



The Title & Escrow File

California Court Holds That A Tripartite Attorney-Client Relationship Exists Between A Title Insurer, Its Insured And Counsel Retained By The Title Insurer

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Ten years ago, a California Court of Appeal took a relatively narrow view of the attorney-client privilege in conjunction with claims investigation and analysis conducted by a title insurer's in-house counsel. (*2,022 Ranch, LLC v. Superior Court* (2003) 113 Cal.App.4th 1377.) That case parsed the functions of the in-house attorney, holding that in certain functions (e.g., factual claim investigation), the attorney-client privilege may not apply.

In contrast, a recent Court of Appeal decision broadly applied the attorney-client privilege with respect to confidential communications among claims counsel for a title insurer, its insured, and the insured's counsel appointed by the title insurer. (*Bank of America v. Superior Court* 2013 WL 151153.)

In a case involving a title insurer's retention of counsel to prosecute an equitable subrogation claim on behalf of the insured lender, the Court of Appeal confirmed the creation of a "tripartite attorney-client relationship" whenever an insurer retains counsel to defend its insured. That tripartite attorney-client relationship includes the insurer, the insured, and the counsel, which together form a unified front in the litigation. As such, confidential communications between either the insurer or the insured, on one hand, and counsel, on the other hand, are protected by the attorney-client privilege. Both the insurer and insured are holders of the privilege and either one can assert it. Moreover, the counsel's work product retains its protection when it is transmitted to the insurer.

The Court of Appeal held that the same tripartite attorney-client relationship arises when the title insurer retains counsel "to prosecute an action on behalf of the insured pursuant to the title policy." The title insurer had retained counsel for the insured (Bank of America) in order to prosecute a claim for equitable subrogation. In response to a motion to quash filed by Bank of America, the trial court ordered the production of certain attorney-client communications under the stated theory that the tripartite attorney-client relationship did not arise when the counsel was retained to prosecute a claim as opposed to defend an action. In granting Bank of America's writ of mandate, the Court of Appeal reversed and held that the

attorney-client privilege applied regardless of whether counsel was retained to defend an action or prosecute a claim under the title insurance policy.

The Court of Appeal's decision includes the following principal holdings:

- Follow appellate procedure: While the appellate courts can be accommodating to parties who fail to precisely follow appellate procedures, here the Court of Appeal was not so helpful. The Court of Appeal issued an order to show cause in response to Bank of America's writ of mandate or prohibition, which triggered a procedural requirement for the Real Party in Interest to file "a return by demurrer, verified answer, or both." Instead, the Real Party in Interest filed a unverified "Return Brief." Given the absence of a "true return," the Court of Appeal accepted the verified allegations of the writ petition as true.
- Creation of a tripartite attorney-client relationship: The act of an insurer's retention of counsel to represent an insured is sufficient to establish a tripartite attorney-client relationship between the insurer, the insured and the counsel. The insurer is not required to have a formal retainer agreement with the counsel retained to represent the insured. The act of retaining counsel "was enough in itself" to establish the tripartite attorney-client relationship.
- An insurer's reservation of rights does not destroy the tripartite attorney-client relationship: A title insurer's acceptance of the tendered claim and assertion of a reservation of rights in itself does not create a disqualifying conflict requiring the appointment of *Cumis* counsel. Here, the title insurer made a reservation of rights because the insured lender tendered its claim two days before the trustee's sale. That reservation had nothing to do with the facts and legal theories in the litigation. Nor was retained counsel acting as *Cumis* counsel.
- There is no distinction between retaining counsel to defend, or to prosecute, a claim: With respect to the attorney-client privilege, there is no distinction between an insurer retaining counsel to defend, or to prosecute, a claim. The subject ALTA loan policy granted the title insurer the right to defend an action or, if applicable, to prosecute a claim. "Both CLTA and ALTA policies have provisions for defense and prosecution of lawsuits."
- The title insurer did not waive the attorney-client privilege by failing to file an objection or a motion to quash: Here, Bank of America filed a motion to quash, but the title insurer did not. Because both the insured and the insurer are holders of the privilege, one party's failure to object or to file a motion to quash did not waive the attorney client privilege. If neither holder of the privilege filed a motion to quash, then a waiver could occur.
- Documents covered by the attorney-client privilege, in contrast to the attorney work product doctrine, are not subject to in camera review: The court affirmed the holding in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 that documents subject to the attorney client privilege are not subject to in camera review by the trial court. In contrast, documents subject to the attorney work product doctrine may be the subject of in camera review. (See *Coito v. Superior Court* (2012) 54 Cal.4th 480, 502).

Bank of America confirms the tripartite attorney-client relationship that exists when a title insurer retains counsel on behalf of its insured. The retained counsel has duties to both the insured and the title insurer. The attorney-client privilege applies to confidential communications between the insured, its insured and retained counsel, regardless of whether that counsel is defending the insured or prosecuting an action on behalf of the insured.