

WASHINGTON CASE UPDATE

Insurer Held to Fend for Itself with Regard to Defense of its Insured

case in point...

From the Desk of Kyle Riley: When a third party pays for the representation of another party, there are ethical issues as to which party the attorney owes a duty. The Washington Supreme Court recently held that an attorney, hired by an insurer to represent a lender-insured, only had a duty to the insured unless the title company could establish it was an intended beneficiary of the legal representation. The Court rejected the argument that the title company was the intended beneficiary of the representation simply because there was no conflict of interests between the title company and the lender. Moreover, the Court held that the engagement letter did not create a duty to the title company, even though it stated that the attorney would keep it informed of the progress in the case.

Claims Pointer: Insurers and their attorneys should be aware that an attorney representing the insured generally does not have a duty to an insurer unless the insurer is an intended beneficiary of the agreement. Thus, it is best for an insurer to obtain separate counsel to represent its interests in a claim, even when no conflicts in the representation exist. In the world of insurance defense, it's every man for himself.

Stewart Title Guar. Co. v Sterling Savings Bank, et al., NO. 87087-0 (Oct. 3, 2013).

Stewart Title Guaranty Company ("Stewart Title") hired Witherspoon, Kelley, Davenport & Toole, PS ("Witherspoon") to defend Sterling Savings Bank ("Sterling") from a claim regarding a lien priority on real property asserted by a construction company. The claim resolved in the construction company's favor; and Stewart Title sued Witherspoon for legal malpractice. Stewart Title claimed that Witherspoon had improperly failed to raise an equitable subrogation defense. Witherspoon responded that (1) it only owed a duty to its client, Sterling and (2) the defense would not have been successful anyway.

The trial court dismissed the malpractice action against Witherspoon by determining that the equitable subrogation defense would not have succeeded. However, the trial court rejected the argument that Witherspoon did not owe a duty to Stewart Title. The parties appealed.

The Supreme Court of Washington affirmed the trial court's ruling. Its reasoning, however, was different. The Supreme Court found that the trial court should have dismissed the case against Witherspoon based on a lack of duty to the third party-payor, Stewart Title. It held that (1) alignment of interests is insufficient to support a duty of care to a non-client and (2) a contractual duty to inform a non-client does not support a duty of care to such person.

In coming to its holding, the Court explained that of the factors considered when holding an attorney liable for malpractice to a third party, the most important consideration is the extent to which the representation was intended to benefit the third party.

The Court rejected the argument that as long as there was no conflict of interest, Stewart Title was an intended beneficiary. This rule would allow any third-party payor to become an intended beneficiary of a legal services contract, which would violate the Washington Rules of Professional Conduct for attorneys.

Finally, the Court rejected the argument that Witherspoon's engagement letter, which stated that it would keep Stewart Title informed as to the progression of the case, somehow created a separate duty to Stewart Title. The Court noted that while an attorney hired to represent a client by a third party may generally have a duty to inform the third party, within the bounds of attorney-client privilege, the duty does not give rise to a broad duty of care that would support a malpractice claim, unless it can be shown that the representation was expressly intended to benefit the third party itself.

The Court decided the case on the issue of Witherspoon's lack of duty to Stewart Title. The Court declined to reach the issue of whether equitable subrogation would have proven to be a viable defense in the case.



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