise form of insurance in the *Boone* case was UM coverage. That fact has nothing to do with the opinion, however, and is entirely left out of the court formulation of the issue before it.)

25. *Boone*, 744 N.E.2d at 157 (emphasis added). The *Moskovitz* case turned on an Ohio statute that regulates prejudgment interest on judgments awarded in medical malpractice cases. Prejudgment interest is awardable only if there has not been a good faith effort to settle and consequently, if any apparent effort to settle has been undertaken in bad faith.

26. *State v. McDermott*, 651 N.E.2d 985 (1995).

27. *Boone*, 744 N.E.2d at 157 (emphasis added).

28. The quote comes from *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The U.S. Supreme Court acknowledged, of course, that there was a fraud exception to the attorney-client privilege, but it observed that bad faith is a far cry from fraud.