BULLIVANTHOUSER

Samuel H. Ruby
San Francisco,
Shareholder-in-Charge

Direct Dial: 415.352.2723
Fax: 415.352.2701
Email Attorney

California Court Upholds Attorney-Client Privilege and Work Product Protection

By Samuel H. Ruby

Reversing a shocking ruling by a trial court, a California Court of Appeal has blocked discovery into communications between members of a law firm representing an insurer, the attorneys' preparation of litigation materials, and their communications with a private investigator hired by them. *Fireman's Fund Ins. Co. v. Superior Court (Front Gate Plaza LLC)*, --- Cal. App. 4th --- (2011).

Front Gate sued Fireman's Fund over a claim for alleged storm damage. In the course of litigation, an accountant claiming to be a whistleblower delivered to the Fund's counsel copies of documents purportedly showing that Front Gate had engaged in fraud. The Fund demanded that Front Gate produce the original documents; Front Gate resisted and sought to preclude the Fund from using the copies.

Front Gate deposed the associate attorney who had spoken with and later received the documents from the whistleblower. Based on attorney-client privilege and work product objections, she refused to answer several questions concerning what she had said to other attorneys in her firm and its outside private investigator, and how the firm had prepared certain subpoenas and a declaration. A discovery referee recommended that the objections be overruled, thus compelling the attorney's testimony on those subjects. The trial court agreed. The Court of Appeal granted Fireman's Fund's petition for a writ of mandate protecting the assertion of privilege.

Front Gate contended that the communications were not privileged because they were not between the attorney and the client. Rejecting that argument, the Court of Appeal held that legal opinions—whether or not communicated to the client, and even if shared with third persons "to whom disclosure is reasonably necessary"—are within the attorney-client privilege. The court also rejected Front Gate's contention that California's work product statute affords absolute protection only to *writings* reflecting an attorney's mental impressions and opinions and not to the thoughts themselves. The court found it "absurd" to interpret California's work product statute to provide the highest protection only for written work product.

The decision is certainly welcome, but it is dismaying that the case had to reach the Court of Appeal. Though experienced counsel and sophisticated litigants are aware that they must always be careful to avoid *waiver* of privilege and protection, few if any would have expected a discovery referee and a trial court to find *no privilege or protection at all* for discussions between attorneys in the same firm or for the thoughts and methods behind the preparation of their documents. Indeed, the appellate proceedings attracted the interest of a number of bar associations, which filed amicus briefs in support of Fireman's Fund. Happily, a grave error was corrected.

Sam Ruby practices insurance coverage law from the San Francisco office of Bullivant Houser Bailey PC. For more information about this eAlert, please contact the author or the Insurance Group of Bullivant Houser Bailey PC.