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# IMPLIED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE IN BAD FAITH CLAIMS

*[Good Faith Claims Handling*, Para. 2.04 and *Law of Evidence*, Para. 3.09*]*

A hit and run driver struck a flagpole on property owned by 100 Renaissance, LLC causing $2,134 in damage. Renaissance filed a claim with Travelers Property Casualty Company seeking coverage under its automobile liability policy which included uninsured motorist (UM) coverage. The policy defined "property damage" as follows:

> "Property damage" means injury to or destruction of:
>
> a. A covered "auto";
>
> b. Property contained in the covered "auto" and owned by the Named Insured or, if the Named Insured is an individual, any "family member"; or
>
> c. Property contained in the covered "auto" and owned by anyone else "occupying" the covered "auto".

The UM portion of the policy defined an "uninsured motor vehicle" to include one "that is a hit-and-run vehicle and neither the driver nor the owner can be identified. The vehicle must hit an 'insured,' a covered 'auto' or a vehicle an 'insured' is 'occupying' . . ."

Travelers assigned its adjuster, Duncan, to handle the claim. Duncan denied coverage under the policy because the flagpole was neither a covered auto, nor property contained in a covered auto. Shortly thereafter, Renaissance's attorney, Wise, sent an email to Duncan in which he disputed the denial. Wise cited Mississippi Code section 83-11-101(2), which states:

> No automobile liability insurance policy or contract shall be issued or delivered after January 1, 1980, unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for property damage from the owner or operator of an uninsured motor vehicle . . .

Wise said that he was aware that Travelers' policy language attempts to limit coverage by narrowly defining the term property damage to exclude all forms of property other than an insured's auto and its contents. Wise, however, also said that Mississippi Code section 83-11-

101(2) contains no such limitation and requires coverage for all types of property damage for which the uninsured driver would be liable. Wise argued that the policy must conform to the statutory requirements that broaden the definition of property damage despite the narrowly worded policy language and, therefore, Travelers must afford coverage for the damaged flagpole.

After consulting with Travelers' in-house counsel, Harris, Duncan signed and sent a letter to Wise that again denied coverage. Duncan's letter explained that based on Travelers' review of the policy terms and the law there was no coverage for damage to the flagpole. Specifically, the letter said "As we understand the Mississippi auto liability and uninsured motorist insurance statutes, coverage is mandated for vehicles listed or otherwise described in the policy (covered autos) and for owners and their family members, drivers and occupants of those vehicles (insureds)." The letter referred to Mississippi Code section 83-11-102(a), but that section doesn't actually contain a subsection (a). The letter also said that the statutory requirements regarding auto liability and uninsured motorist insurance are included in the Mississippi Uninsured Motorists Coverage Endorsement which is part of the insured's commercial auto policy. Finally, the letter explained that the endorsement includes a definition of property damage that "broadens" coverage so that it applies not just to covered autos. The letter concluded, however, that the damage to the flagpole didn't come within the expanded definition of property damage.

**BAD FAITH**

Renaissance filed suit against Travelers alleging both breach of contract and bad faith. In an effort to resolve the matter Travelers paid the breach of contract claim in full. Renaissance, however, proceeded with its bad faith claim seeking to prove that Travelers lacked an "arguable or legitimate" basis to deny the claim. During discovery, Renaissance's attorney took Duncan's deposition and asked that she explain her denial letter and the reasons why Travelers concluded that the damaged flagpole was not covered under the policy. Although Duncan was repeatedly asked to explain Travelers' decision, she failed to provide a coherent rationale for the denial.

An excerpt from Duncan's deposition was included in the court's opinion, mainly focusing on what Duncan knew about the Mississippi UM statute. The transcript included this exchange:

Q: Okay. Would you agree with me that it's important to know what the law is that affects coverage when you're – prior to making your determination of coverage?

A: Is it important to know the law for Mississippi in order to make this decision? Is that what you're asking me?

Q: Yeah, . . . the reason why is Mississippi Code section 83-11-101 sets up minimum standards for Uninsured Motorist coverage. In other words, it says: "Your policy has to provide these coverages," okay? So when you're making the determination if this is different than your policy, isn't it important to know that?

A: Okay. I don't even know how to answer, to be honest with you . . . But as I stated I'm aware of what our – of what UMPD is and what we cover . . . I don't know Mississippi law. I don't know if it differs.

Q: Okay. I'm going to show you section 83-11-102 that you cite in your denial letter, okay? Section 83-11-102, and then you have "a." There's no "a" in section 83-11-102. You're citing to a Mississippi statute, so I guess my question to you is: Where did you come up – where did you find that statute, and what does that mean, "83-11-102-a" ?

A: I don't know. Maybe it was a typo. I don't know.

Q: Okay. Well, where did you come up – did you research Mississippi law?

A: I can't remember.

Q: Well, what do you think happened? What's your best recollection?

A: I mean, General Counsel may have assisted me. I don't remember where that came from. And I'm going to be honest with you about that because I don't remember.

Q: And the reason I'm asking, it looks like you're citing misleading language to my client in order to bolster your decision to deny claims. And granted, this was after you talked to Mr. Harris, and so that's what I'm trying to figure out. Does that make sense?

A: It makes sense, but I don't know.

Q: The situation we have is I have a client who is making an uninsured motorist property damage claim. You've denied the claim. Renaissance told you there's a statute that says that your policy language is inconsistent with the statute. You go to your in-house lawyer, and then you send your denial letter. It seems to be misleading, but it may not be, and that's why I'm trying to figure out where this language came from. And maybe it's a typo. And you're telling me you don't have any recollection of it?

A: No.

In response to Travelers' motion for summary judgment on the bad faith claim, Renaissance sought to compel production of certain email communications between Duncan and Harris. Based on Duncan's deposition testimony, Renaissance argued that Harris actually made the decision to deny the claim. According to Renaissance, Duncan failed in both her letter and her deposition testimony to clearly explain the basis for Travelers' decision to deny the claim, and, therefore, Harris should provide the explanation for the denial. Travelers objected based on the attorney-client privilege. After reviewing the emails in private, the trial court found that Travelers had impliedly waived the attorney-client privilege and ordered Travelers to release the emails to Renaissance and produce Harris for a deposition. Travelers filed an interlocutory appeal with the Mississippi Supreme Court.

## ATTORNEY-CLIENT PRIVILEGE WAIVED

The issue before the Mississippi Supreme Court was whether an insurer impliedly waives the attorney-client privilege if its claims representative relies substantially on the insurer's attorney to prepare the denial letter.

The majority of courts that have dealt with this issue have concluded that the attorney-client privilege is only waived when the insurer expressly raises an advice-of-counsel defense. In *Travelers Property Casualty Company of America v. 100 Renaissance , LLC,* 308 So3d 847 (Miss. 2020), however, the court held that when the facts make it clear that the insurer "substantially if not wholly" relied on the advice of counsel to deny the claim, there can be an implied waiver of the attorney-client privilege even though the insurer didn't expressly assert an advice-of-counsel defense.

The attorney-client privilege applies to all information about the client received by the attorney in his professional capacity and in the course of his representation of the client. A client, however, can waive the privilege in certain circumstances:

> Because of the important public policy considerations that necessitated the creation of the attorney-client privilege, the "at issue," or implied waiver, exception is invoked only when the legal advice is integral to the outcome of the legal claims of the action. Such is the case when a party specifically pleads reliance on an attorney's advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client

> communication, or specifically places at issue, in some other manner, the attorney-client relationship. *Jackson Medical Clinic for Women v. Moore*, 836 So2d 767 (Miss. 2003).

Travelers argued that its decision to deny the claim was reasonable and made in good faith based on its investigation, and not based on the attorney's advice. Based on Duncan's deposition testimony, however, the court concluded that Travelers' investigation was nothing more than a denial based on in-house counsel's evaluation and advice. The court said:

> We agree with the trial court and do not find an abuse of discretion. The attorney-client privilege does not apply here. In *Moore*, the court discussed the implied waiver of the attorney-client privilege in instances in which a party "specifically places at issue, in some other manner, the attorney-client relationship." Travelers sent the denial letter to Renaissance in an effort to explain its arguable and legitimate basis to deny the claim. The letter was signed by Duncan, but based on her deposition testimony, it clearly was prepared by someone other than Duncan, most likely Harris. If so, Harris did not act as legal counsel and give advice to Duncan to include in the denial letter. Instead, the denial letter contained Harris's reasons to deny the claim. Duncan's signature was simply an effort to hide the fact that Harris, not Duncan, had the personal knowledge of Travelers' reasons to deny the claim and to use the attorney-client privilege as a sword to prevent Renaissance from discovering the reasons from the person who had personal knowledge of the basis to deny the claim.

The court referred to two Arizona cases in which a similar conclusion was reached based on similar facts. In those cases attorneys were required to testify because the attorneys made the decision to deny the claims or provided the reasons for the denial.

In *State Farm Mutual Auto Ins. Co. v. Lee*, 13 P3d 1169 (Ariz. 2000), the court held that an insurer impliedly waived the attorney-client privilege when it impliedly asserted the advice-of-counsel defense.

In *Roehrs v. Minnesota Life Ins. Co.*, 228 F.R.D. 642 (D. Ariz. 2005), the court held, in part, that the defendant insurer, through its adjusters, impliedly waived the attorney-client privilege by the adjusters' deposition testimony that they considered and relied on the legal opinions of their attorney in making the decision to deny the claims even though the denials were not solely based on their attorney's advice.

According to the Supreme Court of Mississippi the holdings in these cases "clearly state the legal principle that the trial court applied here: if the claims handler relied substantially, if not wholly, on in-house counsel to prepare her denial letter, the reasoning of in-house counsel should be discoverable." The Supreme Court of Mississippi affirmed the trial court's holding and concluded that Travelers had waived the attorney-client privilege as it related to its in-house counsel, Harris. Travelers was ordered to produce the written communications between Duncan and Harris about Renaissance's property damage claim and was also ordered to produce Harris for a deposition so that Renaissance could question him about Travelers' arguable and legitimate basis to deny the claim.

As explained previously, most states will find an implied waiver of the attorney-client privilege only when an insurer expressly asserts the advice-of-counsel defense. When an insurer expressly asserts this defense in response to an insured's bad faith claim, the insurer is clearly claiming that its denial was reasonable and in good faith because its attorney said so. In this context, most courts have found that the insurer cannot with one hand wield the sword – asserting a defense that it relied in good faith on the advice of counsel as the basis for denying the insured's claim – and with the other hand raise the shield – using the attorney-client privilege to keep the insured from finding out what it learned from its attorney. Courts have held that upholding the privilege in this situation unfairly denies the insured access to information necessary to refute the insurer's defense. This principle is commonly referred to as the "at issue" exception to the attorney-client privilege. If it applies, the insurer is likely to be found to have impliedly waived the privilege,

thereby subjecting its communications with counsel to discovery.

## CONCLUSION

The majority of courts reject claims of waiver when there is no express assertion of an advice-of-counsel defense. According to these courts an insurer's mere consideration of coverage counsel's advice in reaching its decision to deny an insured's claim, without affirmatively invoking the advice-of-counsel defense, is not enough to find an implied waiver of attorney-client privileged communications.

Many cases, however, don't involve an express advice-of-counsel defense. In these cases the insurer might have consulted with counsel, received advice, and to some degree factored that advice into its decision to deny coverage without ever expressly invoking the advice-of-counsel defense. The difficult cases, like *Renaissance,* involve insurer conduct that gives rise to a finding that the insurer impliedly, rather than expressly, raised an advice-of-counsel defense. This implied assertion results from insurer conduct indicating its substantial reliance on advice of counsel as the primary basis for denying the insured's claim. In these cases the insurer has usually failed to clearly and objectively explain the basis for denial, which causes the insured to inquire about the insurer's communications with its coverage counsel.

The *Renaissance* decision demonstrates how important it is that a claims professional understand the factual and legal reasons for a coverage decision and be able to clearly explain those reasons under oath, if necessary. In some states, this knowledge and understanding might be necessary to avoid an inadvertent waiver of the attorney-client privilege.