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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: PROGRESSIVE CHOICE
INSURANCE COMPANY,

PROGRESSIVE CHOICE INSURANCE
COMPANY,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA, SAN DIEGO,

Respondent,

CHRISTINA ELIZABETH PALMER
GERACI,

Real Party in Interest.

No. 12-73128

D.C. No. 3:11-cv-00466-BEN-
NLS

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

Submitted February 7, 2013**

Pasadena, California

Before: PREGERSON, W. FLETCHER, and NGUYEN, Circuit Judges.

Petitioner Progressive Choice Insurance Co. (“Progressive”) petitions for mandamus to vacate the district court’s order requiring Progressive to produce emails it claims are protected by attorney-client privilege. The magistrate judge held that Progressive waived its attorney-client privilege under California law based on its prior disclosures. The district court adopted the magistrate judge’s order.

This court considers five factors in granting mandamus:

(1) whether the petitioner has no other adequate means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court’s order is clearly erroneous as a matter of law; (4) whether the district court’s order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court’s order raises new and important problems or issues of first impression.

Perry v. Schwarzenegger, 591 F.3d 1147, 1156 (9th Cir. 2010) (citing *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)). “[T]he absence of the third factor, clear error, is dispositive.” *Id.* (quoting *Burlington N. & Santa Fe Ry.*

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

v. U.S. Dist. Court, 408 F.3d 1142, 1146 (9th Cir. 2005)) (internal quotation marks omitted).

The district did not clearly err in determining that Progressive waived its privilege under California law. Because the district court's interpretation finds support under current California case law, mandamus is inappropriate. Progressive cannot establish the necessary third factor, and so we deny the petition.

Progressive's motion for judicial notice is denied.

DENIED.