

**ALERT**

# No Bad Faith Where Policy Exhausted under "First in Time, First in Right" Principle

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Applying New York law, the United States Court of Appeals for the Eighth Circuit has held that a professional liability insurer did not act in bad faith by refusing to defend and indemnify an insured after other insureds exhausted the policy's limit of liability through an interpleader action. *Schuster v. Quanta Specialty Lines Ins. Co.*, 2012 WL 612546 (8th Cir. Feb. 28, 2012).

An insured filed suit against a professional liability insurer, alleging that the insurer breached the terms of his insurance policy in bad faith by refusing to defend and indemnify him with respect to multiple legal proceedings and by failing to obtain a release of claims against him. The United States District Court for the District of Nebraska granted judgment on the pleadings in favor of the insurer, and the Eighth Circuit affirmed. The court held that, under New York law, absent bad faith, an insurer has the discretion to make payments pursuant to a "first in time, first in right" principle and has no duty to pay out claims ratably or to consolidate them. Applying this rule, the court concluded that the insurer had no duty to defend or indemnify the insured because other insureds had already exhausted the policy's limit of liability through an interpleader action in federal court. The court noted that the insurer had notified the insured of the interpleader action, but that the insured chose not to participate. The court also held that the allegations were insufficient to establish a claim for bad-faith failure to settle because the insured did not allege that any demand for settlement had been made.

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