



March 2021

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.

About Greenberg Traurig’s Insurance Group: Greenberg Traurig’s **Insurance Group** brings together lawyers from its national and international offices with experience in a broad variety of complementary disciplines – including insurance regulatory and transactional, tax, corporate finance and securities, securitization and structured finance, litigation, health care, and governmental affairs – to support clients from all segments of the insurance industry. The group provides tailored legal services designed to meet the varied needs of our clients in the areas of insurance regulation, legislative and public policy advocacy, life and health insurance, property and casualty insurance, premium finance, reinsurance, agents and brokers, securitization and derivatives, and insurance litigation.

Authors

This GT Alert was prepared by:

- **Jon T. Neumann** | +1 602.445.8411 | neumannj@gtlaw.com
- **Aaron J. Lockwood** | +1 602.445.8421 | lockwooda@gtlaw.com
- **Jorge Coss** | +1 602.445.8347 | cossj@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany. [~] Houston. Las Vegas. London. ^{*} Los Angeles. Mexico City. ⁺ Miami. Milan. [»] Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. Salt Lake City. San Francisco. Seoul. [∞] Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv. [^] Tokyo. [•] Warsaw. [~] Washington, D.C.. West Palm Beach. Westchester County.

This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about

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.

*the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ▣Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimbengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2021 Greenberg Traurig, LLP. All rights reserved.*