

BAD FAITH BLOG

# Colorado Medical Marijuana Facility Gets Burgled, Smoked & Mixed Bad Faith Results

AUTHOR: SANDBERG PHOENIX

**Summary:** Green Earth, the operator of a Colorado Springs retail medical marijuana business and growing facility submitted a claim to its insurer for a wildfire-caused smoke and ash damage and a separate break in and theft. Atain denied the claims on multiple grounds which caused Green Earth to sue Atain for breach of contract and statutory claims for bad faith and unreasonable delays in payment. The District Court was confronted with numerous motions addressing what was and was not covered under the policy issued to Green Earth and whether Green Earth's bad faith and delayed payment claims were sustainable. After reviewing the coverage issues at length, the Court granted summary judgment to Atain on Green Earth's bad faith and unreasonable delay in payment claims regarding the theft, but questions of fact regarding parts of the wildfire claim and Green Earth's related statutory claims for bad faith and unreasonable delay in payment precluded summary judgment.

*The Green Earth Wellness Center, LLC v. Atain Specialty Insurance Co.*

The Court divided Green Earth's wildfire claims into a claim for more than \$200,000 for damage to Green Earth's growing "mother plants and clones" and a claim for \$40,000 for damage to buds and flowers that had already been harvested and were being prepared for sale. The Court then reviewed the terms of the policy and concluded that the policy only covered damage to Green Earth's stock which the parties agreed included the harvested flowers and buds arguably damaged by smoke and ash. Atain, however, disputed coverage for the harvested flowers and buds for other reasons. In determining whether the growing mother plants and clones were "stock" or excluded "growing crops" the Court engaged in an extensive analysis before concluding that Green Earth's mother plants and clones fell within the policy's unambiguous "growing crops" exclusion. Accordingly, only the \$40,000 claim for damage to the previously harvested buds and flowers were covered "stock."

There remained, however, questions whether Green Earth's loss to that covered "stock" were covered because it was undisputed the wildfire started before the policy's inception date. However, Green Earth did dispute "when its losses from the [wildfire] began." In light of that dispute, a trial was required.

Even though Atain had issued the policy of insurance to Green Earth knowing its line of business, it raised additional issues including taking the position that its policy excluded from coverage "contraband, or property in the course of illegal transportation of trade" and further argued that "public policy" supported its coverage denial. In ruling there existed an ambiguity regarding the "contraband" exclusion, the Court noted "federal authorities had made public statements that reflected an ambivalence toward enforcement of the Controlled Substances Act in circumstances where a person or entity's possession and distribution of marijuana was consistent with well-regulated state law." The Court concluded that the "policy's 'Contraband' exclusion is rendered ambiguous by the difference between the federal government's de jure and de facto public policies regarding state regulated medical marijuana." In addition, the Court noted it was undisputed that "before entering into the contract of insurance, Atain knew that Green Earth was operating a medical marijuana business. It is also undisputed that Atain knew ... that the federal law nominally prohibited such a business. Notwithstanding that knowledge, Atain ... elected to issue a policy to Green Earth, and that policy unambiguously extended coverage for Green Earth's inventory of saleable marijuana." Therefore the issuance of the policy itself suggested an intent to provide coverage which overcame application of the "contraband" exclusion.

The Court similarly disposed of Atain's argument that the policy of insurance Atain issued to Green Earth was "unenforceable as against public policy," after first stating the Court was not going to provide advisory opinions. Because it seemed evident the federal public policy regarding medical marijuana was being eroded over time, the Court was not going to accept "Atain's indirect invitation to declare the policy void on public policy grounds. Atain, having entered into the policy of its own will, knowingly and intelligently, is obligated to comply with its terms or pay damages for having breached it." A trial regarding breach of contract on the roughly \$40,000 claim for damage to the harvested marijuana buds and flowers was required. Similarly, Green Earth's statutory claims for bad faith and unreasonable delay in payment relating to the wildfire damages claimed must be tried, according to the Court.

Regarding the theft claim, there was primarily an issue whether the theft damage exceeded the \$2,500 deductible. Because there were damages valuations above and below the deductible, the Court ordered that claim must also proceed to trial.

Even so, the Court granted summary judgment on Green Earth's bad faith and unreasonable delay claims regarding the theft loss. In order to prove its claim, Green Earth had to show Atain had acted unreasonably in denying the claim or refusing to pay the benefits. To show that unreasonable conduct, "an insured must come forward with evidence (typically from an expert) that the insurer's conduct violated industry standards, and the determination of reasonableness is an objective one." Because Atain had come forth with evidence valuing the claim within the deductible and Green Earth had failed to come forward "with evidence to show that Atain's valuation was objectively unreasonable," Green Earth's claims had to fail. Disagreeing with a judicial colleague, the Court ruled Colorado law provided that "the party asserting the bad faith claim has the burden of proof, and thus the burden of demonstrating the unreasonableness of the insurer's conduct lies with the insured." Because Green Earth had failed to come forward with evidence showing Atain's valuation of the theft loss was unreasonable, Atain was entitled to summary judgment on Green Earth's theft loss bad faith and delayed payment claims.

The District Court ruled in favor of Atain on the bad faith theft loss claim because Green Earth failed to demonstrate Atain's valuation of that damage was objectively unreasonable. However, the Court's lengthy discussion of the coverage issues regarding the covered stock strongly suggested the Court was unwilling to rule that Atain's positions on the wildfire claim were reasonable as a matter of law. Although the Court was willing to grant summary judgment on the relatively small claim where Green Earth had failed to establish the unreasonableness of Atain's position, that was not the case regarding the more valuable claim Green Earth asserted concerning its covered stock. It seemed clear the Court considered Atain's "public policy" and "contraband" exclusions strained at best, and potentially asserted in bad faith.

By Anthony L. Martin

Martin, A