



The Docket: Hawaii Supreme Court Addresses Bad-faith Claim

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The Docket is a monthly TitleNews Online feature provided by ALTA's Title Counsel Committee, which reviews significant court rulings and other legal developments, and explains the relevance to the title insurance industry.

Michael O'Donnell and Michael Crowley, both of the law firm Riker, Danzig, Scherer, Hyland & Perretti LLP, provided today's review of a decision by the Hawaii Supreme Court that held an insurer's in-house counsel's communications with the insurer protected by attorney-client privilege are not discoverable merely because a bad-faith claim has been asserted. O'Donnell may be reached at modonnell@riker.com and Crowley may be reached at mcrowley@riker.com.

Citation: *Anastasi v. Fid. Nat. Title Ins. Co.*, 366 P.3d 160 (Haw. 2016).

Facts: The insurer issued a policy insuring a \$2.4 million mortgage. Five months later, the previous owner of the mortgaged property filed a lawsuit claiming his signature on the deed to the borrower had been forged. The insured sought coverage, which the insurer agreed to provide under a reservation of rights. Within a month, the insurer's analysis revealed that the signature on the allegedly forged deed was "very different" from the seller's actual signature, and that the driver's license information recorded by the notary at the closing was not the seller's actual driver's license information. The insurer and retained counsel, however, believed that the real owner of the property may have conspired with the purchaser to defraud the lender out of \$2.4 million. Thus, retained counsel pursued the litigation on behalf of the insured, but the insured eventually lost on summary judgment. Retained counsel filed an unsuccessful motion for reconsideration and, at the insurer's recommendation, an appeal. The parties settled while the appeal was pending, and the insured filed this action against the insurer in which it alleged the insurer acted in bad faith by litigating when it had no reasonable basis for doing so. During the action, the insured filed a motion to compel the production of certain documents generated by the insurer's in-house claims counsel, which the trial court denied because it found that they were privileged. The trial court then granted the insurer's motion for summary judgment, finding that the insurer had not acted in bad faith in litigating the matter. It also found that there was no evidence that the insurer controlled the retained counsel's handling of the litigation, and that any alleged delay by retained counsel therefore was imputed to the insured. On appeal, the appellate court reversed the trial court on the motion to compel, holding that there was a presumption that any documents produced before the insurer made a coverage determination were not privileged. The appellate court further reversed the summary judgment decision and found that there were issues of fact as to whether the insurer acted in bad faith. Specifically, under Hawaii law, an insurer who defends an insured under a reservation of rights is held to an enhanced standard of good faith, which includes "refrain[ing] from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk." Finally, the court affirmed the decision that the insurer did not control the retained counsel's defense in the action.

Holding: On appeal, the Hawaii Supreme Court affirmed the appellate court's decision in part and vacated it in part. First, although it disagreed with the appellate court's holding that any documents produced before a coverage determination are presumptively not privileged, it held that the trial court needed to determine whether the documents were produced "because of the prospect of litigation" in order to determine if they are privileged. Second, the Supreme Court affirmed the appellate court's decision that there were issues of fact as to whether the insurer had acted in good faith, holding that "[i]nsurance companies must act reasonably even when exercising contractual rights," specifically "the right to so prosecute or provide defense in the action or proceeding, and all appeals therein[.]" Finally, the Supreme Court vacated the appellate court's decision that the insurer did not control the retained counsel's decision-making, noting emails between retained counsel and the insurer that raised disputed facts as to whether counsel was deferring to the insurer on whether to appeal.

Relevance to the Title Industry: There are a multitude of lessons to learn from this case. First, claims counsel must be aware that documents generated from a claims investigation are not privileged without the anticipation of litigation, which likely is unknown until the claims analysis is completed. Second, even when an insurer is exercising its contractual rights to defend title, it must ensure the defenses it raises can support the defense of title and document same. In *Anastasi*, the court's concern was that the insurer could delay a title resolution in an attempt to recoup money from third parties, even though it knew it could not establish title. Finally, with regard to litigation, insurers must be careful in their correspondence with retained counsel so as not to give the impression that the insurer is controlling the litigation.

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