

Winter, 2025

AEI CLAIMS LAW QUIZ

BE CAREFUL WHAT YOU PUT IN THE CLAIM FILE, IT MAY BE SUBJECT TO DISCOVERY IN A BAD FAITH ACTION?

[Good Faith Claims Handling, Para 2.04]

FACTS: In February 2020 Melissa Eddy was a passenger in a car driven by her husband when Pamela Shooner crashed into the Eddys' car. Melissa suffered serious injuries to her neck that ultimately required surgery. At the time of the accident, the Eddys had underinsured motorist (UIM) coverage in their auto policy with Farmers Insurance that provided coverage for injuries not covered by the tortfeasor's policy. Shooner's policy covered up to \$100,000 for bodily injury due to her liability. The Eddy's UIM coverage limit was \$250,000 per person and \$500,000 per accident.

In June 2021, the Eddys informed Farmers that Shooner's insurance company offered the \$100,000 policy limit to settle their claim. Soon thereafter the Eddys demanded \$150,000 to settle their UIM claim with Farmers. In support of their settlement demand the Eddys provided Farmers with a list of their medical providers, medical records, bills, and a report from Melissa's surgeon who confirmed that her "spine surgery was directly related to acute injuries" from the auto collision.

In late July 2021, Farmers offered \$33,312 to settle the Eddys' UIM claim. The following month, Farmers authorized acceptance of the \$100,000 settlement offer from Shooner's insurance company. Days later, the Eddys responded to the \$33,312 offer with a \$148,000 demand, which Farmers countered with a \$38,000 offer. In August 2021, the Eddys sued Farmers, asserting that they were entitled to coverage under the policy along with pre-judgment interest and costs of suit.

In March 2022, Farmers offered the Eddys \$150,000 to settle the UIM suit, but the offer was conditioned on their waiver of any bad faith claims against Farmers. In April 2022, Farmers offered the Eddys an unconditional \$150,000 settlement which the Eddys accepted. In early May 2022, the Eddys moved to dismiss the UIM coverage suit against Farmers. But in July 2022, the Eddys sued Farmers for bad faith negotiation of their UIM claim, seeking extra-contractual damages including compensatory and punitive damages, pre- and post-judgment interest, attorney fees, and costs of suit. The Eddys claimed that Farmers "delayed in making any reasonable attempt to resolve" the UIM claim and "failed to promptly, adequately and reasonably investigate the facts and circumstances of the subject collision." The Eddys also claimed that Farmers "recklessly, willfully, knowingly, intentionally, and/or maliciously" breached its duty to act in good faith by delaying the resolution of the UIM claim "in the hopes that Plaintiffs would accept an amount that was unreasonably low considering the nature and severity of Plaintiffs' claims."

During discovery the Eddys requested that Farmers provide them with its complete claim file through April 11, 2022, which was the date that Farmers paid the \$150,000 in UIM benefits to the Eddys. Farmers, however, only provided the claim file through August 27, 2021, which was the date that the Eddys filed their UIM coverage suit against Farmers. The trial court granted the Eddys' motion to compel and ordered Farmers to produce the entire, unredacted claim file up to the benefit payment date of April 11, 2022. Farmers appealed the order, arguing among other points of error, that the attorney-client privilege and work product doctrine protected the portions of its claim file created after the Eddys filed their UIM coverage suit.

QUESTION: Does the attorney-client privilege or work product doctrine protect from discovery the portions of Farmers' claim file that were created after the Eddys filed their UIM coverage suit?

ANSWER: No, according to the Court of Appeals of Ohio in *Eddy v. Farmers Property Casualty Insurance Company*, 239 NE3d 1000 (Ohio App. 2024). The court began its analysis with a brief review of the law regarding the scope of permitted discovery, the attorney-client privilege, and the work product doctrine. The court said that in general parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Confidential communications, like those shared in the attorney-client relationship are privileged communications because they further the public policy of encouraging legal consultation and aiding in the administration of justice. But the privilege is not absolute. It protects only the communications necessary to obtain legal advice, and it applies only when necessary to achieve its purpose. Beyond the attorney-client privilege, certain documents may also be protected from discovery based on the attorney work product doctrine. That doctrine provides that a party cannot obtain discovery of documents that are prepared in anticipation of litigation or for trial by or for another party or its representative. A party's representative includes his attorney and insurer. But here too, the protection is not absolute and can be overcome "upon a showing of good cause."

In *Boone v. Vanliner Insurance Company*, 744 NE2d 154 (Ohio 2001), the Ohio Supreme Court held that, "in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claim file materials that contain attorney-client communications related to the issues of coverage that were created prior to the denial of coverage." The court in *Boone* reasoned that materials in a claim file created prior to the denial of the claim are likely to cast light on whether the insurer acted in bad faith when it decided to deny coverage and, if they do, those materials are unworthy of the protections afforded by any claimed privilege. It is important to note that in *Boone*, the bad faith action was based on the insurer's express denial of coverage, but in *Eddy*, Farmers never actually denied coverage. Instead, Farmers actually paid the UIM benefits while the Eddys' coverage suit was pending. Thereafter, the coverage suit was dismissed and the Eddys then filed their bad faith action, which was based on their claim that Farmers unreasonably delayed its investigation and settlement of their UIM claim. Farmers argued that the Eddys' initiation of their UIM coverage suit was similar to the insurer's express denial of coverage in *Boone*, and, therefore, the Eddys should only be entitled to the contents of its claim file up to the "constructive denial date," or August 27, 2021, which was the date that the Eddys filed the coverage suit against Farmers.

The court rejected the insurer's argument and declined to consider the Eddys' filing of their coverage suit as a constructive denial of coverage. Instead, the court agreed with the Eddys who argued that *Unklesbay v. Fenwick*, 855 NE2d 516 (Ohio App. 2006) governed the scope of discovery in this case. In *Unklesbay* the insured sued his insurer for UIM benefits under his policy and included a bad faith claim based on the insurer's alleged refusal to investigate and pay the claim. After several discovery disputes between the parties, the trial court ordered the production of the "claim file materials that were created prior to the insurer's payment of the UIM benefits." On appeal, the court relied on *Boone* to hold that "claim file materials showing an insurer's lack of good faith in processing, evaluating, or refusing to pay a claim are unworthy of the protection afforded by the attorney-client or work product privilege." This is true, the court said, "regardless of whether the insurer ever denied the claim outright."

The court in *Unklesbay* recognized that insurers can act in bad faith in ways other than denying coverage, and while bad faith conduct in general is an exception to the protection afforded by the attorney-client or work product privilege, the cutoff date for discovery of the claim file may change depending on the particular nature of the alleged bad faith conduct. The court then addressed the cutoff date for discovery of the claim file and held that “attorney-client and work product documents relevant to Unklesbay’s bad faith claim could have been created until the time that the insurer quit dragging its feet, settled the claim, and paid the insured the benefits under the policy.”

The court in *Eddy* concluded that:

The circumstances in this case differ from those in bad faith lawsuits filed after the insurer has denied a claim. When an insurer’s claim denial is at issue, any evidence related to the insurer’s alleged bad faith claims processing or denial would have been created before the claim was denied and before the lawsuit was filed. But here, Farmers agreed to pay the limits of the Eddys’ policy while the Eddys’ coverage lawsuit was pending. And Farmers does not suggest that its duty to process and handle the Eddys’ claim in good faith ended when the Eddys filed their UIM complaint. Indeed, it cited a case explaining as much. See *Palmer by Diacon v. Farmers Ins. Exchange*, 861 P2d 895 (Mont. 1993) (“Courts have held, and we agree, that an insurer’s duty to deal fairly and not to withhold payment of valid claims does not end when an insured files a complaint against the insurer.”).

It follows that the claims file could include evidence related to the Eddys’ allegations of bad faith up to the payment date. We adopt the reasoning of *Unklesbay* and hold that when insureds like the Eddys allege that their insurer unreasonably delayed its handling, processing, and payment of a benefits claim in bad faith, the insureds are entitled to portions of the claim file showing a lack of good faith up to the benefit payment date.

CONCLUSION: Farmers appealed the decision of the appellate court to the Ohio Supreme Court, and on September 3, 2024 the supreme court agreed to review that decision and the scope of the attorney-client privilege in bad faith cases. This pending appeal will be closely followed by insurers to determine in what circumstances the claim file may be subject to discovery in a bad faith action and to what extent it may be protected by the attorney-client privilege and/or the work product doctrine.

The statute that provides the privilege for attorney-client communications in Ohio includes an express exception for an insurer’s bad faith conduct.

Ohio Revised Code Annotated § 2317.02 Privileged Communications

The following persons shall not testify in certain respects:

(A)

* * *

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

In other states, the statute may not be as broad as in Ohio, limiting express exceptions to fraud

and criminal misconduct. In some states, however, the courts have created a common law exception to the attorney-client privilege for an insurer's bad faith conduct. If confronted with a discovery demand for the claim file in a bad faith action, the particular state's attorney-client privilege statute and relevant case law along with the court rule regarding the work product doctrine will help to determine the outcome.

Be careful what you put in the claim file because even the possibility that it may be subject to discovery should remind you that your conduct in handling every claim should be done in a fair and good faith manner and the entries in the claim file should communicate only that fair and reasonable conduct.

Congratulations SCLA's

The following individuals earned their SCLA's in the months of October, November, and December 2024:

Crystal J. Ayguner
Utica National Insurance
Naperville, IL

Shane Beck
United States Liability Ins.
Wayne, PA

Maria Beihl
Auto-Owners
Lakeland, FL

Sean Berens
USAA
San Antonio, TX

Andrew Billings
Liberty Mutual
Mertztown, PA

Kevin R. Bobbe
USAA
Colorado Springs, CO

Martin M. Booker
Auto-Owners
Lakeland, FL

Keirstan M. Bowling
American Modern
Amelia, OH

Andrew Brown
Rental Claims Services
Dallas, TX

Stephen Burke
American Modern
Loveland, OH

Adam Butts
Scottsdale, PA

Joseph Caramanico
United States Liability Ins
West Chester, PA

Adrienne Champagne
Auto-Owners
Saginaw, MI

James D. Chaney
Lewisville, TX

Dan M. Clayton
Safety National Casualty Corp
St Louis, MO

Irina J. Colella
Philadelphia Insurance
Oceanside, NY

Thomas A. Coneys Jr
Liberty Mutual
Strafford, NH

Susan Crouse
Auto-Owners
Lakeland, FL

Adrian J. Delgado
Country Financial
Atlanta, GA

Ann C. Douglas
Kentucky Farm Bureau Mutual
Elizabethtown, KY

Jason M. Duke
Utica National Insurance
Ballston Spa, NY

Krista N. Evans
Travelers
Tomball, TX

Kathryn Everhart
American Modern
Cincinnati, OH

Tara Frederick
Ware Insurance
Chesapeake, VA

Christopher Friskey
Philadelphia Insurance
Plano, TX

Joseph Gandolfo
Lindenhurst, NY

Trent Allen Gillette
McLarens
Rock Falls, IL

Michael Girres
USAA
Colorado Springs, CO

Susan M. Gregory
Liberty Mutual
Henderson, NV

Sara Hocking
GEICO
Renton, WA

Marissa L. Holmes
McCord & Associates
Omaha, NE

Stephanie Hommel
Auto-Owners
Lansing, MI

Pamela N. Howard
Wilber Group
Normal, IL

Jason A. Hussey
First Ins Co of Hawaii Ltd
Honolulu, HI

Emilee B. Jaquay
NYCM Insurance
New Berlin, NY

Caroline E. Kopf
Country Financial
Bloomington, IL

Tracy Lewis
Fort Gibson, OK

Todd Lyle
Country Financial
Zebulon, GA

Chan Lo
Chance Compliance and
Investigations
Brooklyn, NY

Jack Mann
Cedar Rapids, IA

Rachel Erin Miner
USAA
Riverview, FL

Tammy L. Moorhouse
Merchants Insurance Group
Williamsville, NY

Michael L. Morrison
Liberty Mutual
Earlham, IA

David C. Panowicz
Liberty Mutual
Council Bluffs, IA

Kimberly L. Pomeroy
Utica National Insurance
Plainwell, MI

Jennifer Roberts
Acadia Insurance
Rocky Hill, CT

Bettye Rodriguez-Rader
Auto-Owners
Irmo, SC

Brian Rader
State Farm Insurance
Maricopa, AZ

Seth Reed
Kentucky Farm Bureau
London, KY

Malachi Reeves
Auto-Owners
Montgomery, AL

Diane Schwarzhuber
Sentry Insurance
Wausau, WI

Mike Strohmeier
Farm Bureau Financial Services
Paynesville, MN

Amanda L. Swartz
Country Financial
Bloomington, IL

Charles E. Westgate
USAA
Middleboro, MA

Bonnie J. Williams
Liberty Mutual
Savannah, TX

Derek J. Worzalla
Sentry Insurance
Wisconsin Rapids, WI