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Alert | Insurance

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Mississippi Supreme Court Finds 'Ghostwriting' Denial Letters May Implicitly Waive Insurers' Attorney-Client Privilege

Insurers' in-house and outside counsel should exercise care when writing all or part of a denial letter for a claim handler to sign and send, or counsel may unwittingly waive the company's attorney-client privilege and find themselves subject to deposition. In *Travelers Property Casualty Co. of America v. 100 Renaissance, LLC*, the Mississippi Supreme Court upheld just such a waiver, even though the insurer had not raised an advice-of-counsel defense.[1] The court reasoned that the insured was entitled to depose the individual with personal knowledge of the reasons for the denial, but, at deposition, the claim handler testified she had not received any training on the applicable legal standards, and she could not explain the letter's analysis of Mississippi law.[2] The court therefore concluded that because the claim handler did not have personal knowledge of the reasons for denial, the insured was entitled to depose the in-house attorney who prepared the letter and to review correspondence between the attorney and the claim handler regarding the claim.[3]

The dissent in *Travelers* contended that the majority's ruling unreasonably required a claim handler to be able to explain the very legal issues for which she had sought advice from counsel in the first place.[4] But

[1] *Travelers Prop. Cas. Co. of Am. v. 100 Renaissance, LLC*, 308 So. 3d 847, 857 (Miss. 2020), reh'g denied (Jan. 14, 2021).
[2] *Id.*
[3] *Id.* at 857.
[4] *Id.* at 858

the *Travelers* majority is not alone in finding implicit waiver for this kind of undisclosed reliance on counsel. When an attorney performs the functions of an adjuster, courts have routinely held the privilege to be inapplicable, and have observed that merely "[a]ssisting an adjuster in writing a denial letter is not a privileged task."[5] Likewise, courts have found waiver of the privilege when an insurer asserts that its denial was reasonable based on its understanding of the law and that understanding was obtained from advice of counsel.[6]

Of course, there may be circumstances where an insurer makes a knowing decision to waive privilege to support an advice-of-counsel defense. Even in these circumstances care should be taken to limit the scope of the waiver to the minimum necessary to support the advice-of-counsel defense. The *Travelers* decision provides an important reminder that, to avoid inadvertent waiver, the adjuster must have personal knowledge and understanding of the insurer's reasons for denial of a claim that is independent of an attorney's advice regarding the claim at issue.[7] This means that, unless the insurer intends to rely on an advice-of-counsel defense and allow the appurtenant waiver, the adjuster (not the lawyer) must make the final claim decision and be prepared to defend it at deposition. Holdings like the one in *Travelers* reinforce the importance of training claim handlers on the legal standards that may impact their coverage decisions and ensuring that claim handlers understand the coverage positions they assert in their letters to insureds.

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[5] *See Canyon Estates Condo. Ass'n v. Atain Specialty Ins. Co.*, No. 2:18-cv-1761-RAJ, at *3 (W.D. Wash. Jan. 22, 2020); *Dakota, Minnesota & Eastern Railroad v. Acuity*, 771 N.W.2d 623, 638 (S.D. 2009).
[6] *See, e.g., Roehrs v. Minnesota Life Ins. Co.*, 228 F.R.D. 642, 647 (D. Ariz. 2005); *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169, 1187 (Ariz. 2000).
[7] *Travelers*, 308 So. 3d at 854-857.