Exhibit C: DRI Amicus Brief to U.S. Supreme Court in *Boone v. Vanliner Insurance*

No. 01-303

In the
Supreme Court of the United States

Vanliner Insurance Company,
Petitioner,
v.

Richard Boone,
Respondent.

On Petition for Writ of Certiorari
To the Ohio Supreme Court

Brief for *Amicus Curiae*
Defense Research Institute
In Support of the Petition
For a Writ of Certiorari

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Brief for *Amicus Curiae* Defense Research Institute in Support of the Petition for a Writ of Certiorari

Statement of Interests of *Amicus Curiae*

The Interests of *Amicus Curiae* Defense Research Institute are set forth in the Motion accompanying this brief.[1]

[1] Pursuant to Rule 37(6) of the Rules of the Supreme Court of the United States, DRI states that counsel for Petitioner and Respondent had no part in authoring any portion of this brief. Counsel for the DRI authored this brief in its entirety. No person or entity, other than the DRI, its members, or its counsel, made a monetary contribution to the submission of this brief. Petitioner Vanliner Insurance Company has consented to DRI's participation as *Amicus Curiae;* Respondent Boone has not. Vanliner's letter of consent has been filed with the clerk's office.

Summary of Argument

The Ohio Supreme Court's ruling that the attorney-client privilege may be completely subverted in any case in which a plaintiff merely alleges that an insurance defendant has acted in bad faith is at odds with the recent experience of the state courts that have evolved the common law governing the attorney-client privilege. In particular, the analysis eliminates the procedural and substantive safeguards that the privilege affords to parties in civil litigation. With respect to the question of procedural safeguards, the lower court's ruling entirely ignores the threshold elements of proof that this Court has declared in cases such as *United States v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L.Ed.2d 469 (1989) must be met in order to fall within recognized exceptions to the privilege, such as those concerning communications engaged in for the purpose of furthering crime or fraud. In *Zolin*, this Court ruled that a party seeking to avoid the privilege on the basis of such an exception must first make a *prima facie* showing of fraud. Second, this *prima facie* case is subject to confirmation by the trial court through an *in camera* review of the disputed documents and communications. Such procedural safeguards protect defendants from an abuse of the discovery process and one-sided access to crucial documents that otherwise serve to undermine the adversary system of justice.

The lower court's refusal to adopt even these threshold protection is a radical departure from the recent experience of the state courts, particularly inasmuch as the *Zolin* standards apply in cases of criminal wrongdoing, a far more serious group of cases than a claim such as this, where an insurer is merely alleged to have acted unreasonably in regard to a policyholder's claim for insurance benefits. As there is no allegation of criminal conduct or fraudulent activity on the part of Vanliner, nor do the communications relate to future conduct in any respect, even the standards in *Zolin* are inadequate to prevent the very sort of fishing expedition that this Court was concerned about in erecting these safeguards for cases implicating the "crime-fraud" exception.

The "reason and experience" of state supreme courts that have addressed this issue outside of Ohio have emphasized the vital need that insurers have to consult with and obtain the advice and guidance of counsel to guide them in making claims handling determinations. This right to have unfettered access to the advice of counsel is crucial in the period of time with which this case is concerned, the threshold period after which a claim has been received but prior to an insurance company making a final determination as to whether to accept or deny a claim for insurance benefits. The lower court's ruling, if allowed to stand, will have a chilling effect on the willingness of insurers to seek legal advice regarding close coverage questions and will inhibit the flow of information between a lawyer and a client that this Court has repeatedly emphasized as forming the fundamental reason for the existence of this oldest common law privilege. In order to make proper claims determinations and to allow insurance to serve the vital role that it plays in the marketplace by permitting the transfer of risk from policyholders to insurers and insuring that proper claims determinations are made so that claims are properly paid and insurance made available to citizens and businesses at an appropriate cost.

Argument

The ruling of the Ohio Supreme Court is in conflict with established principles of due process as well as the manner in which courts throughout the nation have interpreted similar principles governing the attorney-client privilege and the rights of citizens to obtain advice of counsel. This issue is vital to the administration of justice in the federal courts, as well as state courts throughout the land. If the lower court's holding is to bind parties in Ohio or to be followed by courts in other jurisdictions, insurers will be seriously compromised in their ability to obtain meaningful, candid or timely access to the advice of counsel, thus denying them legal advice as to claims, some justified and others not, that they may be investigating while corrupting the very process by which these entities are required to do business.

The denial of substantive and procedural due process underlying the lower court's opinion, if followed, will have a chilling impact upon the relationship between corporations and outside counsel. Areas in which corporations once felt themselves free to obtain the advice of counsel to assist and guide them in their conduct, will now be subject to discovery and dispute. Insurers will be forced to either seek advice of counsel at their peril or will go forward without the advice of counsel, with untold impacts upon the manner in which important legal decisions are made.

I. The Ohio Supreme Court's Ruling Is Contrary to the Reason and Experience of State Courts Concerning the Procedural and Substantive Protections Afforded by the Attorney-client Privilege.

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed.2d 584 (1981); *Swidler and Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081, 141 L.Ed.2d 379 (1998). Its purpose is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice." *Upjohn*, 449 U.S. 389, 101 S. Ct. at 682. Such goals may only be accomplished, however, if clients are permitted to make full disclosure in the free and competent expectation that the information and confidences that they share with attorneys will be protected from discovery in coverage litigation.

In prior decisions, this Court has recognized that its interpretation of the scope of the attorney-client privilege is guided by "the principles of the common law… as interpreted by the courts… in the light of reason and experience." *Swidler and Berlin v. United States*, 524 U.S. at 403, 118 S. Ct. at 2084. In considering the scope of such privileges, a court must assess whether "reason and experience" "promotes sufficiently important interests to outweigh the need for probative evidence." *Jaffee v. Redmond*, 518 U.S. 1, 9-10, 116 S. Ct. 1923, 1928 (1996).

The lower court's analysis overturns established principles of the common law that are embodied in prevailing case law among the States. Interpreted in the light of reason and experience, that body of law requires that the legal protections accorded to communications between an attorney and a client not be waived without constitutional protections including, at a minimum, requirements that the claimant establish a *prima facie* case for denying the privilege and a court's independent verification by *in camera* review of the claimed documents.

The right to confidential communications between insurers and their attorneys has repeatedly been affirmed by state courts interpreting the common law.[2] *See, e.g. Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 260 (Del. 1995); *Thomas v. First Assurance Life of America*, 606 So.2d 957, 960 (La. App. 3rd Cir. 1992); *Palmer by Diacon v. Farmers Ins. Exchange,* 861 P.2d 895, 905-06 (Mont. 1993); *Maryland Am. Gen. Ins. Co. v. Blackmon* 639 S.W.2d 455, 458 (Tex. 1982); *State ex rel Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 582-83 150 N.W.2d 387, 400 (1967); *Arnold v. Mountain West Farm Bureau Mutual Ins. Co.*, 707 P.2d 161 (Wyo. 1985).

Likewise, federal courts applying state law have refused to find that the attorney-client privilege is abrogated by the mere assertion of a bad faith allegation in the plaintiff's complaint. See *Ferrara & DiMercurio v. St. Paul Mercury Ins. Co.,* 173 F.R.D. 7, 11 (D. Mass. 1997), *aff'd on other grounds*, 240 F.3d 1 (1st Cir. 2001); *Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288, 294 (D. Mont. 1998); *National Industrial Transformers, Inc. v. Atlantic Mutual Ins. Co.*, 1993 WL 158373 (S.D.N.Y. 1993) (ruling otherwise "would create an unwarranted exception to the attorney-client privilege and result in discovery of privileged communications and work product in virtually every insurance coverage dispute"); *Brennan v. Western National Mutual Ins. Co.*, 198 F.R.D. 660, 663 (D.S.D.

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[2] This common law guarantee has been codified in some jurisdictions. *See, e.g., California Evidence Code*, § 954 (protecting "confidential communications" between an insurance company and its attorneys).

2001) (rejecting plaintiff's argument that an exception to the attorney-client privilege exists in bad faith cases simply because of the nature of the litigation).

Such rulings have recognized the vital role of candid communications in guiding the business of insurance. As noted by the Indiana Court of Appeals, "communications between attorney and client and advice given by the attorney must remain confidential to insure the proper functioning of the legal system." *Hartford Financial Services Group v. Lake County Park and Recreation*, 717 N.E.2d 1232, 1237 (Ind. App. 1999).

Likewise, in affirming the confidential nature of communications between an insurer and its coverage counsel, the California Court of Appeals declared in *Aetna Cas. & Sur. Co. v. Superior Court*, 153 Cal. App.3d 467, 474, 200 Cal. Rptr. 471, 474 (1984) that:

> A contrary rule would have a chilling effect on an insurance company's decision to seek legal advice regarding close coverage questions and would dis-serve the primary purpose of the attorney-client privilege—to facilitate the uninhibited flow of information between a lawyer and client so as to lead to an accurate ascertainment and enforcement of rights.

As the Montana Supreme Court opined in *State ex rel. U.S. Fidelity and Guar. Co. v. Montana Second Judicial Dist. Court,* 783 P.2d 911, 916 (Mont. 1989):

> An insurance company must have an honest and candid evaluation of a case, possibly including a 'worst case scenario.' A concern by the attorney that communications would be discoverable in a [third-party] bad faith suit would certainly chill open and honest communication…. It could also impede settlements.

In *Guaranty Nat'l Ins. Co. v. George*, 953 S.W.2d 946, 948 (Ky. App. 1997), the Kentucky Court of Appeals concluded that a legal opinion obtained by an insurer was protected by the attorney-client privilege and therefore not discoverable in a subsequent bad faith action:

> To develop an exception in bad faith cases against insurers would impede the free flow of information and honest evaluation of claims. In the absence of fraud or criminal activity, an insurer is entitled to the attorney-client privilege to the same extent as other litigants.

In light of these concerns, it is the rule in most states, that "a party cannot force an insurer to waive the protections of the attorney-client privilege merely by bringing a bad faith claim." *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 260 (Del. 1995). As a trial court later commented, "[o]ne of the goals of the Supreme Court's decision in *Tackett* was to make sure that a plaintiff in a bad faith action not be able to go on an expedition into the envisioned 'gold mine' that is the claims file just on the basis of a complaint and answer." *Clausen v. National Grange Mutual Ins. Co.*, 730 A.2d 133, 144 (Del. Super. Ct. 1997).

Likewise, in *Hartford Financial*, 717 N.E.2d at 1237, the Indiana Court of Appeals held that:

> A simple assertion that an insured cannot otherwise prove a case of bad faith does not automatically permit an insured to rummage through the insurer's claims file.

In light of the "reason and experience" of these courts in assessing the vita role of this common law privilege in the insurance context, the Ohio court's "not worthy of protection" exception to the attorney-client privilege is a dangerous and unwarranted infringement on the constitutional protections underlying this oldest and most vital common law privilege.

II. The Ohio Supreme Court's Ruling Represents an Unwarranted Expansion of the Recognized Common Law Exceptions to the Attorney-client Privilege.

As this Court has recognized, the policy decisions of the States bear on the question whether to "recog-

nize a new privilege or amend the coverage of an existing one." *Jaffee v. Redmond*, 518 U.S. 1, 13, 116 S. Ct. 1923, 1929-30 (1996).

The States have, in turn, expressed the need for caution before adopting exceptions to this fundamental privilege. *See, e.g. Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 249 Conn. 36, 52, 730 A.2d 51, 60 (1999) ("[e]xceptions to the attorney-client privilege should be made only when the reason for disclosure outweighs the potential chilling of essential communications"). This caution is evident in the manner in which state courts have interpreted the two most commonly recognized exceptions to the privilege: (1) "at issue" waiver and (2) the crime-fraud exception.

A. The "At Issue" Waiver Doctrine.

Like any other party, an insurer can waive the attorney-client privilege. Waiver may occur when an insurer raises its reliance on the advice of counsel as an affirmative defense to a claim of bad faith or other misconduct.

For the most part, courts have interpreted this "at issue" exception conservatively. See *Metropolitan Life,* 730 A.2d at 61(a communication is not "at issue" just because it is relevant, however, nor does "reliance upon legal advice within the process of adhering to contract terms… automatically place the actual legal advice at issue"); *Ex parte State Farm Fire & Cas. Co.*, 2001 WL 306919 (Ala. 2001) (communications from coverage counsel were not placed at "issue" merely because party sought to have bills for those legal services paid).

Such an explicit "at issue" waiver is wholly different, moreover, from a determination that advice of counsel automatically loses its privileged character based on the plaintiff's pleadings at the very outset of the case and prior to any adjudication of coverage.

B. The "Crime-Fraud" Exception.

An exception to the attorney-client privilege has also been recognized for communications that are intended to advance a criminal or fraudulent enterprise. *In Re Grand Jury Proceedings*, 183 F.3d 71, 75 (1st Cir. 1999). However, this "crime-fraud" exception plainly has no application here.

First, this exception only applies to future wrongdoing, where Vanliner has been sued for past misconduct only. Second, before the crime-fraud exception to the privilege applies, a claimant must make a threshold showing of its applicability. Finally, in order for the exception to be given effect, the documents in question must be subject to a court's *in camera* review.

Although the lower court did not attempt to rely on the "crime-fraud" exception to support its legal analysis, it is all the more telling that its holding, while broader than would have been permitted under a "crime-fraud" analysis, contains none of the *Zolin* safeguards that this Court has guaranteed with respect to cases in which litigants seek to invoke the "crime-fraud" exception to the attorney-client privilege.

III. The Ohio Supreme Court's Ruling Denies a Defendant the Procedural Protection That Is Vital to a Citizen's Access to Advice of Counsel.

Apart from these substantive concerns, the Ohio Supreme Court's analysis and, in particular, its finding that a plaintiff may compel disclosure of concededly privileged communications by merely *alleging* bad faith, would eviscerate the procedural protections that this Court has recognized are essential to a citizen's right to counsel. In particular, the lower court denied the petitioner the protection of the attorney-client privilege without (1) any threshold showing by the claimant that there was factual support for his allegations or (2) permitting *in camera* inspection of the subject documents by the trial court to confirm whether they fell within the crime-

fraud exception or some other constitutionally-recognized exception to the privilege. In so doing, the lower court failed to follow the teachings of this Court or the reason and experience of state courts.

In *United States v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L.Ed.2d 469 (1989), this Court set forth the parameters for the use of *in camera* review in cases where parties assert the crime-fraud exception to the attorney-client privilege. First, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person" that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies. 491 U.S. at 472, 109 S. Ct. at 2631. At the same time, this Court recognized the need for careful procedures to be undertaken in connection with such review:

> A blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception… would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk. There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings. Finally, we cannot ignore the burdens *in camera* review may place upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties.
>
> There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents. Courts of Appeals have suggested that *in camera* review was available to evaluate claims of crime or fraud "only when justified" or "in appropriate cases"… We agree. (Case citations omitted).

Zolin, 491 U.S. at 571, 109 S.Ct. at 2630.

Therefore, "before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Zolin*, 491 U.S. at 572, 109 S.Ct. at 2631.

In contrast to *Zolin* and state court cases that have since embraced its standard, *Vanliner* stands alone in recognizing a previously unstated exception for conduct that is "unworthy" of protection. All previous bad faith cases that have reached this result have done so on the basis of the "crime-fraud" exception (likening bad faith to a species of fraud) and have therefore afforded insurers the procedural safeguards guaranteed by this Court in *Zolin*. *Vanliner* stands alone in denying defendants these protections.

In *United Services Automobile Ass'n v. Werley*, 526 P.2d 28 (Alaska 1974), the Alaska Supreme Court declared that a policyholder claiming bad faith might, under certain circumstances, be entitled to obtain privileged claim materials possessed by its insurer. The court ruled that the insured must do more than allege bad faith, however. Rather, it must make a *prima facie* showing of fraud, such that "the evidence in favor of a proposition be sufficient to support a finding in its favor, if all the evidence to the contrary be disregarded." *Id.* at 32, n.15. Further, as the Alaska Supreme Court has since declared in *Central Construction Co. v. The Home Ind. Co.*, 794 P.2d 595, 600 (Alaska 1990), quoting *Zolin*, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person" that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Likewise, in *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982), the Colorado Supreme Court ruled that an insured seeking to compel the disclosure of privileged documents in an insurance bad faith case must do more than merely allege fraud or bad faith. In order to prevail, the party attempting to show that the exception to the privilege applies must first make "a factual showing 'adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the… fraud exception… has occurred.'" *Id.* at 33. If the trial court finds the requisite factual showing has been made, the requested documents are subject to an *in camera* inspec-

tion, at the trial court's discretion, to determine whether there is a "foundation in fact for the charge." *Id. Accord Escalante v. Sentry Ins. Co.*, 743 P.2d 832, 842 (Wash. Ct. App. 1987), *review denied*, 1988 WL 632337 (Wash. 1988). If the insured cannot make this threshold showing, however, there is no need for *in camera* review of the disputed documents. *Barry v. USAA*, 989 P.2d 1172, 1176 (Wash. Ct. App. 1999) (affirming privilege in light of insured's failure to establish initial "factual showing").

As in *Zolin* and *Kerr v. U.S. District Court*, 426 U.S. 394, 404, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725 (1976), it is constitutionally impermissible to restrict the scope of the privilege in the manner proposed by the Ohio Supreme Court without providing for some sort of threshold showing of proof by the claimant that is then subject to independent verification by the court through an *in camera* inspection of the documents in question. This *in camera* inspection, while arguably prejudicial to the defendant's rights since the trial judge's views may be affected by the contents of the documents that he or she inspects, at least provides a threshold safeguard against the potential for abuse of discovery inherent in the unguarded approach authorized by the Ohio Supreme Court.

In light of the careful guidance set forth by this Court in *Zolin*, with respect to an exception to the privilege in cases of criminal wrongdoing, it is all the more shocking that the privilege should be denied to a civil litigant in a case that merely involves unsupported allegations of unreasonable conduct that do not rise to the level of criminal wrongdoing.

IV. The Ohio Supreme Court's Limitation on the Attorney-client Privilege Will Impair the Business of Insurance and Fair and Impartial Operation of Our Adversary System of Justice.

Insurance plays an important role in the commerce of the United States by allowing citizens and businesses to transfer risk to insurers. As this Court recognized in *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348, 105 S. Ct. 1986 (1985),the protections afforded by the attorney-client privilege are no less important to corporations than they are to individual citizens.

Owing to the significance of insurance, the States have enacted various statutes governing the manner in which insurers investigate and handle claims, and have established significant statutory and common law penalties for mishandling claims or acting unfairly or deceptively. At the same time, the very value of insurance is subverted if insurers are obliged to pay unwarranted claims, diverting resources away from where they are needed and driving up the costs of insurance for all policyholders.

This Court has recognized that the protection of the attorney-client privilege is not without its consequences. In particular, that information that is indubitably relevant may thereby be shielded from discovery. *Trammel v. United States*, 445 U.S. 40, 50, 100 S. Ct. 906, 912, 63 L. Ed.2d 186 (1980). At the same time, it is recognized that the adversary system of justice ceases to function where one side is deprived of unfettered access to counsel at an early and critical stage of the development of a legal dispute or, alternatively, where the legal advice that it obtains is fully discoverable by its adversary.

In light of these concerns, this Court has been properly cautious in imposing restrictions on the attorney-client privilege and, indeed, has affirmed its expanded scope in recent cases. *See, e.g. Swidler and Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081 (1998) (privilege persists even after death of attorney) and *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996) (recognizing similar privilege for statements made to a psychotherapist).

By promoting full and frank communications between attorneys and their clients, the attorney-client privilege encourages observation of the law and aids in the administration of justice. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348, 105 S. Ct. 1986 (1985) and *Upjohn v. United States*, 449 U.S. at 389, 101 S.Ct. at 682. Contrariwise, requiring corporations to "fly blind" by denying them unfettered access to counsel at the crucial early stage of claims handling where insurers must considered whether or how to address a demand

for insurance coverage will not assist the administration of justice or the proper functioning of our adversarial system.

The common law and the Constitution contain no authority to support the Ohio Supreme Court's unwarranted abrogation of the attorney-client privilege or its creation of an unprecedented elimination of the privilege based upon a mere allegation of bad faith. Such a cramped construction of the privilege and its resulting infringement on the rights and contractual expectations of the petitioner Vanliner constitutes reversible error that must be reviewed and corrected by this Court. For these reasons, the Defense Research Institute respectfully urges this Court to grant Vanliner's Petition for a Writ of Certiorari.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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