

Insured Waived Attorney-Client Privilege by Providing Defense Counsel's Memo to Insurer

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Applying California law, a federal district court has held that a title insurance company waived the attorney-client privilege for a memo written by its defense counsel because the company voluntarily provided the memo to its insurer in connection with the insurer's coverage investigation under an errors and omissions policy. *Fidelity Nat'l Fin., Inc. v. Nat'l Union Fire Ins. Co.*, 2012 WL 4443993 (S.D. Cal. Sept. 25, 2012). The court also held that even if the insurer had agreed to maintain an ethical wall between the claim files for the company's E&O policy and financial institution bond, the company's use of portions of the E&O claim file in litigation with the insurer over coverage under the financial bond constituted a waiver of privilege.

After learning of allegations that it was involved in a Ponzi scheme, the company provided notice to its insurer, which had issued two separate policies, an E&O policy and a financial institution bond. In connection with its coverage investigation under the E&O policy, the insurer requested that defense counsel provide an analysis of potential liability for one of the underlying claims. The company provided the insurer with a memo written by defense counsel but demanded that the insurer create an ethical wall between the E&O and financial bond claim files for the purpose of maintaining the company's attorney-client privilege between the two claims. After the insurer paid its limit on the E&O policy, the insurer and the company disputed whether additional coverage was available under the financial bond. In the ensuing coverage litigation, the insurer's expert relied on defense counsel's memo, which the insurer obtained from the E&O claim file. The company then filed a motion for discovery sanctions, alleging that the insurer improperly had relied on an attorney-client privileged document.

The court first considered whether the company had waived the privilege by providing defense counsel's memo to the insurer. The court rejected the company's argument that the privilege was preserved because the E&O policy imposed a duty to cooperate on the company and the parties therefore had a "common interest" in defeating the underlying claims. The court noted that, under California law, the insurer's reservation of rights created "divergent interests" between the insurer and the company, which precluded a finding that the privilege was protected by any common interest. The court therefore concluded the company waived the privilege by producing the memo. Next, the court considered the company's argument that the privilege was protected because the insurer had agreed to create an ethical wall between the E&O and financial bond claim files. Noting that the company had used materials from the E&O claim file in the coverage litigation over the financial bond, the court concluded that even if the insurer had agreed to an ethical wall, which was a

fact that the insurer disputed, the company had relied on materials in the E&O claim file to support its position in the coverage litigation, thus putting the file at issue and waiving any privilege that may otherwise have attached.