

## Insurer's Defense in a Bad Faith Settlement Claim that an Issue Is "Fairly Debatable" Does Not Compel the Production of Privileged Documents

10.26.2010

Brad A. Catlin

The Indiana Court of Appeals decided a question of first impression today in *Allstate Ins. Co. v. Clancy*, Case No. 45A03-0910-CV-498. This case involves claims of bad faith settlement practices. At issue was whether the trial court abused its discretion by compelling production of documents subject to the attorney-client privilege on the ground that Allstate has implicitly raised an advice of counsel defense, thereby waiving the attorney-client privilege. The Court held that it did.

This case arose out of a motor vehicle accident. Clancy was driving a vehicle and negligently struck a motorcycle driven by a Mrs. Goad. Mr. Goad was riding on his own motorcycle alongside Mrs. Goad when the accident happened. He swerved to avoid a collision, turned his head back, and saw Clancy's vehicle strike Mrs. Goad and witnessed her being thrown from her motorcycle. The Goads filed a complaint against Clancy in which Mrs. Goad claimed damages for injuries sustained in the accident, and Mr. Goad claimed damages for negligent infliction of emotional distress.

Clancy's insurance policy with Allstate contained the following term:

The limit stated for bodily injury is our total limit of liability for all damages because of bodily injury sustained by any one person, including all damages sustained by anyone else as a result of that bodily injury.

Allstate felt it was unclear whether Mr. Goad's claims were derivative of Mrs. Goad's and whether such a claim was covered under the \$100,000 policy limit. The Goads told Allstate that Mrs. Goad would not accept a policy limit offer unless Mr. Goad received a policy limit offer as well. Nevertheless, Allstate offered Mrs. Goad policy limits but, citing uncertainty as to whether Mr. Goad's claim was derivative in nature, did not make an offer to Mr. Goad. Mrs. Goad rejected the offer.

Allstate then hired Richard Samek to file a dec action in federal court regarding the meaning of the per-person limit language contained in the policy held by Clancy. The federal court held as follows:

[T]o the extent that Mr. Goad asserts a claim for emotional harm from witnessing the personal injuries sustained by his wife Dianna, such a claim is subject to the same per-person limit of liability under the Allstate policy as the per-person limit applicable to the claim of Dianna Goad for her bodily injury.

A jury eventually returned an \$11,000,000 verdict, consisting of \$10,000,000 for damages resulting from the injuries to Mrs. Goad and \$1,000,000 for Mr. Goad's emotional distress. Clancy assigned his claims against Allstate to the Goads, who then filed a bad faith claim against Allstate. In its answer, Allstate stated the following affirmative defense:

The emotional distress claim(s) of Robert Goad in cause No. 45D11-0209-CT-200 and whether insurance coverage existed for such claims is fairly debatable.

The Goads sought production of documents, including communications between Allstate and Samek. Allstate produced some communications between Allstate and Samek, but withheld others, claiming that they were protected by the attorney-client privilege and were neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Goads filed a motion to compel, which the trial court granted because Allstate had "opened the issue that it denied coverage on advice of counsel in its affirmative defense that coverage of Robert Goad's claim was 'fairly debatable.'" Allstate appealed.

On appeal, the Court first held that Allstate's asserted privilege was not waived, even though the documents at issue had been disclosed.

We conclude that where the disclosure is compelled it is not voluntary, and the act of disclosure alone under that circumstance should not be interpreted as a waiver of any kind, limited or general, of the privilege.

The Court then acknowledged that good faith reliance upon advice counsel is a defense to the Goads' bad faith claim, but held that Allstate did not expressly raise that defense. In order to determine whether Allstate had impliedly raised the defense notwithstanding its express waiver, the Court adopted the following test:

(1) Assertion of the privilege was a 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 vital to his defense. Thus, where these three conditions exist, a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct.

The Court held that Allstate did not waive its attorney-client privilege by the mere contention that insurance coverage was "fairly debatable," because this is not "a sufficient affirmative act to raise the defense of advice of counsel impliedly or to make the client's communications with counsel relevant to the case such that a denial of production of such communications would deny opposing parties access to information vital to their claim." Likewise, its defense that the coverage issue was "fairly debatable" was a good faith defense to the bad faith claim that did not call into question the advice that Allstate received from Samek.

We hold that the "fairly debatable" defense, absent any other connection to reliance upon advice of counsel, is tantamount to a good faith defense and insufficient in and of itself to waive attorney-client privilege.

Judge Robb dissented, arguing that the Court should distinguish between when the defense claims that a factual issue is "fairly debatable" and when a legal issue is "fairly debatable."

This case is notable because it establishes a few points of law in Indiana. First, a party does not waive privilege when producing documents pursuant to a court order. Second, the Court recognized a test for when a defense impliedly raises whether a party relied in good faith upon the advice of its counsel. Finally, the Court recognized that the defense that an issue is "fairly debatable" is a good faith defense to a bad faith claim and does not place the advice of counsel at issue.

### Lessons:

1. A party does not waive attorney-client privilege when producing documents pursuant to a court order.
2. Courts must follow a three-part test to determine whether a defense to a bad faith claim impliedly raises whether a party relied in good faith upon the advice of its counsel.
3. The defense that an issue is "fairly debatable" is a good faith defense to a bad faith claim and does not place the advice of counsel at issue.