

ALERT

Evidence of Prevailing Industry Standards Necessary in Bad Faith Action

October 28, 2013

The United States District Court for the District of Colorado, applying Colorado law, has held that summary judgment on a bad faith claim was premature where neither party had provided evidence of the prevailing insurance industry standards. *Larson v. One Beacon Ins. Co.*, 2013 WL 5366401 (D. Colo. Sept. 25, 2013).

Former clients of the insured attorney brought a malpractice action against her, alleging that her substance abuse compromised her representation in an underlying case. Although there was evidence that the clients' damages exceeded \$4 million, the clients twice offered to settle for the \$1 million limits of the attorney's professional liability policy. The insurer consulted with the attorney each time, but the attorney indicated that she did not wish to settle. The attorney later declared bankruptcy, and the trustee of her estate entered into a \$4.5 million settlement with the clients. The trustee then brought suit against the insurer, asserting claims for breach of contract and bad faith. With respect to the bad faith claim, the trustee alleged that the insurer had failed to adequately investigate the allegations in the underlying suit, to advise the attorney of her potential exposure to liability above the policy limits, or to recommend that she retain independent counsel.

The court held that, under Colorado law, in order to succeed on a bad faith claim, a plaintiff must show that an insurer's conduct was unreasonable, which is to be determined objectively according to the standards generally applicable in the insurance industry. The court found that neither party had come forward with evidence from expert witnesses or other sources establishing the relevant insurance industry standards and practices. The court determined such evidence to be essential, and therefore summary judgment would be premature,

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even though many of the underlying facts were undisputed.

The court also dismissed the breach of contract claim because the trustee had not pointed to any express provision of the policy that was allegedly breached. The court concluded that the only basis for the breach of contract claim was a violation of the duty of good faith and fair dealing—the same as the bad faith claim—and this claim properly sounded in tort rather than contract.