

ALERT

Massachusetts Appeals Court Evaluates Reasonableness of Defense Counsel's Hourly Rate

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The Appeals Court of Massachusetts has held that a billable rate of \$225 per hour by defense counsel retained by an insured who refused the carrier's offer of a defense pursuant to a reservation of rights was reasonable for counsel in the Boston metropolitan area. *N. Sec. Ins. Co., Inc. v. R.H. Realty Trust*, 2011 WL 362213 (Mass. App. Ct. February 8, 2011). The court also held that the insurer's failure to pay defense counsel at all for 14 months, among other factors, justified a finding that the insurer violated the Massachusetts Consumer Protection Statute.

Lessees of a property owned by the insured real estate trust filed a lawsuit in September 2001 alleging harm from mold contamination. In response, the insurer issued a letter accepting the defense subject to a reservation of rights. The trust rejected the representation and retained defense counsel with 40 years of trial experience at a rate of \$225 per hour. Defense counsel kept the insurer abreast of the status of the case and issued two invoices reflecting the \$225 rate. The insurer paid the initial invoice at a reduced rate of \$150 per hour 14 months after receipt. Subsequently, the insured settled the underlying claim for \$575,000 less than the underlying claimant's original demand. In June 2004, the insured sent the insurer a demand letter pursuant to the Massachusetts Consumer Protection Statute seeking the \$225 rate.

The insurer subsequently filed a declaratory judgment action to determine what constituted reasonable rates for defense counsel's services. Defense counsel counterclaimed, asserting breach of contract as a third-party beneficiary and violations of the

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Massachusetts Consumer Protection Statute, among other claims. Defense counsel also filed a motion seeking partial judgment that \$225 was a reasonable rate given defense counsel's experience. In response to defense counsel's motion, the trial court ruled that "\$225 per hour is *per se* reasonable as an hourly fee for an attorney in the Boston Metropolitan area." The case proceeded to trial, and the court ultimately ruled that the services rendered by defense counsel were worth \$350 per hour. It ordered the insurer to pay that amount. The trial judge also held that the insurer had violated the Massachusetts Consumer Protection Statute and awarded defense counsel attorney's fees.

On appeal, the insurer argued that the \$150 rate was appropriate because it was commensurate with what it paid its panel attorneys. The appellate court disagreed, reasoning that defense counsel was entitled to a reasonable fee based on the market and not the rate that the insurer could bargain for as an active litigant who routinely retains attorneys to handle a large number of matters. In finding defense counsel's \$225 rate reasonable, the appellate court cited underlying expert testimony that the \$225 rate was not only reasonable, but "remarkable" given defense counsel's experience and reputation.

The insurer also argued that it did not violate the Massachusetts Consumer Protection Statute because it had a rational basis to believe that its rate of \$150 was appropriate. The appeals court disagreed, citing a number of factors, including: the unnecessary 14 month delay in providing the first payment to defense counsel; the insurer's failure to pay undisputed and reasonable expenses for court reporters and experts; the insurer's failure to negotiate with defense counsel in good faith; the insurer's failure to rely on advice from its own outside counsel and claims manager that defense counsel's \$225 rate was reasonable; defense counsel's testimony that the insurer intentionally delayed paying bills in the past in the hopes of forcing a financially advantageous outcome; and defense counsel's success in settling the case. The appellate court reversed the trial court's award of \$350 per hour, however, holding that defense counsel was not entitled to recoup compensatory damages in excess of the fee agreed upon with the trust. Accordingly, the court affirmed in part, reversed in part and remanded to determine the appropriate amount of damages, with interest, based on a rate of \$225 per hour.