

## **RUDOLFO BROTHERS PLASTERING, INC. CLAIMED THAT EVEREST INDEMNITY INSURANCE COMPANY ACTED IN BAD FAITH BY ENTERING INTO A SETTLEMENT AGREEMENT THAT EXHAUSTED THE LIABILITY COVERAGE OF AN OWNER CONTROLLED INSURANCE PROGRAM (OCIP) POLICY TO RUDOLFO'S DETRIMENT.**

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*Everest Indemnity Insurance Company v. Rea*  
Arizona Court of Appeals January 15, 2015

Rudolfo Brothers Plastering, Inc. claimed that Everest Indemnity Insurance Company acted in bad faith by entering into a settlement agreement that exhausted the liability coverage of an Owner Controlled Insurance Program (OCIP) policy to Rudolfo's detriment. Everest argued it reached the settlement decision in good faith based on its subjective beliefs regarding the relative merits of the various available courses of action, which it formed after consulting with counsel. The superior court ruled that this defense impliedly waived the attorney-client privilege and ordered Everest to produce otherwise privileged documents.

The court of appeals reversed in a split decision. Waiver will be implied only when a party affirmatively asserts it was acting in good faith because it relied on such advice for its own evaluation and interpretation of the law. See *State Farm v. Lee* (2000) (State Farm impliedly waived the privilege because its defense was based on its "investigation and evaluation" of the law which depended on and included the advice of counsel, and its actions were "inextricably intertwined" with such advice). The majority interpreted *Lee* to mean that for waiver to apply, a party must affirmatively claim its conduct was based on its understanding and advice of counsel, rather than merely stating that it consulted with and received advice from counsel. The majority rejected the argument that Everest waived the privilege by defending itself on subjective reasonableness grounds following consultation with counsel.

Dissenting Judge Orozco agreed with the majority's statement of the law, but believed the facts established "something more" than Everest's mere consultation with counsel. Everest had asserted in its initial disclosure statement and response to interrogatories that its decision to settle was in good faith; and that it consulted with counsel regarding the settlement negotiations, in which counsel actually participated. Judge Orozco believed such participation, combined with Everest's claim of subjective good faith, constituted "an affirmative interjection of counsel's role in formulating and acting." In addition, Judge Orozco rejected what she saw as the majority's "magical admission" standard by which a party must formally state it relied on counsel before the privilege can be impliedly waived. *Lee* does not require this affirmative and explicit declaration. According to Judge Orozco, the majority placed the form of Everest's assertions over the substance of the facts, which demonstrated that Everest's actions were inextricably intertwined with the advice of counsel. This was sufficient for waiver of the attorney-client privilege.

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