# Bad Faith Actions in South Carolina: Will Attorney-Client Privilege Survive?


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South Carolina's attorney-client privilege protects against the disclosure of communications pursuant to which legal advice of any kind is sought by a client from a professional legal adviser, acting in that capacity. At the client's discretion, such confidential communications are protected from disclosure by the client or the legal adviser except if such protection is waived. The only recognized exception to this time-honored privilege recognized by the South Carolina Supreme Court includes communications in furtherance of tortious or fraudulent conduct. South Carolina has long revered the sanctity of attorney-client communications. How, then, are we now faced with the potential destruction of that privilege if an insurer denies bad faith liability?

South Carolina first recognized a cause of action for bad faith arising from an insurer's handling of a first party claim over thirty years ago. That cause of action has continued to be refined by our courts. While it is axiomatic that not all communications between a client and counsel are privileged, public policy protecting confidential communications requires the balance between those communications and justice. Therefore, a bad faith claim gives rise to conflicting tenets: the attorney-client privilege and the duty of good faith and fair dealing that an insurer owes to its insured.

Generally, the party asserting the privilege bears the burden of establishing it. Pursuant to South Carolina law, lack of waiver is an essential element of establishing the attorney-client privilege. A waiver may be explicit or it may be implied, by making communications with counsel an issue. The United States District Court for South Carolina previously found there is no *per se* waiver of the attorney-client privilege upon a plaintiff's allegations of bad faith. If, however, an insurer voluntarily injects a legal or factual issue into the case, such constitutes a waiver of the privilege. The court further determined that 'voluntarily injecting' the issue was not limited to the assertion of advice of counsel as an affirmative defense. Rather, the assertion of any new legal or factual position may form the basis of a waiver.[1] Thus, an insurer's answer to a complaint, asserting it acted reasonably and in good faith, or asserting certain coverages were precluded could be construed as injecting issues of law and fact contained in the documents for which the insurer seeks privilege, thereby waiving the

privilege.

While the previously established threshold is sufficiently daunting, an even more imposing question looms: May an insurer waive attorney-client privilege simply by denying bad faith liability? *In Re: Mt. Hawley Insurance Company* 2018 WL 3203033, United States Court of Appeals, Fourth Circuit (June 28, 2018). Here, Mt. Hawley provided excess commercial liability coverage to ContraVest Construction Company ("ContraVest"). ContraVest constructed a development in Beaufort County, South Carolina as a result of which it was sued for defective construction by the homeowner's association. ContraVest made a demand upon Mt. Hawley for defense and indemnity, which Mt. Hawley denied. ContraVest ultimately settled the underlying action and it, along with the homeowner's association, filed an action against Mt. Hawley alleging bad faith failure to defend or indemnify.

Mt. Hawley removed the case to District Court where ContraVest sought production of Mt. Hawley's file relating to excess coverage on the project that was the subject of the underlying suit, as well as all of Mt. Hawley's files relating to ContraVest's claims under its excess policies. Mt. Hawley produced its files, redacting certain information and providing accompanying privilege logs. In response to multiple motions to compel, the District Court ordered the production of Mt. Hawley's files for an in camera review, finding because Mt. Hawley denied liability for bad faith failure to defend or indemnity, it put the relevant files "at issue," thereby waiving attorney-client privilege. Mt. Hawley petitioned the Fourth Circuit seeking a writ of mandamus vacating the District Court's order to compel. Finding no controlling precedent, the Fourth Circuit certified the following question to the South Carolina Supreme Court:

> Does South Carolina law support application of the "at issue" exception to the attorney-client privilege such that a party may waive the privilege by denying liability in its answer?

Undeniably, the federal rules provide for broad discovery. It is likewise undeniable that a client's justifiable belief that its communications with counsel will enjoy confidentiality, unless in furtherance of wrongful conduct, is a bedrock of our judicial system. If the South Carolina Supreme Court answers the certified question in the affirmative, it begs the question of how an insurer may defend itself in a bad faith action without the wholesale relinquishment of attorney-client privilege. Is a *prima facie* case of bad faith enough to offset the fundamental right to freely seek advice of counsel? Is the appointment of a special referee, who objectively reviews the materials for which protection is sought, the answer? Is there a fair and well-reasoned process by which to balance the significant right of an insured to the fair and good faith performance of the insurer under the policy against the insurer's right to maintain confidentiality of its communications with legal counsel? We will all anxiously await the Supreme Court's answer.

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[1] *City of Myrtle Beach v. United National Insurance Company* 2010 WL 3420044 (2010) (not reported in F. Supp. 2d)

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