

District Court Holds That Untimely Objection Waives Fifth Amendment Objection in Coverage Dispute

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The United States District Court for the Western District of Pennsylvania dismissed an appeal of an order in *Federal Insurance Co. v. Le-Nature's, Inc.*, 380 B.R. 747 (Bankr. W.D. Pa. 2008), in which the bankruptcy court granted the insurer's motion to compel discovery and ruled that the defendant waived all of his discovery objections, including objections based upon the Fifth Amendment's protection against self-incrimination, for failing timely to assert them. *Federal Ins. Co. v. Le-Nature's, Inc.*, Civil Action No. 08-269 (W.D. Pa. July 25, 2008). The district court held that it lacked jurisdiction over the interlocutory appeal because it was neither a "final order" under 28 U.S.C. § 158(a)(1) nor immediately appealable under the collateral order doctrine. Wiley Rein represented the insurer.

After the defendant in the declaratory judgment coverage action refused to respond to the insurer's discovery requests, the insurer filed a motion to compel discovery. The defendant responded to the motion to compel by arguing, for the first time, that his Fifth Amendment rights would be implicated by the discovery. The bankruptcy court granted the insurer's motion to compel and held that, due to the defendant's failure timely to assert objections and failure to show good cause, the defendant had waived all objections to the discovery requests, including any objections based on his Fifth Amendment rights.

On appeal, the district court noted that a bankruptcy court's discovery orders generally were not "final orders" subject to appellate review under 28 U.S.C. § 158(a)(1), and, thus, appellate jurisdiction could only be based on an exception to the final order rule. The defendant argued that the court should hear the appeal pursuant to the "collateral order" doctrine due to the importance of the Fifth Amendment issues at stake. The district court rejected this argument, observing that the Third Circuit had applied the collateral order doctrine to discovery orders "only in two very limited circumstances: where the information sought is either privileged or a trade secret." The district court reasoned that the discovery order at issue was not subject to review under the collateral order doctrine because it did not "order the production of specific privileged material or grant a party's motion to compel discovery over a specific objection as to privilege." Instead, the defendant had failed to respond to the insurer's discovery requests, and the bankruptcy court had never ruled on the merits of the Fifth Amendment privilege claim.