UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:	
LONG POINT ROAD LIMITED PARTNERSHIP,	Case No. 93-72769-JW
Debtor.	Chapter 7
WAMCO, VIII, INC., as successor in interest to FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION,	Adversary Proceeding No. 96-8296
Plaintiff,	
v.	**JUDGMENT**
THE RTC LAND ASSETS TRUST 1995-NP2B, as successor to the RESOLUTION TRUST CORPORATION as receiver for ATLANTIC FINANCIAL SAVINGS, F.A. and CYNTHIA LOWERY, as Trustee for the ESTATE OF LONG POINT ROAD LIMITED PARTNERSHIP,	ENTERED SEP 0 8 1997 J.G.S.
Defendants	

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the motions by the Plaintiff WAMCO, VIII, Inc. and Defendant RTC Land Assets Trust 1995-NP2B to compel production of certain documents and to allow depositions of certain individuals are granted in part and denied in part as more fully explained in the attached Order.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
September 8, 1997.

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DISTRICT OF SOUTH CAROLINA

IN RE:	Case No. 93-72769-JW
LONG POINT ROAD LIMITED PARTNERSHIP,	Chapter 7
Debtor.	
WAMCO, VIII, INC., as successor in interest to FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION,	Adversary Proceeding No. 96-8296
Plaintiff,	
v.	**ORDER**
THE RTC LAND ASSETS TRUST 1995-NP2B, as successor to the RESOLUTION TRUST CORPORATION as receiver for ATLANTIC FINANCIAL SAVINGS, F.A. and CYNTHIA LOWERY, as Trustee for the ESTATE OF LONG POINT ROAD LIMITED PARTNERSHIP,	ENTERED SEP 0 8 1997 J.G.S.
Defendants	

This matter comes before the Court on motions by the Plaintiff WAMCO, VIII, Inc. ("WAMCO") and Defendant RTC Land Assets Trust 1995-NP2B ("NP2B"), to compel production of documents and to allow depositions of certain individuals who are or have been attorneys representing each party or their predecessors in interest on the discrete issue of notice or knowledge of a certain loan agreement and its amendment. Although WAMCO and NP2B have now largely agreed to produce to each other the documents requested, they still disagree regarding the applicability of the attorney-client privilege and work-product doctrine to certain

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documents[1] requested from NP2B which have been submitted *in camera* to the Court for review and determination, and to their proposed respective requests to depose and examine certain attorneys. Based upon the arguments of counsel and the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. WAMCO and NP2B both claim security interests in the real property owned by the Debtor in this case, Long Point Road Limited Partnership ("Long Point").

2. WAMCO purchased its claim against Long Point from Southern National Bank ("Southern National"), which was the successor to the First Savings Bank, FSB (the "First"), which in turn was the successor to First Federal Savings and Loan Association ("First Federal") (collectively referred to as "WAMCO and its predecessors"). Southern National was subsequently acquired by Branch Banking & Trust ("BB&T").

3. During the pendency of Long Point's bankruptcy, which was in Chapter 11 prior to conversion to Chapter 7, NP2B purchased the claim, notes, security interests, loan agreement and related documents from the Resolution Trust Corporation (the "RTC") acting in its capacity as receiver for Atlantic Financial Savings, F.A. ("Atlantic") (collectively referred to as "NP2B and its predecessors").

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[1] Four separate documents were submitted to the Court for review. One of these documents actually contained a group of documents. Therefore, the Court shall treat the submission as a submission of seven distinct documents with attachments and several copies of the same.

4. Long Point purchased the subject property in approximately 1986. In June 1987, First Federal made a loan to Long Point in the original principal amount of $3,642,000.00 which was secured by a second mortgage against the property then owned by Long Point.

5. In April 1988, Atlantic made two loans to Long Point, secured by the same property. The first loan in the original principal amount of $7,000,000 was used to pay off an existing first mortgage to Georgia-Pacific and to reduce the outstanding debt to First Federal to a $500,000 balance. The second loan in the stated principal amount of $3,000,000 was to serve as a revolving line of credit.

6. Section 5.02 of the original loan agreement (the "Loan Agreement") provided essentially that Atlantic would receive two-thirds (2/3) of all release payments with First Federal receiving the balance until First Federal's indebtedness was paid in full.

7. At the April 1988 closing, First Federal subordinated its liens to Atlantic's liens (the "Subordination Agreement"). The Subordination Agreement provided *inter alia* that:

> [t]his Agreement in the subordination and priorities of the First Federal Mortgage and the Lender [Atlantic] Mortgage shall continue in full force and effect until the Mortgagor [Long Point] has satisfied in full its indebtedness and obligations to the Lender [Atlantic] secured by the Lender Mortgage, regardless of whether any party in the future seeks to rescind, amend, terminate, or reform by litigation or otherwise, its respective agreements with the Mortgagor, provided, however, no such rescission, amendment, or reformation shall increase the amount of the Loans or the interest charged on the Loans.

8. In April 1989, Long Point sold approximately 100 acres of the subject property to the South Carolina State Ports Authority ("Port Authority"). At this time, Long Point and Atlantic agreed to an amendment to the Loan Agreement (the "First Amendment"). The First Amendment amended the Loan Agreement (1) to direct the application of the proceeds from the

Ports Authority Sale; (2) to reflect amendments to various guaranties; and (3) to delete the provision of the Loan Agreement providing that First Federal receive one-third (1/3) of the proceeds after two-thirds (2/3) of the proceeds were disbursed to Atlantic. Thus, under the terms of the First Amendment, Atlantic would receive all net proceeds from any subsequent sale of property by Long Point and First Federal would receive no proceeds.

9. WAMCO filed this adversary proceeding and based certain causes of action on the assertion that it and its predecessors had no knowledge of the First Amendment to the Loan Agreement and that Atlantic and Long Point executed the First Amendment without the knowledge or consent of First Federal in violation of the terms of the Subordination Agreement. WAMCO claims that NP2B and its predecessors, through the First Amendment, materially altered the terms of the debt and that NP2B is no longer entitled to priority over WAMCO's lien position. WAMCO requests that the Court declare its claim superior to NP2B's claim, and enter judgment against NP2B for conversion, breach of contract, and breach of fiduciary duty.

10. NP2B responds that WAMCO and its predecessors have known or should have known about the provisions of the Loan Agreement and the First Amendment and are therefore bound by the terms of the Loan Agreement as modified by the First Amendment. NP2B asserts that WAMCO and its predecessors had actual or constructive knowledge of the Loan Agreement and the First Amendment. Actual knowledge, according to NP2B, would include knowledge of WAMCO and its predecessors, including its agents and attorneys, of the existence and provisions of the Loan Agreement and the First Amendment. Constructive knowledge, according to NP2B, is demonstrated by, *inter alia*, the fact that since 1989, upon the sale and closing of any parcel of the subject property, WAMCO and its predecessors executed partial releases without receiving

one-third (1/3) of the proceeds of any sale by Long Point. NP2B's defenses include the statute of limitations, laches, estoppel and detrimental reliance, waiver, unclean hands, ratification, lack of consideration, release, and failure to mitigate.[2]

11. WAMCO and NP2B served discovery on each other in December 1996 and January 1997, respectively. On May 19, 1997, NP2B filed a Motion to Compel. On June 6, 1997, WAMCO filed its own Motion to Compel. After hearings on June 19, 1997 and July 17, 1997 before the Court, counsel for WAMCO and NP2B agreed to exchange privilege logs, and designate which documents were still in controversy. While this process has obviated the need for a review of most of the documents, the general question of the applicability of the attorney-client privilege and work-product doctrine remains unresolved and impacts the balance of discovery.

CONCLUSIONS OF LAW

In this adversary proceeding, discovery is conducted and motions to compel are filed pursuant to the provisions of Rules 26 through 37 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.").

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents or other tangible things ... The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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[2] At the last hearing before the Court, NP2B's counsel also indicated that NP2B intended to assert a defense of novation based on the conduct of the First in advancing additional funds to Long Point in December 1991. The motion to amend NP2B's answer to include this defense has not yet been filed.

Fed. R. Civ. P. 26(b)(1) (emphasis added).

I. NP2B's Motion to Compel

WAMCO filed this adversary proceeding, asserting four causes of action: (1) declaration regarding the priority of WAMCO's and NP2B's claims; (2) conversion; (3) breach of contract; and (4) breach of fiduciary duty. WAMCO claims that NP2B and its predecessors materially altered the Loan Agreement by executing the First Amendment without the knowledge of WAMCO and its predecessors, and that therefore the priority of the claims must be reversed. Furthermore, WAMCO asserts that its claim has priority and that NP2B and its predecessors breached the terms of the Loan Agreement and Subordination Agreement and that WAMCO just learned of this breach. Based on these alleged breaches, WAMCO asserts that NP2B converted funds that should have been held in trust for WAMCO and its predecessors and that WAMCO just learned of this conversion. WAMCO further asserts that NP2B owed it and its predecessors a fiduciary duty under the terms of the Loan Agreement and have breached that duty.

A critical element of WAMCO's complaint is the knowledge of WAMCO and its predecessors of the existence and provisions of the First Amendment.[3] WAMCO specifically pled in its complaint a lack of knowledge of the First Amendment and thus placed that lack of knowledge at issue in this adversary proceeding.

The "at issue" waiver of the attorney-client privilege occurs when the party puts "at issue" some fact which necessarily involves an examination of the attorney's advice [or

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[3] WAMCO's complaint rises or falls upon a showing of it and its predecessors' lack of knowledge of the First Amendment. This would be determined before the Court must consider NP2B's affirmative defenses.

communication] to the client. Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1419 (11th Cir. 1994), modified on other grounds, 30 F.3d 1347.

> A party is treated as having waived its privileges if: (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 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.

Small v. Hunt, 152 F.R.D. 509, 512 (E.D.N.C. 1994), citing Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D.Wash. 1975). The "at issue" doctrine is based on notions of fairness and truth-seeking. Id.; In re Hillsborough Holdings Corp., 176 B.R. 223, 239 (M.D.Fla. 1994) ("[t]he waiver of the privilege is based upon a premise that when a party's conduct reaches a certain point of disclosure, *fairness* requires that the privilege cease. [citations omitted]. Thus, the law regarding waiver prevents a party from placing some privileged information into evidence for his own benefit, then claiming that disclosure of the remainder of the information is privileged, when the failure to disclose would prove manifestly unfair to the opposing party").

Other circuits have adopted this rationale: Garcia v. Zenith Electronics Corporation, 58 F.3d 1171, 1175 n.1 (7th Cir. 1995) ("We note that the attorney-client privilege is generally waived when the client asserts claims or defenses that put his attorneys advice at issue in the litigation"); Glenmede Trust Co. v. Thompson, 56 F.3d 476, 486 (3rd Cir. 1995) ("The attorney-client privilege may be waived by a client who asserts reliance on the advice of counsel as an affirmative defense"); Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1417 (11th Cir. 1994) (A party may waive the attorney-client privilege if it injects into the case an issue that in fairness requires an examination of otherwise protected communications); Thorton v. Syracuse Sav. Bank, 961 F.2d 1042, 1046 (2nd Cir. 1992) ("An attorney-client privilege may be waived if

a party injects into litigation an issue that requires testimony from its attorneys or testimony concerning the reasonableness of its attorneys' conduct").

South Carolina law imputes an attorney's notice of a fact to his client, including cases involving lien priorities. Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp., 257 S.E.2d 496, 497 (S.C. 1979). In Crystal Ice, the question before the South Carolina Supreme Court involved the priority of liens and knowledge imputable to a mortgage holder's counsel. The South Carolina Supreme Court held that "knowledge of the existence of the prior purchase money mortgage was imputed to Crystal Ice through its agent, attorney Ken Lester." The court cited general agent/principal law:

> It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority.

Crystal Ice, 257 S.E.2d at 497; see also McLeod v. Home Ins. Co., 672 F.Supp. 903, 906 (D.S.C. 1987) (A principal is bound by the acts of his agent acting within the scope of his authority, and notice to the agent under such circumstances is imputed to the principal).

Based upon Crystal Ice, this Court finds that the knowledge of WAMCO and its predecessors' counsel regarding the existence and terms of the First Amendment is imputable to WAMCO and its predecessors. Accordingly, WAMCO cannot protect relevant facts which demonstrate notice or knowledge of the First Amendment to those counsel by assertion of an attorney-client privilege. As the Court of Appeals for the Third Circuit stated:

> Facts are discoverable, the legal conclusions regarding those facts are not. A litigant cannot shield from discovery the knowledge it possessed by claiming it has been communicated to a lawyer; nor can a litigant refuse to disclose facts simply because that information came from a lawyer.

Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 864 (3rd Cir. 1994) (the court found that privileged information should be redacted from the documents, but that the facts in the documents themselves are discoverable); see In re Allen, 106 F.3d 582, 604 (4th Cir. 1997) (attorney-client privilege protects only the disclosure of client communications, not the disclosure of underlying facts).

Documents or testimony that tend to show that WAMCO, its predecessors, or current or former counsel had notice or knowledge of the existence and provisions of the First Amendment are discoverable and not protected. WAMCO cannot assert lack of knowledge, including the knowledge of counsel, and then deny the opposing side the opportunity to review documents and depose witnesses who would possess information about WAMCO's knowledge or lack of knowledge.

Accordingly, this Court holds that WAMCO cannot assert the attorney-client privilege to prevent NP2B from ascertaining the facts relating to the actual or imputed knowledge of WAMCO and its predecessors or its counsel regarding the First Amendment.

Additionally, in response to NP2B's motion, WAMCO asserts that certain documents may be protected by the work-product doctrine contained in Rule 26(b)(3) of the Federal Rules of Civil Procedure which states in pertinent part as follows:

> Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the

> party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3). "Clearly 'the work-product doctrine is distinct from and broader than the attorney-client privilege'. Cameron, supra at 587 [Cameron v. General Motors Corp., 158 F.R.D. 581, 585 (D.S.C. 1994)], citing United States v. Nobles, 422 U.S. 225, 239, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 (1975)". In re TJN, Inc., 94-73386-W, C-96-8108 (Bkrtcy.D.S.C. 1/23/97).

NP2B asserts that if these documents are protected by the work-product doctrine, that the privilege has been waived just as the attorney-client privilege has been waived. However, the standard for waiver of the attorney-client privilege is different than the criteria needed to show a waiver of the work-product doctrine. "We ... are of the opinion that broad concepts of subject matter waiver analogous to those applicable to claims of attorney-client privilege are inappropriate when applied to Rule 26(b)(3)". Epstein, Edna Selan, The Attorney-Client Privilege and the Work-Product Doctrine, American Bar Association, Section of Litigation, (3rd Ed.) at 404 citing Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222 (4th Cir. 1976). Since the specific documents that WAMCO claims may be subject to the work-product doctrine were not presented to the Court, the Court cannot make a determination as to whether that doctrine is applicable.[4]

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[4] The Court may not have to undertake an exhaustive review of all documents in which the work-product doctrine may be asserted until NP2B demonstrates that it is unable to obtain the requested information from other sources, such as through the depositions allowed herein.

II. WAMCO's Motion to Compel

WAMCO similarly seeks documents and testimony concerning communications between NP2B and its predecessors and their counsel regarding the giving of notice of the First Amendment to WAMCO and its predecessors. NP2B claims any such advice falls without exception under the attorney-client privilege and also may be protected by the work-product doctrine.

The issue posed by WAMCO's complaint is whether WAMCO had knowledge of the existence and the provisions of the First Amendment and therefore any documents or testimony showing that Atlantic Financial and/or its successors, including NP2B, communicated the Loan Agreement or First Amendment to WAMCO or its predecessors are clearly discoverable. However, no element of any of WAMCO's causes of action requires an inquiry into the advice of counsel to NP2B or its predecessors, nor into the "state of mind" or knowledge in the possession of NP2B or its predecessors. The "state of mind" of WAMCO's counsel is relevant under the analysis of Crystal Ice but a similar argument is not persuasive with respect to the materials or testimony sought by WAMCO.

WAMCO suggests that NP2B has placed its counsel's advice at issue by pleading the affirmative defense of estoppel and detrimental reliance.

> The essential elements of estoppel as related to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least the expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the

> true facts. As related to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) prejudicial change in position.

Southern Dev. Land & Golf v. Public Serv., 426 S.E.2d 748, 756 (S.C. 1993). In support of these defenses, NP2B asserts that WAMCO and its predecessors, in apparent contradiction with the provisions of the Loan Agreement, consented to releases of numerous properties from the liens of the mortgages held by both NP2B and WAMCO with no consideration being paid to WAMCO or its predecessors. NP2B asserts that it is entitled to rely on the actions or conduct of WAMCO and its predecessors in executing these releases either to support an estoppel defense or to indicate that WAMCO and its predecessors may have had knowledge of the First Amendment.

The critical focus of the estoppel defense as asserted by NP2B would appear to be that if WAMCO or its predecessors knew of the Loan Agreement that provided them with 1/3 of any sale proceeds and, through their actions or conduct, failed to seek and collect those proceeds, NP2B can rely upon that conduct so that WAMCO should be estopped from any action to assert a right to recover said proceeds. Given that focus, advice given to NP2B by its counsel regarding the giving of notice of the First Amendment bears no relationship as to whether NP2B and its predecessors were entitled to rely on the actions of WAMCO and its predecessors. Therefore, this Court finds that the attorney-client privilege and work-product doctrine may apply to NP2B's documents and that NP2B has not waived the privileges by placing "at issue" its communications or advice, if any, regarding the giving of notice of the First Amendment to WAMCO or its predecessors.

WAMCO has not sustained its burden of convincing the Court that attorneys for NP2B and its predecessors should be deposed and examined in this matter at this time.

III. Remaining Disputed Documents

NP2B submitted certain documents *in camera* for review and determination if they are protected from disclosure due to the attorney-client privilege or work-product doctrine.[5] Although initially identified as four documents, the Court views this group as actually consisting of seven documents plus separatcly identifiable attachments and additional copies, identified as follows:

1. Correspondence dated February 27, 1989
2. Correspondence dated July 24, 1991
   - 2a. Attachment - Correspondence dated July 23, 1991
   - 2b. Extra Copy
3. Correspondence dated July 19, 1991
4. Facsimile sheet dated July 19, 1991
   - 4a. Correspondence dated July 19, 1991
   - 4b. Attachment - Correspondence dated July 19, 1991
   - 4c. Extra Copy
5. Facsimile cover sheet dated July 24, 1991
   - 5a. Attachment - Correspondence dated July 17, 1991
   - 5b. Extra copy
6. Correspondence dated April 24, 1992
7. Undated Memo

Having thoroughly reviewed the documents in this matter, and applicable authority, the Court finds that documents #1, #2, #3, #4, #4a, #4b and #6 are privileged and not subject to discovery. The Court further finds that documents #2a, #5, #5a and #7 in their original form subject to a redactment of all handwritten notes of counsel, are not privileged.

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[5] No privilege log was submitted to assist the Court as to how the parties had identified the documents.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
September 8, 1997.

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