



2019 Annual Conference
March 13 -15 2019
Orlando, FL

Mixing and Mingling – Risky or Reasonable for Claims and Coverage Communications to Reside in One File? and Other Current Issues of Privilege Waiver

Policyholders are constantly pressing to see the insurer’s privileged coverage analysis. This seminar will address some of the latest policyholder efforts to invoke waivers to defeat attorney-client privilege in disputed coverage matters.

I. Background on waiver of attorney client privilege (bad faith claims and other insurance claims)

Policyholders frequently invoke the argument that the insurer has “waived” attorney client privilege – either expressly, impliedly, or automatically by how it chooses to defend a claim. This waiver argument was recently tested in *State ex rel. Shelter Mutual Insurance Company v. Wagner* (June 26, 2018), Mo. App. W.D. Case No. WD81541 (2018 Mo. App. LEXIS 701) (reversing trial court decision of waiver in a bad faith claim). The *Wagner* case is now headed to the Missouri Supreme Court. Before examining this new case, some brief background on the pertinent privilege and waiver issues is helpful.

A. Risks arising out of use of counsel and arising out of the “advice of counsel” defense

When an insurer is accused of bad faith for an improper settlement or coverage decision, it has the option to invoke an advice-of-counsel defense. If the insurer relied in good faith on counsel’s input, this may help to portray the insurer as reasonable. Still, the overall reasonableness of the insurer’s actions will be examined. After all, the lawyer is not handling the whole process for the insurer. Indeed, if the lawyer is too closely involved with claims handling or business decisions, the privilege evaporates for that separate reason – as the lawyer’s communications are non-privileged business communications as opposed to legal advice. See *Tackett v. State Farm Fire & Casualty Insurance Co.* 653 A.2d 254 (Del. 1995) (requiring insurer to disclose the contents of the claim file included privileged communications from counsel); *Genovese v. Provident Life and Accident Ins. Co.*, 74 So.3d 1064 (Fla. 2011) (“If the trial court determines that the investigation performed by the attorney resulted in the preparation of materials that are required to be disclosed...and did not involve the rendering of legal advice, then that material is discoverable”).

In *Tackett*, Plaintiffs asserted a bad faith claim alleging State Farm delayed payment of underinsured motorist benefits following an automobile accident where the tortfeasor's liability limits were paid, but were viewed as inadequate by the Plaintiffs. During the course of pretrial discovery, the Tacketts propounded interrogatories concerning State Farm's claims handling procedures and sought production of the Tacketts' entire claim file. State Farm produced the file, but deleted nine items on the grounds of privilege. The trial court ordered the documents produced for an in camera examination and, thereafter, ordered their production. During discovery, a State Farm claim superintendent completed an affidavit and took the position that there was "routine handling" of the claim. The court determined that there was an implicit waiver because the State Farm "alleged particularized facts that implicitly relied upon communications with counsel contained in the [insured's] file and because the Tacketts would not be able to contest the insurer's claim without access to the claim file." The *in camera* review by the court revealed that, in addition to the advice of counsel, State Farm's handling of the claim was not routine and possibly improper. Thus, in *Tackett*, the privileged was deemed waived. *Id.* But see *Wagner*, 2018 Mo. App. LEXIS 701, *10-11 (discussed below; no waiver despite privileged communications placed into the claims file).

B. The justification for finding waiver based upon an advice of counsel defense

A drawback to the advice of counsel defense is well-understood: it places the attorney's advice at issue, thereby waiving attorney-client privilege with respect to the subject matter of the advice. *See, Static Control Components, Inc. v. Lexmark Int'l., Inc.*, 250 F.R.D. 575, 580 (D. Colo. 2007) (citing *In re EchoStar Commc'ns. Corp.*, 448 F.3d 1294, 1302-1305 (Fed. Cir. 2006)). "This [waiver] rule allows the opposing party to probe fully all advice received by the alleged [wrongdoer] and which played any part in its belief concerning [the alleged conduct]. *Id.* Some courts allow counsel to protect the legal work and mental impressions (work product) that has not been shared with the client. *Id.*; *Nicholas v. Bituminous Cas. Corp.*, 235 F.R.D. 325, 333 (N.D. W. Va. 2006) ("[a]sserting the advice of counsel defense does not waive information protected by the work-product doctrine unless counsel communicated the information to the defendant."); *see, Cordis Corp. v. SciMed Life Sys., Inc.*, 980 F. Supp. 1030 (D. Minn. 1997), *see also, Thorn EMI N. Am., Inc., v. Micron Tech., Inc.*, 837 F. Supp. 616, 620 (D. Del. 1993).

While this aspect of the waiver rule may seem to be straightforward – privilege being waived when an insurer invokes the advice of counsel defense -- courts in many jurisdictions today have expanded the rule to include a murkier concept of implied waiver. According to some courts, an implied waiver can occur whenever an insurer broadly asserts its good faith in handling a claim. The assertion of good faith, in turn, arguably places at issue all information known to the insurer, including legal advice. Courts have adopted a variety of approaches to the notion of applied waiver in these circumstances. We'll group them into three approaches for purposes of discussion, identify the real dangers for insurers, and follow some of the recent arguments and results.

C. Implied waiver, and courts' different approaches to finding one

First, some jurisdictions have adopted a *per se* rule (nearly automatic waiver), meaning that an insurer loses its claim of privilege over certain key documents if it contests an allegation of bad faith. Courts in Ohio are a leading example of eliminating insurer's claims of privilege over certain key documents in bad faith cases. *E.g. Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3d 209, 2001 Ohio 27, 744 N.E.2d 154, 158 (Ohio 2001) ("[I]n 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 that were created prior to the denial of coverage."). The Ohio legislature, and some courts, have attempted to soften this rule in certain respects by bifurcating issues, requiring a prima facie showing of bad faith, and utilizing "in camera" reviews. But a number of Ohio courts are still fairly strict in requiring production of privileged materials without these protections in bad faith cases.

Second, on the other extreme, some jurisdictions are restrictive in finding a waiver and very protective of the privilege. These will only find an implied waiver if the insurer directly puts the attorneys advice at issue in the case. *Wagner*, 2018 Mo. App. LEXIS 701, *10-11; *Leaphart v. Nat. Union Fire Ins. Co.*, 2017 Mont. Dist. LEXIS 16, *26 (Mont. 8th Dist., July 28, 2017) (emphasizing that waivers should be voluntary, knowing, and intentional); *2,022 Ranch, L.L.C. v. Superior Court*, 113 Cal. App.4th 1377, 1395, 7 Cal. Rptr. 3d 197 (2003) ("waiver can only be shown by 'demonstrating that the client has put the otherwise privileged communication directly at issue'"); *see also, Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163-164 (Tex. 1993) (finding no waiver; setting rules which requires "offensive use" of the material in seeking affirmative relief, with the confidential material going to "the very heart of the affirmative relief sought"). *But see In re Kubosh Bail Bonding*, 522 S.W.3d 75 (Tex.App. 1 Dist. 2017) (finding waiver of privilege where party attempted to use privileged emails for its own benefit "offensively").

Third, many jurisdictions take an approach which attempts to balance the need for discovery against the importance of maintaining the privilege under the circumstances. These courts may establish clear rules which: (a) require a plaintiff to establish a "prima facie" case of bad faith before discovery of privileged materials will be required; and/or (b) examine privileged materials in camera to determine if they provide any evidence of bad faith. *ContraVest Inc. v. Mt. Hawley Ins. Co.*, 2017 U.S. Dist. LEXIS 48638, *1-2, 2017 WL 1190880 (D. S.C., Mar 31, 2017). Or they may attempt to review the position of the insurer versus the nature of the discovery requested to determine if a waiver should be found. For example, in *Lee (Arizona)*, the insurer was deemed to have impliedly waived privilege where it argued that its interpretation of its policies, statutes, and case law were reasonable. The insurer did not seek to expressly rely upon the advice of counsel in defending itself, but the court ruled that the argument of "reasonableness" in its interpretation of legal materials placed "at issue" the advice that it had received from its counsel. The court thus found the privilege to be waived. *Id*; *see also Maplewood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 614-18 (S.D. Fla. 2013)(requiring production of privileged items on various grounds, including placing them at-issue).

D. The extent of a waiver where it is found

When the privilege is waived, as one recent court stated in the bad faith context, the opposing party is “entitled to discover the attorney-client communications relating to the subject matter of the advice.” *Spargo v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 96823, *3-5, 2017 WL 2695292 (D. Nev., June 22, 2017). This proposition may seem reasonable, but defining the “subject matter” of the advice can be difficult. Some courts including California courts are restrictive, making clear that “[w]hether express or implied, the scope of a waiver must be narrowly construed and ‘fit within the confines of the waiver.’” *Garcia v. Progressive Choice Ins. Co.*, 2012 U.S. Dist. LEXIS 105932, *9, 2012 WL 3113172 (S.D. Cal., July 30, 2012) (citation omitted); *Transamerica Title Ins. Co. v. Superior Court*, 188 Cal.App.3d 1047, 1052, 233 Cal. Rptr. 825 (1987) (scope of waiver must be “narrowly defined”). Other courts like those in Ohio restrict the waiver on the basis of timing, stating that plaintiffs are entitled to materials “related to the issue of coverage that were created prior to the denial of coverage.” *Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3d 209, 2001 Ohio 27, 744 N.E.2d 154, 158 (Ohio 2001). In sum, a variety of approaches exist on the extent of waiver, depending on the jurisdiction.

II. New development: *State ex rel. Shelter Mutual Insurance Co., v. Wagner* (June 26, 2018), Mo. App. W.D.

A. Context

In *State ex rel. Shelter Mutual Insurance Company v. Wagner* (June 26, 2018), Mo. App. W.D. Case No. WD81541 (2018 Mo. App. LEXIS 701) (2018 WL 3121727), a Missouri appellate court considered whether communications between an insurance company and its coverage counsel regarding whether to accept a plaintiff’s settlement demand were protected by the attorney-client privilege. The appellate court held that they were. The decision is notable because (1) the Missouri appellate court, not known for its insurer-friendly decisions, rejected arguments adopted by other states for requiring disclosure of these communications, and (2) the Missouri Supreme Court recently accepted transfer of the case for further review.

In *Wagner*, the carrier provided automobile liability coverage to an insured that caused an auto accident. The two injured plaintiffs later sued the insured for bodily injuries. A dispute arose during the lawsuit as to how many of the carrier’s policies would apply to the accident. The plaintiffs demanded settlement for the limits of all the policies, but the insurance company refused. The plaintiffs obtained a judgment against the insured for \$300,000. They then filed an equitable garnishment action against the insurance company and its insured to collect on the judgment. The insured filed a cross-claim against his insurer for bad faith refusal to settle. In discovery, the insured sought production of communications between the insurer and its coverage counsel that pertained to the insurer’s consideration of whether to pay the plaintiffs’ prior settlement demand. The trial court ordered production of those communications on the grounds that the insured “held the right to waive attorney-client privilege for all documents in the claims file—even those between Shelter and its attorney.”

B. Arguments for production of privileged materials

On appeal, the insured raised at least three arguments as to why the communications should not be protected as privileged: two arguments seen in other jurisdictions and one fairly specific to Missouri practice.

1. Waiver based upon deposition testimony

First, the insured first argued that the insurer implicitly waived the attorney-client privilege when its corporate representative testified in cross examination at deposition that its decision to reject the claimants' settlement demand was made in reliance on the advice of outside counsel. The insured argued that an insurer does not have to plead advice of counsel as an affirmative defense for a waiver to occur in a bad faith refusal to settle case. Instead, the insured relied on authority from Arizona, *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 13 P.3d 1169 (2000), for the proposition that an insurance company's waiver of attorney-client privilege can be implied. In *Lee*, the Arizona court held that a "mere denial of the allegations in the complaint, or an assertion that the denial was in good faith" would not waive the privilege. However, an insurer's decision to "advance[] its own interpretation of the law as a defense, including what its employees knew ... in making that evaluation," including "information from the lawyers," would waive the privilege.

The Missouri appellate court in *Wagner* rejected the implied waiver argument and strongly upheld attorney client privileged for the insurer. "The resulting application of such a rule," the court said, "would mean that an insurance company would always waive privilege if it ever consulted an attorney because the attorney's counsel would likely form at least part of the basis for the insurance company's behavior." The appellate court continued: "An insurance company would never be entitled to attorney-client privilege in cases of bad faith settlement, even if the attorney's advice was but a part of the information the insurance company used in its decision making process." The appellate court reiterated Missouri's "long-standing preference for protecting 'the sanctity of the attorney-client privilege'" and rejected the waiver argument. For on this point about deposition testimony, see Part III below.

2. Non-privileged status based upon counsel's alleged involvement in claim handling

Second, the insured next contended that the attorney-client privilege should not apply because the insurance company's counsel "was merely acting as a part of the claims department at the time advice was given." He cited cases from Indiana, *Harper v. Auto Owner's Ins. Co.*, 138 F.R.D. 655 (S.D. Ind. 1991); New York, *Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. TransCanada Energy USA, Inc.*, 119 A.D.3d 492, 493, 990 N.Y.S.2d 510 (2014); and Washington, *Hawthorne v. Mid-Continent Cas. Co.*, No. C16-1948RSL, 2017 WL 2363740 (W.D. Wash. May 31, 2017); for the proposition that communications from an attorney who functions as a claims adjuster for an insurer (*i.e.* someone involved in "investigating, evaluating, negotiating, or processing the claim") rather than as a legal advisor, would not receive privileged status. For more on this point, see Part I.A above (*Tackett* case).

Under the facts at hand, the *Wagner* court rejected this argument about the attorney acting as a claims adjuster as well. It stated, the attorney “was hired specifically to represent Shelter as opposed to being hired to represent or work on the underlying claims against [the insured].” The insurer’s lawyer was not, according to the appellate court, “acting in the ordinary course of Shelter’s business of adjusting a claim. Instead, the attorney was retained specifically to protect Shelter’s interests as settlement negotiations occurred. The attorney was not acting as a claims processor or an adjuster.”

3. Non-privileged status due to coverage materials mixed into in the claim file

Finally, the insured argued that he was entitled to the communications under *Grewell v. State Farm Mut. Auto. Ins. Co.*, 102 S.W.3d 33 (Mo. banc 2003). In a doctrine somewhat unique to Missouri, *Grewell* had recognized “an insured’s right of access to his or her liability insurance claims file.” The insurance company in *Wagner* notably did not bifurcate its file between coverage and liability defense, but rather, commingled the privileged communications in a single file. The Missouri appellate court, however, held that *Grewell* did not apply because that case did not involve a claim of attorney-client privilege. The appellate court in *Wagner* clarified that *Grewell* “holds that an insured is entitled to his or her claims file but does not hold that the entitlement to the file extends to documents protected by privilege.” The court in *Wagner* accordingly held that *Grewell* did not require disclosure of the communications at issue. 2018 Mo. App. LEXIS 701, *13-14; *see also Andrews v. Ridco, Inc.*, 2015 S.D. 24, ¶¶22-24, 863 N.W.2d 540, 548-49 (no waiver despite counsel’s advice embedded into claim notes, where that advice was not cited as based for insurer’s position).

The *Wagner* appellate court upheld the privilege, rejecting all of the arguments for production of the privileged material. The Missouri Supreme Court has accepted transfer of the case but has not yet issued a ruling.

III. Contending with hostile plaintiff’s counsel’s to probe insurer representatives at deposition for an inadvertent waiver of privilege

Insurer representatives often find themselves in the crosshairs of plaintiff’s counsel when coverage and bad faith litigation has commenced. Depositions of insurance representatives can be a turning point in these cases. An representative who is well prepared and experienced can help in personalizing the company, diffusing stereotypes, and telling the company’s story. Conversely, a poorly prepared, unsympathetic or evasive representative can result in significant challenges to a successful outcome for the carrier.

Properly preparing for a deposition should be viewed with the utmost importance. Understanding the potential pitfalls is fundamental to this preparation. An inadvertent waiver of attorney-client privilege is one such pitfall that can compromise the carrier’s position through the disclosure of information that improve plaintiff’s counsel position.

A. References to legal analysis can, in some jurisdictions, cause a finding of “implied waiver,” especially if not discussed carefully at deposition

As noted in *Wagner* above, Plaintiffs may try to cite an insurance representative’s deposition testimony as the basis for a claim that attorney client privilege was waived. This effort failed in *Wagner*, but it succeeded *Roehrs v. Minn. Life Ins. Co.*, 228 F.R.D. 642, 646-647 (D. Az. 2005).

In *Roehrs*, the federal court in Arizona was reviewing a first party claim involving an alleged bad faith breach of the policyholder’s disability income policy. In deposition testimony, three of the adjusters stated that they gathered information from multiple sources before making a decision on the claim. The sources included medical professionals, attorneys, and internal insurance supervisors. *Id.* at 646-47 & n. 8. The adjusters each stated, and the insurance company contended, that their subjective belief of no coverage was justified by the facts. *Id.* To determine if this decision process caused an implied waiver of privilege, the Court reviewed the three criteria for waiver as set forth by the Arizona Supreme Court:

1) assertion of the privilege was a result of some affirmative act, such as filing suit [or raising an affirmative defense], by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

Id. at 645 (citing *State Farm Mutual Automobile Insurance Co. v. Lee*, 199 Ariz. 52, 13 P.3d 1169, 1173 (Ariz.2000)). The court concluded that this reliance on legal advice, as part of the basis for decision, constituted an affirmative act that placed the legal materials at issue. *Id.* Under these circumstances, the court found that there was an implied waiver of the attorney client privilege. *Id.* at 646-47.

A contrary decision, finding no waiver, was reached more recently in *Labertew v. Chartis Prop. Cas. Co.* (Apr. 19, 2018), D. Ariz. No. No. CV-13-1785-PHX-DGC (2018 U.S. Dist. LEXIS 65812). In *Labertew*, the insurance representative had denied coverage and defense for a third party claim against the policyholder. When asked about the reason for denial in deposition, the representative agreed that one element of his analysis involved the views received from coverage counsel. *Id.* *9. But this was not enough to cause a waiver. The Court quoted the reasoning of *Lee* on this point:

We assume client and counsel will confer in every case, trading information for advice. This does not waive the privilege. We assume most if not all actions taken will be based on counsel's advice. This does not waive the privilege. Based on counsel's advice, the client will always have subjective evaluations of its claims and defenses. This does not waive the privilege. All of this occurred in the present case, and none of it, separately or together, created an implied waiver.

Id. *10 (citing *Lee*, 199 Ariz. at 66). As the *Labertew* court pointed out, *Lee* found a waiver based upon the presence of an additional factor: the insurer’s claim that its “actions were the

result of its reasonable and good-faith belief that its conduct was permitted by law *and* its subjective belief based on its claims agents' investigation into and evaluation of the law." *Id.* at *10-11 (quoting *Lee*; emphasis in original).

Accordingly, among *Lee*, *Labertew*, and *Roehrs* (all from Arizona), there is quite a bit of grey area, and room for debate as to whether any reliance on legal analysis creates a waiver. Under these circumstances, in Arizona (and similar jurisdictions using the balancing test), the safest route for an insurance representative at deposition involves acknowledging legal advice as one of multiple factors, without claiming either: (a) the advice of counsel defense; or (b) a subjective, good faith belief that the law permitted the denial.

Outside of Arizona (and jurisdictions utilizing a similar balancing test), depositions are not as perilous. For example, in Missouri, the *Wagner* court simply held – despite an insurance representative acknowledging reliance on counsel -- that a “waiver must be voluntary.” The *Wagner* court thus stated that a “waiver extorted under cross-examination is not voluntary,” at least not where the insurer declined to invoke the advice of counsel defense. 2018 Mo. App. LEXIS 701, *6-8; *see also Sharp v. Evanston Ins. (In re C.M. Meiers Co.)*, 2016 Bankr. LEXIS 3849, *30-31 (Bankr C.D. Call 2016) (“an insurer who consults counsel as part of its claims analysis does not waive the attorney-client privilege;” citing *Aetna Casualty & Sur. Co. v. Superior Court*, 153 Cal. App. 3d 467, 477, 200 Cal. Rptr. 471, 477 (Cal.App. 1 Dist. 1984).

The Missouri court in *Wagner* simply applies a different test, more protective of privileged materials. For more on these different tests, see Part I above.

B. Waivers from use of documents to prepare for depositions, or use of documents during the deposition

Plaintiffs’ counsel also try to obtain access to privileged materials by inquiring about items used in deposition preparation and/or by determining the representative’s reliance on privileged materials in the claim file. For example, in *In re Seroquel Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 5218, *14-15, 2008 WL 215707 (M.D. Fla 2008), the court compelled production of dozens of documents that were used in deposition preparation. The theory is that if counsel selected certain documents to prepare the witness, then opposing counsel is entitled to see what information was used to shape that testimony. In another case, *Auto Owners Ins. Co. v. Totaltape, Inc.*, 135 F.R.D. 199, 202, 1990 U.S. Dist. LEXIS 18546, *6-8 (M.D. Fla 1990), the insurer was required to produce the entire claims file -- despite work product objections – where the adjuster referred to it repeatedly during the course of the deposition.

C. Avoiding pitfalls which can undermine privilege at deposition

To avoid the traps noted above, insurer representatives can use the following guidance:

1. Avoid reliance on privileged materials in deposition preparation or during the deposition
2. Do not invoke “advice of counsel” as the basis for justifying a decision, as opposed to a proper investigation and analysis of the claim

3. Avoid indicating a denial of coverage was based on a subjective understanding of the law or subjective understanding of the legal bases for the claim.
4. Use the bases outlined in the declination letter if asked for the basis for the denial of coverage.

IV. Strategic choices and options for insurers facing the risk of implied waiver

Danger for insurers arise not only when courts find *per se* waivers, but also when they undertake a balancing test for finding a waiver. In those cases, insurers are often placed in an untenable position of choosing either: (a) defending their actions on the basis of their own reasonable behavior, which can trigger a waiver of privilege; (b) conceding certain arguments about their behavior in favor of focusing only on purely contractual or legal issues; or (c) even avoiding legal counsel in the first place, despite a difficult issue, due to the chilling effect of waiver rules. Insurers and their counsel clearly prefer courts to respect the attorney-client privilege. In order to maximize the chances of preserving attorney-client privilege, it is important for them to understand the best current arguments and strategies for encouraging courts to uphold it.

There are at least 3 ways that insurers can work to reduce the likelihood of losing the protection of attorney client privilege in bad faith cases. First, they should keep lawyers out of the business of claims handling. If legal advice is needed on a specific issue, the request and response should be focused, with the lawyer remaining separated from the actual claims handling process.

Second, once a bad faith claim is filed, the insurer should carefully plan its defense, and if it wishes to protect all privileged items, it should affirmatively state that in its answer that it is not relying upon the advice of counsel defense. There could still be an implied waiver, but disclaiming this defense can be important.

Third, once privileged materials are sought, the insurer (and its counsel) should begin the argument by emphasizing that protection of privilege serves the interests of justice for everyone. Where the concept of privilege is strong, it encourages insurers to be honest in seeking legal advice in difficult situations, preventing legal errors and mistakes. Where it is weakened, insurers may be reluctant to openly share their concerns with counsel, inhibiting counsel from assisting them.

As noted above, some courts will seek to balance the plaintiff's need for the materials against the benefits of protecting privilege. In that case, insurers should insist that: (a) trial and even discovery be bifurcated between coverage issues and bad faith issues; (b) plaintiff be required to make a prima facie showing of bad faith before privilege can be waived, and that any waiver be narrowly tailored to fit the purposes of the discovery; and (c) the court itself review the materials to determine whether they are relevant to proving bad faith. Further, some courts may allow insurers to invoke work product doctrine to protect certain materials.