The Implied Waiver of the Attorney-Client Privilege in Insurance Bad Faith Cases

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TIP
It is the advice of counsel defense that impliedly waives the attorney-client privilege, not the mere advice of counsel.

This article provides an overview of the law on the implied waiver of the attorney-client privilege in insurance bad faith cases. It begins with the most extreme situation, where no attorney-client privilege protection exists. It then canvases the various tests that have been articulated, in the jurisdictions that have maintained the privilege in a bad faith case (that is, most jurisdictions), for determining whether there has been an implied waiver of the privilege. It continues with a discussion of cases where an implied waiver has been found and makes suggestions for avoiding these results. The article emphasizes an often overlooked distinction—that between the advice of counsel generally and the advice of counsel defense. The former should not result in an implied waiver; the latter will. It also focuses on the distinction between pleading bad faith or good faith and actual reliance on the advice of counsel defense. The former should not result in an implied waiver; the latter will.

The article concludes that an implied waiver of the attorney-client privilege should rarely, if ever, be found if counsel for insurers are careful to avoid certain traps for the unwary. These traps include defending based on the advice of counsel; permitting an insured’s counsel to establish during discovery that a claims examiner’s knowledge of the law, provided to him by coverage counsel, was a basis for the declination of coverage; and defending based on the so-called affirmative defenses of “good faith” and “reasonableness.”

The article also concludes that where an insurer claims it is not relying on any privileged communications to defend, courts should eschew what is often a convoluted and imprecise legal implied waiver analysis in favor of the practical approach of simply entering an order barring the insurer from relying on any such communications during the litigation.

Preliminaries and the Per Se Waiver Rule

The preliminaries. At the outset, it is important to highlight a couple of privilege preliminaries. State law, not federal law, supplies the rule of decision on privilege in diversity cases. Moreover, Federal Rule of Evidence 502 does not apply to the implied waiver of the attorney-client privilege because it only governs certain waivers by disclosure.

The rule. Some courts have held that the attorney-client privilege and work product doctrines do not apply in bad faith insurance cases. In Boone v. Vanliner Insurance Co., the Ohio Supreme Court held that in a bad faith insurance action “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.” A federal district court in Montana has also taken this approach. Subsequently, however, the Montana Supreme Court held that the attorney-client privilege applies in bad faith cases but can be waived.

The rationale for the per se rule—need and a lack of good faith—is suspect and sweeps too far as long as conduct implicating the crime-fraud exception to the attorney-client privilege is not involved. The issue is not whether the claim file should be discoverable in an insurance bad faith case—it is. The issue is whether information in the claim file protected by the attorney-client privilege is discoverable. In many cases, and not just insurance bad faith cases, the legal advice provided to the client may be relevant, but that, in and of itself, does not abrogate the attorney-client privilege. Similarly, in many cases a lack of good faith might be shown from the advice the client received from its counsel. In these situations, the privileged information is not discoverable unless the privilege is waived or the crime-fraud exception is implicated. It is not clear why the rule should differ in an insurance bad faith case. Because the insured or a third party will be able to discover all the other information in the claim file, it is normally given access to sufficient evidence to prove a bad faith claim. Although no analysis of this issue has been undertaken here, one can safely speculate that many insurance bad faith cases have been proven even though the insured or a third party was not given access to privileged materials in the claim file.

An exception to the rule. In Ohio, the Boone rule does not apply to any privileged communications and/or work product created after coverage is denied. This temporal line may make a bright line, but it may not be a defensible one in all cases. This is because the distinction between what is done in the ordinary course of business or in anticipation of litigation is not always dependent on a denial of coverage. Depending on the facts of a particular case, work on a claim file could be in anticipation of litigation even though the claim has not yet been denied. If this is true and an insurer wants to hold back the claim file on this basis, it will have to submit a detailed affidavit to the court that sets forth the facts in support of the “anticipation of litigation” position. The failure to make this evidentiary showing will result in a denial of the insurer’s motion for a protective order because the party asserting a privilege has the burden of proving that the privilege applies.

The Florida conundrum. Until recently, Florida presented a confusing picture on the per se rule. In Allstate Indemnity Co. v. Ruiz, the Florida Supreme Court held that “all materials” in the underlying claim file and from the related litigation file, created up to and including the date of resolution of the underlying matter and pertaining to coverage benefits liability or damages, should be...
produced in a first-party bad faith action. The Florida state courts usually have limited Ruiz to the work product doctrine and refused to apply its rule to materials protected by the attorney-client privilege. In contrast, the federal courts in Florida generally held that the Ruiz rule applied to materials protected by both the work product doctrine and the attorney-client privilege. However, in Genovese v. Provident Life & Accident Insurance Co., the Florida Supreme Court, on March 17, 2011, held that when an insured brings a bad faith claim against an insurer, the insured may not discover the privileged communications that occurred between the insurer and its counsel in the underlying action. Because the highest state court in Florida has now spoken on this issue, the Florida federal courts should now follow Genovese.

The stay and/or bifurcation motion. If an attorney practices in a jurisdiction that follows the per se rule, the law provides the insurer with some protection against the discovery of documents normally protected by the attorney-client privilege. Boone recognized the stay and/or bifurcation exception to the per se rule. In that case, the court found that “if the trial court finds that the release of this information will inhibit the insurer’s ability to defend on the underlying claim, it may issue a stay of the bad faith claim and related production of discovery pending the outcome of the underlying claim.” Many Ohio courts have issued a stay in these circumstances. Other jurisdictions have likewise issued a stay or bifurcation order in these circumstances.

Because the issuance of a stay or bifurcation order is within the sound discretion of the court, there are many instances where that relief has been denied in insurance bad faith cases. Many courts find it inconsistent with the notions of judicial economy and efficiency to stay a bad faith claim pending the outcome of the coverage claim. Depending on the facts of the case, insurers may be more successful in obtaining a bifurcation order than a stay of discovery directed to the bad faith claim.

The Ohio cases demonstrate the general rule that where “prejudice” exists, a failure to bifurcate and stay discovery can be “grossly prejudicial” to an insurer and constitutes an abuse of discretion. However, prejudice is not to be assumed. Rather, the insurer must make a specific showing of prejudice.

The Implied Waiver Tests

The per se waiver rule is the minority rule. Most courts that have considered the issue have concluded that allegations of bad faith by an insured, or of good faith by an insurer, are not sufficient on their own to overcome the attorney-client privilege. In the jurisdictions that do not follow the per se waiver rule, one of the following three tests is generally used for determining whether there has been an implied waiver of the attorney-client privilege.

The automatic waiver test. This test provides that a privilege is waived upon the assertion of a claim, counterclaim, or affirmative defense that raises as an issue a matter to which otherwise privileged material is relevant. One example, albeit not from a bad faith case, is a suit in which the plaintiff attempts to replevy some bonds and his or her ownership of the bonds is the issue. In this circumstance, the action should be dismissed if the plaintiff fails to answer questions from the defense about the ownership of the bonds on the ground of his or her Fifth Amendment privilege against self-incrimination. Similarly, again for illustrative purposes only because it does not involve a bad faith case, if a defendant pleads truth as a defense to a slander claim based on his or her statement that the plaintiff is a communist, this affirmative defense should be taken as established if the plaintiff refuses to answer questions about his or her being a communist on Fifth Amendment grounds.

In the context of a bad faith case, if an insurer pleads the “advice of counsel” defense and actually defends on that basis, this would constitute an automatic waiver of the attorney-client privilege with regard to that advice because the insurer has placed the advice of counsel “at issue” and, thereby, made it “relevant.”

The Hearn relevant and vital test. It appears that a plurality of the federal circuits follow, in some form, the so-called Hearn test, articulated in Hearn v. Rhay. This test contains the following elements:

1. assertion of the privilege was the result of some affirmative act, such as filing suit, 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 that is vital to its defense.

All three elements of the Hearn test must be satisfied for it to apply. Self-evidently, just because some evidence may be relevant (e.g., state of mind), that does not mean that the privilege has been waived. Were it otherwise, a privilege would have little effect because it would always be trumped by relevance.

It appears that the Hearn test, or some semblance of it, is followed in the Fifth, Seventh, Ninth, Tenth, and Eleventh Circuit Courts of Appeal. Although the First, Eighth, and District of Columbia Circuits appear to follow a type of “balancing” test that balances the need for the privileged information against the need for maintaining its confidentiality, this balancing test appears to be simply another formulation of the Hearn test.

Although the Hearn implied waiver test has been followed by a number of courts, it has been criticized for its generality, which does not lead to predictable results by the courts. This lack of predictability is seen as being particularly inappropriate in the realm of the waiver of the attorney-client privilege. For this reason, Hearn has been criticized as providing “insufficient guidance to be just and workable.”

In Bertelsen v. Allstate Insurance Co., the South Dakota Supreme Court “supplement[ed] the Hearn test to emphasize further the importance of protecting the attorney-client privilege.” The court initially stated that “the analysis of this issue should begin with a presumption in favor of preserving the privilege.” It then asserted that “a client only waives the privilege by expressly or impliedly injecting his attorney’s advice into the case.” Concluding its analysis, the court observed that “a client only waives the privilege to
the extent necessary to reveal the advice of counsel he placed at issue.” Although the South Dakota Supreme Court refused to follow the *Hearn* test, it did not decide whether the privilege applied under the facts of the case because it remanded the issue to the trial court. That court ultimately found no express or implied waiver of the privilege.  

In *In re County of Erie*, the Second Circuit Court of Appeals also restricted the use of the *Hearn* test. In that case, the court found that it is not sufficient for a party to make privileged material relevant to the case by pleading a claim, such as bad faith, or affirmative defense, such as good faith. The court found that the essential element in finding an “at issue” waiver is reliance on privileged advice in the assertion of the claim or defense. In short, for there to be a waiver “a party must rely on privileged advice from his counsel to make his claim or defense.”

**The at issue test.** Under this last test, a litigant waives the attorney-client privilege if it directly puts the attorney’s advice at issue in the litigation. At issue waiver occurs “when the party has asserted a claim or defense that he intends to prove by use of the privileged materials.” It also occurs when a client testifies concerning portions of the attorney-client communication, and when he or she places the attorney-client relationship directly at issue, as in a legal malpractice case. In the arena of insurance bad faith, the classic example is an insurer defending based on the “advice of counsel” defense. If the insurer takes this approach, the advice it relies on will be subject to discovery by the plaintiff because “fairness” in these circumstances means that if the insurer attempts to use the privilege as a shield, the plaintiff will be permitted to use it as a sword against the insurer.

**Is there really a difference in the tests?** The three tests appear to be examples of a judicial exercise to see how many angels can dance on the head of a pin. The automatic waiver test appears to be the same as the at issue test. They both depend on the insurer injecting a privileged communication into the case through the advice of counsel defense. The *Hearn* test is really no different. Its first component—the assertion of the privilege by an affirmative act—equates with alleging advice of counsel as an affirmative defense in a case. The second element—the placing of the privileged information at issue by making it relevant—equates with the insurer defending on the basis of the advice of counsel defense (not just alleging it). And prejudice to the plaintiff, the third factor, is simply the result of an insurer’s decision to erect the so-called shield of the attorney-client privilege in a case in which it is defending based on the advice of counsel. Thus, although different judges may like their own draftsman ship, the three tests are, in the end, substantively the same or so similar as not to make a substantive difference. Consequently, even though the *Bertelsen* court found it necessary to “supplement” the *Hearn* test, and the *Erie* court “restricted” it, neither court had to go so far. Both could have read *Hearn* in a manner that was consistent with their analyses.

### Some Cases in Action

**When the advice of counsel defense is not asserted.** *Lexington Insurance Co. v. Swanson* is instructive. In *Swanson*, the insurer claimed that it was not asserting an advice of counsel defense, either explicitly or implicitly. In light of this position, the court ruled that the plaintiff could not discover the insurer’s privileged documents. However, the court also provided the plaintiff with a measure of protection. It barred any reference to or evidence of any involvement or advice by the insurer’s counsel.

The result seems balanced and practical in the circumstances. Of course, those circumstances, unlike those present in the three cases discussed below, included an absence of any evidence that the insurer had implicitly waived the attorney-client privilege. The thrust of the insured’s argument was that it was entitled to the privileged material because the insurer’s adjusters had admitted that they had received legal advice from counsel that was relevant to the issue of good faith claims handling and was used by the insurer in the handling of the claim. Such evidence was insufficient to constitute an implied waiver. For the reasons previously discussed, this result seems eminently correct because the insurer was not defending the case based on the advice of counsel defense. Moreover, as discussed below, the everyday reality of advice of counsel does not place that advice at issue.

**When the advice of counsel defense is asserted.** The easy implied waiver case is one where the insurer defends based on the affirmative defense of advice of counsel. It did, the privilege would cease to exist in a bad faith case (and in any case) because every insurer (and every client) seeks the advice of counsel. What can implicitly waive the privilege is defending a case based on the advice of counsel defense, not merely the advice of counsel.

By defending, either explicitly or implicitly, based on the advice of counsel, an insurer places that advice at issue. It also permits the insured or a third party to argue that these communications, in these circumstances, are discoverable because they are reasonably calculated to lead to the discovery of admissible evidence. In the military jargon that some judges and lawyers are wont to use, if an insurer seeks to use legal advice as a sword to defeat an insured’s bad faith claim, it will not be permitted to use the attorney-client privilege as a shield to protect against the disclosure of that legal advice during discovery.

**Nightmare cases for insurers.** The cases discussed immediately below are well known to insurers, for the wrong reason. However, these cases are the exception, not the rule. Rarely does a court find an implicit waiver of the attorney-client privilege in circumstances where advice of counsel is not raised as a defense. Moreover, with the benefit of 20/20 hindsight, the result in each of the following cases was avoidable.

*State Farm Mutual Automobile Insurance Co. v. Lee* presents a good example of what an insurer should not do if it wants to protect communications normally covered by the attorney-client privilege. In *Lee*, the insurer’s claims managers testified that they were acting within the law when they denied coverage. Under the *Hearn* analysis employed by the *Lee* court, this placed the extent of the insurer’s investigation and the basis for its subjective evaluation at issue and waived the privilege. The *Bertelsen* court thought that *Lee* went too far. As a result, it felt compelled to reject the *Hearn* approach as not striking “an appropriate balance of the need for discovery...
with the importance of maintaining the privilege.62

Lee was essentially followed by City of Myrtle Beach v. United National Insurance Co.63 However, Myrtle Beach goes further than Lee in finding an implied waiver of the attorney-client privilege because it based the waiver on allegations contained in the answer, not the discovery in the case, as was done in Lee. This approach is at odds with the numerous cases that have held that allegations of bad faith by the insured or good faith by the insurer are insufficient to waive the privilege. It is also contrary to the court’s recognition, earlier in the opinion, that there is no per se waiver of the attorney-client privilege simply by a plaintiff making allegations of bad faith.64 If allegations of bad faith by an insured are not sufficient to waive the privilege, it is not clear why allegations of reasonableness and good faith should. Because one is the flip side of the other, it would seem that the insurer no more injected the issues into the case than the insured at the pleadings stage.

Another good example of what an insurer should not do can be found in Mendoza v. McDonald’s Corp.65 Notwithstanding Lee, the defendant in Mendoza affirmatively asserted that its actions in investigating, evaluating, and paying this personal injury claim, in addition to being objectively reasonable, were subjectively reasonable and taken in good faith. This was found to waive the privilege because it implicated the advice and judgment McDonald’s received from its counsel.66

Mendoza is also important because it concluded that there is nothing in Lee to suggest that an insurer will only be deemed to have implicitly waived the attorney-client privilege when it argues its actions were reasonable based on its subjective evaluation of the law.67 The Mendoza court recognized that at “the heart of Lee is a recognition that, in the bad faith context, when an insurer raises a defense based on factual assertions that, either explicitly or implicitly, incorporates the advice or judgment of its counsel, it cannot deny an opposing party the opportunity to discover the foundation of those assertions in order to contest them.”68

Some practice pointers from Lee and Mendoza can be summed up as:

1. never have a claims representative testify that a denial of coverage was based, even in part, on his or her subjective understanding of the law or communications with counsel;
2. if your claims representative is asked at deposition or in interrogatories for the basis for the denial of coverage, have him or her refer to the bases set forth in the declination letter if the letter is satisfactory (and it should be); and
3. if your claims representative is asked whether any of those grounds are based on his or her subjective knowledge of the law, make sure that he or she is prepared to answer “no” wherever that is true.

If counsel for the insured or a third party pursues this line of questioning and asks what the disclaimer is based on if not the claims representative’s subjective understanding of the law and/or whether the disclaimer is based on communications with counsel, the insurer’s attorney should object based on discovery being limited to the discovery of facts and that the legal theories of counsel are not a proper subject of discovery. Defense counsel might also state that his or her client’s position on the law will be set forth in his or her briefing at the appropriate time and that the judge will decide the applicable law and its application to the case. The point is that counsel for the insured should not permit the claims representative to be drawn into a colloquy about his or her knowledge of the law or communications with counsel.

Another leading implicit waiver case is Tackett v. State Farm Fire & Casualty Insurance Co.69 In that case, the Delaware Supreme Court concluded that the insurer waived the privilege when, in responding to a discovery request that it set forth factors in support of its claim of reasonable justification for not paying the claim, it relied on the claim superintendent’s affidavit and the claim file for taking the position that there was “routine handling” of the claim.70 The court found an implicit waiver, even though the insurer never expressly injected its counsel’s advice, because the insurer had “alleged particularized facts that implicitly relied upon communications with counsel contained in the [insured’s] file” and because the insured would be unable to contest the insurer’s claim of good faith without access to the claim file.71

Tackett is a dangerous case for insurers because the particularized facts involving the advice of counsel found to support the waiver were revealed during an in camera review of the claim file by the court. Those facts, including the advice of counsel, revealed the insurer’s handling of the claim was not routine and was possibly not proper. Under these circumstances, it is not surprising that the court fashioned a rule that resulted in the disclosure of the attorney’s advice demonstrating that the handling of the claim was not routine.

Tackett is a reminder that counsel need to review the claim file carefully before they submit it for in camera review, to make sure it does not contradict the position taken by the insurer in the case. If it does, settlement should be considered. Of course, a detailed review of the claim file should be made at the outset of any case before an insurer asserts its defenses. If this had been done in Tackett, the case would not be so notorious.

A more balanced approach, Botkin v. Donegal Mutual Insurance Co.,72 takes a different view of implied waiver than the cases discussed above, particularly Lee, Mendoza, and Myrtle Beach. In this case, the plaintiff argued that a claims examiner’s acknowledgment that the insurer relied on the advice of counsel in denying the claim was insufficient for there to be a waiver. The claims examiner admitted that the insurer denied coverage, in part, based on counsel’s advice. The court held that the mere fact that the insurer relied on the opinion of coverage counsel in denying the claim did not waive the attorney-client privilege.73 The court approached the issue commonsensically by recognizing that when the insurer enlisted the assistance of counsel it intended to rely on counsel’s advice. It reasoned that “[t]here would be little point in retaining coverage counsel to issue an opinion if a party did not intend to rely on it.”74 It also recognized that if this reliance alone gave rise to a waiver, no one would seek the advice of coverage counsel.75 Thus, the insurer’s reliance on coverage counsel’s opinion, without more, did not put the advice of counsel at issue.76 The

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court found this result to be the proper one, even though the coverage opinion was relevant to the litigation, because relevance, without more, is not a basis for vitiating the attorney-client privilege. 73 If it were, the entire purpose of the attorney-client privilege—encouraging the open and frank discussion between a client and counsel—would be undermined. 74

Proponents of the Lee approach would argue that Botkin is distinguishable because the content of the privileged communication with counsel was not placed at issue, as it was in Lee. 75 This appears to be a difference without substance because it is well known that a coverage opinion canvasses the relevant law. Thus, for the purposes of waiver, it should not make a difference whether an insurer testifies that it relied on a coverage opinion from counsel, the Botkin situation, or that, based on communications with counsel, the insurer subjectively or objectively believed that it was acting within the law when it denied coverage, the Lee and Mendoza scenarios.

In the absence of any indication that the insurer plans to use either the coverage opinion or other communications with counsel as a defense at trial, neither situation rises to the level of placing the letter or the communications at issue. Instead of finding a waiver of the attorney-client privilege in these circumstances, or in circumstances where the insurer claims that it is not relying on any privileged communications to establish its defense, the proper judicial approach is the one taken by the court in Lexington Insurance Co. v. Swanson, namely, an order barring the insurer from relying on any such evidence at trial. This approach both preserves the sanctity and importance of the attorney-client privilege and protects the rights of the plaintiff at trial.

Conclusion

An implied waiver of the attorney-client privilege in an insurance bad faith case should be a rare occurrence, no matter which test is used for determining whether there has been an implied waiver. There will be a waiver when an insurer defends based on the advice of counsel but “[m]ost sophisticated litigants will know better than to dig that hole for themselves.”80 Mere allegations of bad faith by an insured or good faith and reasonableness by the insurer should not waive the privilege where the insurer is not relying on the advice of counsel to defend. Where the advice of counsel defense is not expressly asserted or relied upon, counsel for the insurer need to aggressively limit discovery to the facts and not permit an insured’s counsel to delve into a claims examiner’s understanding of the law. This is because an enterprising attorney for an insured could argue that this understanding of the law implicates the advice of counsel. Although this should be immaterial because it is only the advice of counsel defense, not just advice of counsel, which can trigger an implied waiver, there is no reason to permit an insured’s counsel into this province.

Counsel for insurers should think twice about alleging as affirmative defenses reasonableness and/or good faith based on an investigation of the law because they, in the view of some courts, could place at issue the insurer’s mental state. Moreover, it is not clear that reasonableness and/or good faith are affirmative defenses, which must be pled and proven, as opposed to simply being defenses. The insured has the burden of proving the bad faith; the insurer does not have the burden of proving reasonableness or good faith. The burden should not be tampered with; an attorney does so at his or her own peril.

Finally, the practical approach should not be shrouded by the mist of legal constructs. If the insurer claims that it is not going to rely at trial on any privileged communications with counsel, a court, instead of engaging in a convoluted implied waiver analysis, should simply enter an order barring the use of such communications at trial. 81

Endnotes

2. FED. R. EVID. 502 explanatory note (revised Nov. 28, 2007).
3. This article does not specifically address the waiver of the work product doctrine in insurance bad faith cases. However, work product immunity can be waived when the party asserting the immunity places a particular document “in issue through some affirmative act intended to inure to that party’s benefit or where the party makes selective use of the privileged materials.” See Gruss v. Zwirn, 276 F.R.D. 115, 133 (S.D.N.Y. 2011) (and cases cited therein).
6. Silva v. Fire Ins. Exch., 112 F.R.D. 699 (D. Mont. 1986) (first-party bad faith claim can be proved only by showing the manner in which the claim was processed, and the claims file contains the sole source of much of the needed information).
10. 744 N.E.2d at 158; see also Harper v. Auto-Owner Ins. Co., 138 F.R.D. 655, 661 (S.D. Ind. 1991) (there is a rebuttable presumption that the entire claim file is discoverable up to the point where a claim is denied because it is at that point that further activity on the claim is in anticipation of litigation). The anticipation of litigation/ordinary course of business distinction is the...
parlance of the work product doctrine. It is inapplicable to the attorney-client privilege because the privilege applies irrespective of whether the advice is given in anticipation of litigation.


12. An insurance company may not insulate its claim file from discovery by hiring an attorney to conduct the ordinary claim investigation. See Arkwright Mut. Ins. Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa., No. 90 Civ. 7811 (AGS), 1994 WL 510043, at *5 (S.D.N.Y. Sept. 16, 1994). In circumstances where an insurer has hired an attorney to both investigate the underlying claim and render legal advice, a court can conduct an in camera inspection to determine whether the documents at issue are protected by the attorney-client privilege. See Genovese v. Provident Life & Accident Ins. Co., 74 So. 3d 1064, 1068 (Fla. 2011).

13. 899 So. 2d 1121 (Fla. 2005).

14. Id. at 1129.


16. 74 So. 3d 1064 (Fla. 2011).

17. Id. at 1068.


23. See id. at 764 (bifurcation warranted to prevent the prejudice that would likely occur from the disclosure of attorney-client communications and work product materials).


27. See Loew’s, Inc., 22 F.R.D. at 276–77 (citing MOORE, FEDERAL RULES AND OFFICIAL FORMS 164 (1956)).

28. Id.


31. This element would appear to be satisfied by the assertion of advice of counsel as an affirmative defense or the insurer bringing a declaratory judgment action in which there is a bad faith counterclaim.


34. Deutsche Bank, 837 N.Y.S.2d at 23. The automatic waiver test also employs the concept of relevance. Under that test and the
For a compilation of cases that have criticized the 

American Bar Association.

For a good example of a defendant avoiding an at issue waiver, albeit not in an insurance bad faith case, by it assiduously claiming 

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70. Id. at 260.
71. Id.
73. Id. at *19.
74. Id.
75. Id.
76. Id. at *20.
77. Id. at *21–22.
78. Id. at *22.
79. See Cincinnati Ins. Co. v. Zurich Ins. Co., 198 F.R.D. 81, 88 (W.D.N.C. 2000) (“While it is true that Cincinnati has placed [counsel’s] knowledge and opinions at issue, Cincinnati has not so implicated the contents of confidential communications to mandate their production.”).