

# Attorney-Client Privilege Survives in South Dakota

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**Summary:** Andrews had a compensable work-related injury while working as a gold polisher for Ridco. Andrews sued Twin City Fire Insurance Co. ("Twin City") and Ridco for the alleged bad faith handling of his worker's compensation claim. During the course of that case, the circuit court ordered unredacted materials produced from nearly 200 claim files which Twin City claimed were protected under the attorney-client privilege. The Supreme Court of South Dakota reversed and remanded with directions.

Andrews v. Ridco

Andrews' work comp claim was filed roughly two years after his injury. The administrative law judge ruled that he had a work-related injury which was a major contributing factor to his neck pain which required continuing treatment. Three years later a lawsuit was filed by him against Twin City and Ridco making multiple claims alleging the "bad faith handling of his worker's compensation claim." Those claims included a claim for common law bad faith, aiding and abetting or civil conspiracy to commit fraud to deny first party insurance benefits in bad faith, and other related claims.

The plaintiff's theory was that Twin City had a history of "systematically handl[ing] worker's compensation claims, including Andrews' claim, in bad faith under a claim handling program known as the Large Loss Initiative (the Initiative)—also referred to as the Million Dollar List." The allegations were that Twin City's parent, The Hartford, created the initiative in 1998, but there was also evidence that the Initiative had concluded in 2000. Andrews' claim file was never reserved for more than \$323,000, although the lowest amount under the Initiative was a reserve for either \$500,000 or \$1,000,000. Nevertheless, Andrews continued to argue that there was a connection between the Initiative and his claim file.

In order to prove his theory, Andrews' attorneys filed multiple discovery requests, including seeking claim file notes of 247 "Large Loss Initiative" claim files. Twin City only had available to it 199 of those files and produced claim file notes which "redacted the attorney-client privilege contained in these claim file notes." The circuit court judge ruled that Twin City was impliedly defending on an advice of counsel theory. For that reason, there had been an implied waiver of the attorney-client privilege.

Although a recognized exception to the attorney-client privilege is the reliance upon an “advice of counsel” defense, the court considered whether, in this case, there had been an implied waiver of the attorney-client privilege through an apparent (but not pleaded) reliance upon the advice of counsel defense by Twin City in the bad faith action. The argument was that Twin City had “embedded and redacted attorney-client communications into the claims file notes” and through that practice, had “injected its reliance on the advice of counsel into the bad faith litigation.”

The Supreme Court of South Dakota rejected that contention. Furthermore, the Supreme Court noted that Twin City had “merely alleged that it did not act in bad faith.” By defending on that ground, the court ruled that “Twin City has not placed at issue its subjective good-faith reliance on the advice of counsel such as would invoke an implied waiver” of the privilege in the Andrews and 199 other claim file notes. The court also noted that whenever there is a waiver of the attorney-client privilege under the advice of counsel defense, that waiver is limited to “the extent necessary to reveal the advice of counsel [Twin City] placed at issue.”

The trial court judge had also ruled that Twin City had completely delegated its claim handling duties to outside counsel and that such communications were not protected by the attorney-client privilege. The Supreme Court of South Dakota disagreed with that analysis. The court stated such an “unequivocal delegation of the claims handling function is not an implied waiver of the attorney-client privilege; rather, it places the material ‘outside the scope of the asserted privileges.’” For those reasons the Court reversed the ruling regarding the attorney-client privilege waiver.

In addition, the Court ruled that on remand the circuit court was going to be required to conduct an in-camera review of the disputed documents before it could rule on the implied waiver. Such an in-camera review was required “to determine whether Twin City completely delegated its claim handling function or impliedly waived its attorney-client privilege by injecting its reliance upon advice of counsel into the bad faith litigation by an affirmative act.”

The court also noted that some of the 199 other claim file notes were outside of South Dakota. For that reason, the circuit court was going to have to engage in a conflict of law analysis to determine which state or states had the most significant relationship with the communication before ruling on the privilege issue case-by-case. In particular, to the extent that any of those 199 other claim file notes “have no connection to South Dakota other than the circuit court compelling their production, the most significant relation test is the appropriate analysis for evaluating whether the attorney-client privilege is waived for each claim file.”

This case demonstrates that at least in South Dakota the attorney-client privilege lives on in disputed bad faith claims. Whereas other courts seem willing to find a waiver of the attorney-client privilege and to seem to try to find ways to support a waiver of the privilege in whole or in part, that does not seem to be the case in South Dakota.

By Anthony L. Martin

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