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BAD FAITH BLOG

Ohio Appellate Court Upholds Insurer's Privilege Claim in First-Party Dispute

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Summary: In August 2012 a fire destroyed thirty-six apartment units owned by Summit Park Apartments, LLC ("Summit Park"). Great Lakes Reinsurance ("Great Lakes") insured Summit Park and the policy provided for construction costs, loss of business income, and out-of-pocket expenses. The policy also obligated Great Lakes to pay out claims within thirty days.

Summit Park Apartments v. Great Lakes Reinsurance

Immediately after the loss Summit Park initiated a claim with Great Lakes. Within two months of the fire Summit Park also submitted to Great Lakes a proposal of construction repair and costs. In a five-month period Great Lakes only made two partial payments towards the construction costs. Summit Park subsequently notified Great Lakes of lost rent amounts and out-of-pocket expenses. After Great Lakes failed to remit additional payments Summit Park filed a lawsuit against it, Claims Adjusting Group ("CAG"), and Commercial Industrial Building Owner's Alliance, Inc. ("Commercial Industrial") alleging breach of fiduciary duty and fraud.

The trial court granted a motion to dismiss CAG and Commercial Industrial from the case leaving Great Lakes as the sole defendant. During discovery the parties disputed whether certain documents Summit Park requested from Great Lakes were privileged under the attorney-client and work-product doctrines. The documents consisted of five e-mails and one attachment. The trial court, after in *camera* review but without providing any findings of fact and conclusions of law, held the documents were not privileged. Great Lakes appealed the ruling.

Great Lakes raised three issues on appeal; the first two were consolidated into one and the appellate court found the third issue moot. Addressing the consolidated issue—whether the trial court erred in determining the records were not privileged and thus subject to discovery—the court held most of the communications were work-product and not subject to the "bad faith" exception The court relied on *Boone v. Vanliner Ins. Co*, which held the attorney-client privilege did not apply to communications in bad-faith between a party and its counsel and therefore those communications were discoverable. 91 Ohio St.3d 209, 212, 744 N.E.2d 154 (2001). Subsequent Ohio appellate decisions extended the Boone rule to include work-product as well. However the court remanded the case to the trial court for further consideration as to the other documents because the record was unclear as to what individuals may have received the allegedly privileged documents. The court admonished both parties, but particularly Great Lakes, for not requesting a modification of the trial court's order to include findings of fact and conclusions of law in denying its motion for a protective order.

With respect to the last two e-mails the court found their content to be communications between Great Lakes' counsel and therefore within the work-product doctrine. In finding that these e-mails were not discoverable the court denied Summit Park's claim they were subject to the "bad faith by a party" exception. Finally the court discussed the attachment which consisted of an activity log assembled by Great Lakes' counsel using information received from its client and therefore undiscoverable.

This case teaches that work-product e-mails were not discoverable under any exception because on their face there was no evidence of bad-faith behavior or communications. This case also illustrates how difficult it can be to make a record and for courts to rule on privilege issues without disclosing the substance of the documents to which privilege is claimed.

By Aaron French & Tamar Hodges

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