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Guidelines to Assist an Insurer's Analysis of Whether a Court Will Find an Implied Waiver of the Attorney Client Privilege in Arizona Bad Faith Cases

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Because Arizona cases touching on this issue are copious, confusing, and complex, we note the following guidelines—though sometimes conflicting—have emerged from *Lee* and its progeny and will assist an Insurer's analysis of whether a court will find an implied waiver of the Privilege:

1. The mental state of an Insurer must be an issue to impliedly waive the Privilege.[1]

a. An Insurer cannot impliedly waive the Privilege if it defends a bad faith claim solely on objective reasonableness.[2]

b. A court, however, may reject an Insurer's claim it is defending a bad faith based solely on objective reasonableness.[3]

2. An Insurer must affirmatively inject the relevance of attorney-client communications into the litigation to impliedly waive the Privilege.[4]

a. These acts *do* affirmatively inject the relevance of attorney-client communications into litigation:

i. An Insurer asserts its actions were subjectively reasonable based, in part, on its agents' evaluation of the law and part of that evaluation is informed by counsel.[5]

ii. An Insurer's adjusters testify that they considered *and relied upon* the legal opinions or legal investigation of in-house counsel to deny a claim.[6]

iii. Counsel directs an Insurer to act in bad faith, i.e. counsel directs an Insurer to: make an Insured jump through needless adversarial hoops, take actions without a reasonable basis, or delay a claim.[7]

iv. An Insurer asserts a defense dependent upon the advice or consultation of counsel.[8]

v. An Insurer asserts its settlement offers were subjectively reasonable, in part, because it determined it had a strong probability of prevailing on coverage.[9]

vi. An *Insured* testifying he did not seek policy benefits because, based on prior counsel's advice, he did not think benefits were available and consequently did not seek benefits earlier.[10]

b. These acts *do not* affirmatively inject the relevance of attorney-client communications into litigation:

i. An Insurer and counsel simply conferring and/or trading information for advice.[11]

ii. An Insurer taking actions based on counsel's advice.[12]

iii. An Insurer forming subjective evaluations of its claims and defenses based on counsel's advice.[13]

iv. An Insured (or an Insurer) filing a bad faith action.[14]

v. An Insurer's mere denial of bad faith or affirmative claim of good faith.[15]

vi. An Excess Insurer suing a Primary Insurer for bad faith based upon a breach of the duty to give equal consideration to settlement offers within policy limits.[16]

vii. An Insurer relying on advice of counsel to issue a denial letter.[17]

viii. An Insurer consulting with counsel to evaluate the objective reasonableness of its position.[18]

ix. An Insurer asserting its actions were subjectively reasonable *and* admitting it consulted with counsel regarding the subjectively reasonable actions.[19]

3. An Insurer does not waive the Privilege unless application of the privilege would deny the Insured access to information vital to the Insured's claim, i.e. the Insurer cannot use the Privilege as both a sword and a shield.[20]

a. Neither the relevance nor importance *alone* of attorney-client communications is sufficient to impliedly waive the Privilege.[21]

b. A court probably will not find an implied waiver of the Privilege if the Insured has other evidence of bad faith available.[22]

4. Even if an Insurer impliedly-waives the Privilege, the waiver is limited to content actually communicated to the Insurer.[23] The implied waiver does not extend to counsel's file.[24]

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[1] *See Twin City Ins. Co. v. Burke*, 204 Ariz. 251, 63 P.3d 282 (Excess Insurer did not waive the privilege, in part, because the mental state and conduct of the Excess Insurer's agents and counsel were not at issue); *Empire West Title Agency, L.L.C. v. Talamante ex rel. Cty of Maricopa*, 234 Ariz. 497, 323 P.3d 1148 (Purchaser did not waive privilege, in part, because the Purchaser's state of mind was not an issue).

[2] *See Nguyen v. Am. Commerce Ins. Co.*, 2014 WL 1381384 *5 (Ariz.App. Apr. 8, 2014) (Memorandum Decision) (Insurer did not impliedly waive the Privilege, in part, because the Insurer defended solely on objective reasonableness).

[3] *See Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 153-54, 213 P.3d 288, 302-03 (App. 2009).

[4] *See State Farm v. Lee*, 199 Ariz. 52, 56, 13 P.3d 1169, 1173 (2000) (En Banc) (stating the first and second criteria of the implied waiver test, i.e. a litigant impliedly waives the Privilege if, "(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."); *see also Mt. Hawley Ins. Co. v. Slayton ex rel. Cty. of Coconino*, 2013 WL 708535 (Ariz.App. Feb. 26, 2013) (Memorandum Decision) (in case which arose from a General Contractor ("GC") Insurer suing a Subcontractor ("Sub") Insurer to recover defense and indemnity costs, Court of Appeals held that the GC Insurer did not impliedly waive the Privilege, in part, because the GC Insurer did not inject attorney-client communications into the lawsuit by attempting to rely on attorney-client communications to prove its defense and settlement of the underlying case was reasonable).

[5] *See Lee*, 199 Ariz. at 57, 13 P.3d at 1174; *Nguyen*, 2014 WL 1381384 *5 (Insurer did not impliedly waive the Privilege, in part, because the Insurer never took the position that "its subjective view of the law was reasonable ([much less that its] subjective view necessarily incorporated advice from its counsel."); *Ingram v. Great Am. Ins. Co.*, 112 F.Supp. 3d 934, 939 (D. Ariz. 2015) (Insurer impliedly waived privilege where it denied workers compensation claim after a subjective evaluation of the law).

[6] *Roehrs v. Minnesota Life Ins. Co.*, 228 F.R.D. 642, 646-647 (D. Ariz. 2005) (Order) (an Insurer impliedly waived the Privilege because the adjusters affirmatively injected attorney-client communications into the litigation by testifying at their depositions that "they each considered *and relied upon*, among other things, the legal opinions or legal investigation [of in-house counsel] in denying" the claims) (emphasis added); *but see Safety Dynamics Inc. v. Gen. Star Indem. Co.*, 2014 WL 268653 at *1 (D. Ariz. Jan. 24, 2014) (Order) (*Roehrs* is not precedent, distinguished *Roehrs*, and declined to follow *Roehrs*).

[7] *See Mendoza*, 222 Ariz. at 153-154, 213 P.3d at 303-04.

[8] *Everest Indemnity Ins. Co. v. Rea*, 236 Ariz. 503, 342 P.3d 417, 419 (App. 2015).

[9] In *Cosgrove v. Nat'l Fire & Marine Ins. Co.*, 2016 WL 4578139 (D. Ariz. Sept. 2, 2016), a bad faith case arising from an alleged breach of the duty to give settlement offers within policy limits equal consideration, the District of Arizona held that an Insurer impliedly waived the Privilege with coverage counsel because the Insurer asserted its settlement decisions were subjectively reasonable, in part, because: it determined there was an 80 percent chance the claims were not covered, this "determination involved[d] an evaluation of the law"; "it [was] highly likely [the Insurer's] determination was informed by counsel's advice"; and it was "more probable than not that [the Insurer] not only consulted with [coverage counsel] but necessarily relied on the information and advice [it] received." *Cosgrove*, 2016 WL 4578139 *5.

[10] *Barten v. State Farm Mut. Auto. Ins. Co.*, 2015 WL 11111310 (D. Ariz. June 19, 2015) (Order) (in bad faith case arising from a car accident, District of Arizona held that an *Insured* would impliedly-waive the Privilege regarding his decision not to seek attendant care benefits if he affirmatively injected the issue by testifying that he did not think attendant care benefits were available and consequently did not seek such benefits earlier based on his previous counsel's advice).

[11] *See Lee*, 199 Ariz. at 66, 13 P.3d at 1183 ("We assume client and counsel will confer in every case, trading information for advice. This does not waive the privilege."); *Safety Dynamics, Inc. v. Gen. Star Indem. Co.*, 2013 WL 11299209 at *3, 4 (D. Ariz. Aug. 8, 2013) (Order) (Insurer did not impliedly waive the Privilege, despite an adjuster's testimony that he relied on advice of counsel to issue a denial letter, in part, because *Lee* noted that "client and counsel confer[ing]" does not waive the privilege, so the deposition testimony was "insufficient by itself to waive the privilege").

[12] *See Lee*, 199 Ariz. at 66, 13 P.3d at 1183 ("We assume most if not all actions taken will be based on counsel's advice. This does not waive the privilege."); *Safety Dynamics*, 2013 WL 11299209 at *3, 4 (Magistrate ordered that an Insurer did not impliedly waive the Privilege, despite an adjuster's testimony that he relied on advice of counsel to issue a denial letter, in part, because *Lee* noted that "action taken…based on counsel's advice" does not waive the privilege, so the deposition testimony was "insufficient by itself to waive the privilege").

[13] *See Lee*, 199 Ariz. at 66, 13 P.3d at 1183 ("Based on counsel's advice, the client will always have a subjective evaluations of its claims and defenses. This does not waive the privilege."); *Nguyen*, 2014 WL 1381384 *5 (Insurer did not impliedly waive the Privilege, in part, because the Insurer merely consulted counsel to evaluate the objective reasonableness of its position).

[14] *See Lee*, 199 Ariz. at 62, 13 P.3d at 1179; *Burke* 204 Ariz. at 255, 63 P.3d at 286; *Empire West*, 234 Ariz. 499, 323 P.3d 1150; *Slayton*, 2013 WL 708535 (GC Insurer did not impliedly waive the Privilege, in part, by simply filing the lawsuit).

[15] *See Lee*, 199 Ariz. at 62, 13 P.3d at 1179.

[16] *See Burke*, 204 Ariz. 251, 63 P.3d 282

[17] *Safety Dynamics*, 2013 WL 11299209 at *3, 4 (Insurer did not impliedly waive the Privilege, despite an adjuster's testimony that he relied on advice of counsel to issue a denial letter, in part, because *Lee* noted that "client and counsel confer[ing]" does not waive the privilege, so the deposition testimony was "insufficient by itself to waive the privilege").

[18] *See Nguyen*, 2014 WL 1381384 *5 (Insurer did not impliedly waive the Privilege, in part, because the Insurer merely consulted counsel to evaluate the objective reasonableness of its position).

[19] *See Everest*, 236 Ariz. 503, 504, 342 P.3d 417, 418 (Insurer did not impliedly waive the Privilege despite asserting its actions were subjectively reasonable and admitting it consulted with counsel regarding the subject settlement agreement) ("*Lee* expressly held that the assertion of a subjective good faith defense coupled with consultation with counsel did not, without more, waive the attorney-client privilege.").

[20] *See Lee*, 199 Ariz. at 56, 13 P.3d at 1173 (stating the third criteria of Arizona's implied waiver test, i.e. a litigant impliedly waives the Privilege if, "(3) application of the privilege would have denied the opposing party access to information vital to his defense."); *Id.* at 65, 13 P.3d at 1182 (Under the sword and shield analysis, the Insurer's "claims managers cannot testify that they investigated the state of the law and concluded and believed they were acting within the law but deny [the Insureds] the ability to explore the basis for this belief and to determine whether it might have known its actions did not conform to the law."); *Burke*, 204 Ariz. at 255, 63 P.3d at 286 (questions that determine whether an Insurer implied waived the Privilege include: (a) "Would the application of the privilege deny [Insurer] access to information vital to its defense?"; and (b) "Would recognizing the privilege make it impossible for the factfinder to fairly determine the very issue raised by [Insurer]?"); *Mendoza*, 222 Ariz. at 155, 213 P.3d at 304 (The Insurer "sought to shield from [the Insured] the very evidence she would need to challenge [the Insurer's] representations that its adjusters subjectively believed their actions were reasonable and taken in good faith."); *Everest*, 236 Ariz. 503, 342 P.3d at 418 (the Privilege "may be deemed waived [only] when application of the privilege would deny an opposing party access to necessary information to counter a claim or defense asserted by the other party."); *Ingram*, 112 F. Supp. at 939 (the Insurer's adjusters could not "testify that they investigated the state of the law and concluded and believed they were acting within the law but deny [the Insureds] the ability to explore the basis for this belief and to determine whether it might have known its actions did not conform to the law.").

[21] *See Burke*, 204 Ariz. at 256, 63 P.3d at 287 (as *Lee* noted, "there is more than relevance and materiality needed to find a waiver, for communications with counsel are almost always very relevant and material."); *Lee*, 199 Ariz. at 58, 13 P.3d at 1175; *Empire West*, 234 Ariz. at 499, 323 P.3d at 1150 ("neither the relevance nor pragmatic importance alone of the information sought will support a finding that the attorney-client privilege has been waived." (internal cites omitted); *Everest*, 236 Ariz. 503, 342 P.3d at 419 (it "is not sufficient that the information sought is relevant or important to a claim or defense…").

[22] *See Lee*, 199 Ariz. at 56, 13 P.3d at 1173 (again, stating the third criteria of the implied waiver test, i.e. a litigant impliedly waives the Privilege if, "(3) application of the privilege would have denied the opposing party access to information vital to his defense."); *Empire West*, 234 Ariz. at 500, 323 P.3d at 1151 (an implied waiver should not be found unless the party seeking the attorney-client communications demonstrates that denial of the waiver would "undermine its defense" and there are not "other means of obtaining information about what [a litigant] knew or should have known…") (even if the Purchaser's state of mind was at issue, the Title Agent did not "demonstrate that denying it access to the requested communications would undermine its defense" because it had "other means of obtaining information about what [the Purchaser] knew or should have known regarding the easement's purported abandonment."); *Slayton*, 2013 WL 708535 (GC Insurer did not impliedly waive the Privilege, in part, because the Sub Insurer had reasonable alternatives to seeking privileged communications to prove its case, such as retaining an expert to testify the GC Insurer did not act reasonably in defending and settling the underlying action).

[23] *See Cosgrove*, 2016 WL 4578139 (limited implied waiver to "communication with [coverage counsel] to the extent those communication addressed the coverage issues in the underlying case on which [the Insurer] based its settlement decisions."); *Ingram*, 112 F. Supp. 3d at 940 (limited the implied waiver to "only those communications pertaining to the law and information that was part of what [the Insurer] knew in reaching its evaluation of the law" and the Insurers were "not entitled to discovery of all of counsel's communications."); *City of Glendale v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2013 WL 1797308 at *6, 7 (D. Ariz. Apr. 29, 2013) (Order) (a case which arose from an Insurer's refusal to defend and indemnify and considered an Insurer's assertion of an advice-of-counsel defense and consequent *explicit* waiver of the Privilege rather than an *implied* waiver of the Privilege, held the Insurer's waiver extended only to "counsel's advice that was contained in the adjuster's notes in the claims file" and *did not* extend to "documents in [counsel's] files that [were] not communicated to the Insurer."); *Roehrs*, 228 F.R.D. at 647 (Magistrate concluded an Insurer impliedly waived the Privilege, but limited the waiver to communication with certain adjusters on certain issues).

[24] *Id.*