



## Alerts

### Washington Supreme Court Rejects Standing of Title Insurer to Sue Defense Counsel

November 6, 2013

*Lawyers for the Profession® Alert*

*Stewart Title Guar. Co. v. Sterling Sav. Bank*, \_\_\_ P.3d \_\_\_, 2013 WL 5687998 (Wash. 2013)

#### Brief Summary

A title insurer filed a legal malpractice action against the law firm it had hired to defend its insured from a claim of lien priority on real property by a construction company. The trial court granted summary judgment in favor of law firm, and the insurer appealed. The Supreme Court of Washington held that: (1) an alignment of interests was insufficient to establish that the law firm owed a duty of care to the insurer, and (2) a duty to inform was insufficient to establish duty of care owed by the firm to the insurer.

#### Complete Summary

A title insurer (Title Company) hired the defendant law firm (defendant firm) "to defend its insured (The Bank) from a claim of lien priority on real property by a construction company ("Construction Company). The claim was resolved in favor of Construction Company, and The Bank then sued defendant firm for malpractice. The Bank claimed that the law firm improperly failed to raise the viable defense of equitable subrogation. Defendant firm argued that there was no duty and no breach, specifically, (1) that 'defendant firm's client was The Bank, not Title Company, and hence defendant firm owed no duty to Title Company that would support the non-client third-party payor's claim of malpractice; and (2) that equitable subrogation would not have been a viable argument anyway. Defendant firm moved for summary judgment on both grounds.

The trial court ruled against defendant firm on the first ground (i.e., no duty), but agreed with it on the second ground (i.e., no breach). The court therefore granted summary judgment in favor of defendant firm. The Supreme Court of Washington recited the following facts relevant to the issue of 'defendant firm's duty to Title Company. A lender, The Bank, agreed to lend money to a borrower to purchase property to develop. As a condition of the loan, The Bank required a first priority security interest in the property. The lender's title insurance company, Title Company, negligently failed to inspect the property before the loan was closed. As a result, Title Company failed to discover that the builder, Construction Company, had already started construction on the property. By statute, Construction Company gained an interest in the form of a mechanics'

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lien as of the date construction began.

After a payment dispute arose, Construction Company discovered that its mechanics' lien held first position. The lender asked its title insurance company to defend it in the ensuing foreclosure action because the insurer's policy covered mechanics' liens. Title Company admitted its duty to defend The Bank and hired 'The Bank's long-time law firm, defendant firm, to do so. In the underlying lawsuit, defendant firm stipulated that Construction Company had first priority and sought a swift settlement. At some point after the stipulation, Title Company fired defendant firm over disagreements related to whether equitable subrogation was a viable defense for The Bank. Title Company hired new counsel, who tried to argue that The Bank was equitably subrogated to the prior interests it paid off and therefore had priority after all. The trial court held the parties were bound by the earlier stipulation and disallowed the equitable subrogation defense.

Title Company then sued defendant firm for malpractice based on 'defendant firm's failure to raise the equitable subrogation defense for the lender, before stipulating the construction company had priority. As noted, defendant firm argued that: (1) its client was the insured lender, not the title insurer, and it therefore owed no duty to the title insurer; and, alternatively, (2) an equitable subrogation argument would have failed. The trial court rejected 'defendant firm's argument that it had no duty, but the trial court agreed with defendant firm that equitable subrogation would not have been a viable argument at the time of the underlying trial.

The Supreme Court of Washington noted that 'defendant firm's only client was The Bank, and that Title Company was a non-client third-party payor. In *Trask v. Butler*, 123 Wash.2d 835, 872 P.2d 1080 (1994), the court adopted a multi-factor test to determine whether an attorney may be liable for malpractice to a non-client third party. The relevant factors are: (1) the extent to which the transaction was intended to benefit the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the attorney's conduct and the injury; (5) the policy of preventing future harm; and (6) the extent to which the profession would be unduly burdened by a finding of liability. The court in *Trask* explained that the first factor is the "primary inquiry" in determining an attorney's liability to third parties. The court further explained that "under the modified multi-factor balancing test, the threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained" and that "no further inquiry need be made unless such an intent exists." *Trask*, 123 Wash.2d at 843.

The court noted that the issue presented here was whether an attorney hired by a title insurer to represent its insured owed a duty to the non-client insurer and, hence, whether that insurer can sue the lawyer for negligently representing the insured during the defense. This was an issue of first impression in Washington. The trial court concluded that Title Company was an intended beneficiary of 'defense firm's representation of The Bank, and thus that defense firm owed a duty of careful representation to Title Company, based in part on finding a contractual duty on the part of defendant firm to inform Title Company and in part on the alignment of interests between defendant firm and Title Company. The Supreme Court of Washington held that an alignment of interests is insufficient to support a duty of care to a non-client. It further held that a contractual duty to inform is insufficient to support a duty of care to a non-client. Summary judgment in favor of defendant firm was thus affirmed.

### **Significance of Opinion**

This case is significant because the Supreme Court of Washington held that an alignment of interests between an insurer and insured and a contractual duty to inform the non-client were insufficient to support a duty of care to a non-client third party to support a malpractice claim. The court did recognize that other jurisdictions have come to a different conclusion.

For more information, please contact [Terrence P. McAvoy](#).

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