

The Marshall Fire
Legal Remedies for Colorado Disaster Survivors

September 30, 2022

INTRODUCTION

On December 30, 2021, the Marshall Fire destroyed over 1,000 homes in eastern Boulder County. Stright-line winds exceeding 110 miles per hour spread toxic smoke, ash, soot, and char throughout Louisville, Superior, and neighboring communities.

The Marshall Fire directly impacted over 30,000 Coloradans. In the wake of the fire, homeowners and renters have faced a host of legal challenges, including, but not limited to:

I.	Unreasonable Delay or Denial of Insurance Benefits.....	3
II.	Underinsurance.....	5
III.	Deceptive Trade Practices.....	6
IV.	Price Gouging.....	8
V.	Habitably.....	9
VI.	Retaliation.....	10

This Memorandum addresses common legal issues faced by disaster survivors in the wake of the Marshall Fire. It analyzes the nature of each issue and potential remedies under Colorado law.

Stephen H. Hennessy is a civil litigator and trial lawyer based in Boulder. He leverages experience in disaster recovery and insurance law.

Before he attended law school, Stephen worked with the Federal Emergency Management Agency, where he facilitated recovery efforts for multiple disasters throughout the United States. Before he founded Hennessy PLLC, Stephen was a litigation associate at a leading commercial law firm in Denver, where he litigated insurance bad faith actions in federal court.

This report is presented for analytical purposes only and should not be construed as legal advice. The law is constantly changing. The law applies differently in every case. Speak with an attorney before taking legal action.

I. Unreasonable Delay or Denial of Insurance Benefits

Every year, homeowners and renters (insureds) pay premiums to their insurance companies (insurers) for insurance coverage, and often receive no tangible benefit. They trust that, in the event their home is damaged by a catastrophe, their insurers will help them rebuild.

Courts in Colorado recognize that when an insured suffers a loss, they become “particularly vulnerable” to their insurer.¹ For example, the insurer may delay payment of a claim to the insured in the hope of settling for an amount less than what is owed.² Accordingly, under Colorado law, a “special duty” is imposed upon an insurer to deal with an insured in good faith.³

A. Breach of Contract

Courts in Colorado construe insurance policies as contracts.⁴ However, because of the unique nature of the relationship between the insurer and insured, courts construe ambiguous provisions in insurance policies in favor of the insured.⁵ If an insurer fails to pay what is owed under an insurance policy, an insured may bring a civil action against the insurer for breach of contract.

For example, if an insured submits estimates to remediate wildfire damage totaling \$150,000, but the insurer approves payment for just \$50,000, the insured may recover \$100,000 for breach of contract if they can prove the additional remediation work is necessary to restore their home to the condition it was in before the wildfire.⁶

B. Violation of C.R.S. § 10-3-1115

In addition to bringing a civil action for breach of contract, an insured may seek statutory damages if their insurer unreasonably delayed or denied payment.⁷ If the insured proves the delay or denial was without a reasonable basis, they may recover two times the covered benefit, in addition to any damages for breach of contract.⁸

For example, if the insured can prove the delay or denial of the \$100,000 payment was without a reasonable basis, in addition to \$100,000 in damages for breach of contract, they can recover \$200,000 in damages for violation of C.R.S. § 10-3-1115, for a total of \$300,000.⁹

¹ *Decker v. Browning-Ferris Indus.*, 931 P.2d 436, 443 (Colo. 1997) (citing *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1273 (Colo. 1985)).

² *Id.*

³ *Id.*

⁴ See *Smith v. State Farm Mut. Auto., Ins. Co.*, 399 P.3d 771, 773 (Colo. App. 2017).

⁵ *Cyprus Amax Minerals v. Lexington Ins.*, 74 P.3d 294, 299 (Colo. 2003).

⁶ Deductibles, depreciation, and/or other policy terms may apply. Subject to policy limit.

⁷ C.R.S. §§ 10-3-1115, 1116.

⁸ C.R.S. § 10-3-1116(1) (an insured may also recover court costs and reasonable attorney fees); see also *American Family Mut. Ins. Co. v. Barriga*, 418 P.3d 1181, 1185-86 (Colo. 2018).

⁹ Deductibles, depreciation, and/or other policy terms may apply.

C. Insurance Bad Faith

In certain cases, an insurer may also face exposure for bad faith. If the insured proves the insurer (1) acted unreasonably under the circumstances, and (2) knowingly or recklessly disregarded the validity of their claim, they may recover additional damages.¹⁰

For example, if the insured can prove (1) the delay or denial of the \$100,000 payment was unreasonable under the circumstances, and (2) the insurer knew or recklessly disregarded the validity of their claim, the insured may recover damages for emotional distress, pain and suffering, fear and anxiety, and/or impairment of quality of life.¹¹

D. What is Unreasonable?

The reasonableness of an insurer's conduct is measured objectively based on industry standards,¹² for which the Unfair Claims Practices Act (UCPA) may be offered as evidence.¹³ Examples of where an insurer violates the UCPA include:

- Refusing to pay claims without conducting a reasonable investigation based upon all available information;¹⁴
- Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;¹⁵
- Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;¹⁶
- Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;¹⁷ and
- Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.¹⁸

¹⁰ *Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 415 (Colo. 2004).

¹¹ *See id.*

¹² *Am. Family Mut. Ins. Co. v. Allen*, 102 P.3d 333, 343 (Colo. 2004).

¹³ *See id.* at 344.

¹⁴ C.R.S. § 10-3-1104(1)(h)(IV)

¹⁵ C.R.S. § 10-3-1104(1)(h)(III)

¹⁶ C.R.S. § 10-3-1104(1)(h)(VI)

¹⁷ C.R.S. § 10-3-1104(1)(h)(II)

¹⁸ C.R.S. § 10-3-1104(1)(h)(XIV)

After a disaster like the Marshall Fire, many insureds find themselves in a vulnerable position. They need to restore their home. And they need their insurance benefits fast, and paid in full. Where an insurance company fails to honor its special duty, and unreasonably delays or denies payment on a claim, the insured has powerful remedies under Colorado law.

If an insured has their insurance claim unreasonably delayed or denied, they should speak with an attorney.

II. Underinsurance

When most people buy homeowners insurance, they expect that, in the event their home burns to the ground, their insurance will pay the amount necessary for them to rebuild. Unfortunately, in the wake of the Marshall Fire, that has been far from the case.

Approximately 1,084 homes were destroyed by the Marshall Fire.¹⁹ Impacted homeowners have filed approximately 983 total loss claims.²⁰ Assuming a rebuild cost of \$350 per square foot, approximately 639 homes were underinsured.²¹ At that rate, homeowners in Boulder County will need to pay approximately \$179 million out of pocket to fill in the gap.²²

So why did the majority of homeowners in Boulder County choose to buy too little insurance? They did not. Most homeowners will tell you they relied on their insurance agent or insurance company to help protect themselves in the event of a catastrophic loss.

So is it reasonable to rely on your insurance agent? It depends. But too often, courts in Colorado tell homeowners to swim at their own risk.

The Colorado Court of Appeals has explained: “Colorado follows the general rule that insurance agents have a duty to act with reasonable care toward their insureds, but, absent a special relationship between the insured and the insurer’s agent, that agent has no affirmative duty to advise or warn his or her customer of provisions contained in an insurance policy.”²³

With respect to sufficient coverage, the Colorado Court of Appeals has explained: “[G]eneral duty of reasonable care which an insurance agent owes his client does not include the obligation

¹⁹ Boulder County, *Boulder County Releases Updated List of Structures Damaged and Destroyed in the Marshall Fire*, <https://www.bouldercounty.org/news/boulder-county-releases-updated-list-of-structures-damaged-and-destroyed-in-the-marshall-fire/> (Jan. 6, 2022).

²⁰ Colorado Division of Insurance, *Division of Insurance Releases Initial Estimates of Underinsurance for Homes in the Marshall Fire*, <https://doi.colorado.gov/news-releases-consumer-advisories/division-of-insurance-releases-initial-estimates-of> (Apr. 26, 2022).

²¹ *Id.*

²² *Id.*

²³ *Kaercher v. Sater*, 155 P.3d 437, 441 (Colo. App. 2006).

to procure a policy affording the client complete protection, but insured has responsibility to advise agent of the insurance they want, including the limits to the policy to be issued[.]”²⁴

Thus, under Colorado law, most insurance agents do not have an affirmative duty to advise on whether a policyholder is buying too little insurance, or whether they should purchase more. So does that mean underinsured homeowners are straight out of luck? Not necessarily.

If an insurance agent agreed to obtain a particular form of coverage, and failed to do so, the policyholder may have legal recourse.²⁵ The Colorado Supreme Court has explained: “There is no question that an insurance broker or agent who agrees to obtain a particular form of insurance coverage for the person seeking such insurance has a legal duty to obtain such coverage or to notify the person of his failure or inability to do so.”²⁶

Furthermore, if an insurance agent obtained the agreed-upon coverage, but failed to properly advise on the amount or type thereof, the policyholder may have legal recourse if there was a “special relationship.”²⁷ The Colorado Court of Appeals has explained: “Whether a special relationship has been formed turns on whether there is ‘entrustment,’ that is, whether the agent or broker assumes additional responsibilities beyond those which attach to an ordinary, reasonable agent possessing normal competencies and skills.”²⁸

Finally, Colorado law mandates that insurance companies offer certain types of coverage. When issuing or renewing a replacement cost homeowners insurance policy, insurance companies must make available law and ordinance coverage in an amount equal to ten percent of the dwelling’s limit of liability, and extended replacement cost coverage in an amount equal to at least twenty percent of the dwelling’s limit of liability.²⁹ Insurance companies must offer policyholders the opportunity to purchase twenty-four months of additional living expense coverage.³⁰

If a homeowner is underinsured because of the wrongful conduct of their insurance agent or insurance company, they should speak with an attorney.

III. Deceptive Trade Practices

When a family’s home is rendered uninhabitable, they may find themselves in a particularly vulnerable position. Many are desperate for their home to be restored. Unfortunately, certain service providers take advantage of this condition and seize the opportunity to profit.

²⁴ *Id.* (citing *Jones v. Grewe*, 189 Cal. App. 3d 950, 234 (1987)).

²⁵ *See Bayly v. Pete’s Satire*, 739 P.2d 239, 243 (Colo. 1987).

²⁶ *Id.*

²⁷ *Kaercher*, 155 P.3d at 441.

²⁸ *Id.*

²⁹ C.R.S. § 10-4-110.8(6)(a)

³⁰ C.R.S. § 10-4-110.8(6)(b)

Service providers may approach homeowners in the aftermath of a disaster with “contracts” or “work authorizations” for emergency remediation. Often, these agreements are uncertain in scope and price, and difficult for the homeowner to get out of. If a dispute arises concerning the work, homeowners may be subject to liens or even foreclosure.

The Colorado Consumer Protection Act classifies certain conduct as “deceptive trade practices.” Examples of deceptive trade practices include:

- Making false or misleading statements of fact concerning the price of goods or services;³¹
- Representing that goods or services are of a particular standard, quality, or grade when the person or business knows or should know that they are of another;³²
- Advertising goods or services with intent not to sell them as advertised;³³
- Employing “bait and switch” advertising.³⁴
- Knowingly or recklessly making a false representation as to affiliation, connection, or association with or certification by another;³⁵

To establish a violation of the Colorado Consumer Protection Act, a consumer must prove: (1) the business engaged in a deceptive trade practice, (2) the challenged practice occurred in the course of the business’s operation, vocation, or occupation, (3) the practice significantly impacts the public as actual or potential consumers of the business’s goods, services, or property, (4) the consumer suffered injury in fact to a legally protected interest, and (5) the challenged practice caused the consumer’s injury.³⁶

Generally, a person who is injured by an unfair or deceptive trade practice can bring a civil action to recover (1) the actual damages sustained, (2) \$500.00, or (3) three times the amount of actual damages sustained if they can establish bad faith conduct.³⁷ “Bad faith conduct” means fraudulent, willful, or intentional conduct that causes injury.³⁸

For more isolated instances of deception that do not significantly impact the public, other remedies may be available, such as Fraud or Civil Theft.³⁹

³¹ C.R.S. § 6-1-105(1)(l)

³² C.R.S. § 6-1-105(1)(g)

³³ C.R.S. § 6-1-105(1)(i)

³⁴ C.R.S. § 6-1-105(1)(n)

³⁵ C.R.S. § 6-1-105(1)(c)

³⁶ *Hall v. Walter*, 969 P.2d 224, 235 (Colo. 1998).

³⁷ C.R.S. § 6-1-113(2)

³⁸ C.R.S. § 6-1-113(2.3)

³⁹ *See Meredith v. Ramsdell*, 384 P.2d 941, 944 (Colo. 1963); *see also* C.R.S. § 18-4-405.

If a disaster survivor has been injured by a deceptive trade practice or other fraudulent conduct, they should speak with an attorney.

IV. Price Gouging

Shortly before the Marshall Fire, in July 2020, a new law in Colorado went into effect that prohibits price gouging during a declared disaster period.⁴⁰ In that law, the General Assembly determined that “when a declared disaster results in abnormal disruptions to the market, the public interest requires that any unfair and unconscionable increase in the price of consumer goods or services be discouraged.”⁴¹

Colorado’s price gouging law provides that a person or business engages in an unfair and unconscionable act or practice, when during a disaster period and within the designated area, the person or business charges a price so excessive as to amount to price gouging in (1) the sale or offer to sell building materials, consumer food items, emergency supplies, fuel, medical supplies, or other necessities, or (2) the provision of or offer to provide repair or reconstruction services, transportation, freight, or storage services, or services used in an emergency cleanup.⁴²

The prohibition remains in effect in the geographic area designated in the disaster declaration for a period of 180 days after the date the disaster declaration begins.⁴³

On January 20, 2022, the Colorado Attorney General’s Office issued a press release stating that the Attorney General sent letters to AirBnB, Zillow, VRBO, and REColorado expressing concern over reports that some landlords excessively raised their prices after so many disaster survivors were displaced from the Marshall Fire.⁴⁴

According to the Attorney General’s Office:

The letters ask the companies to take the necessary steps to ensure unscrupulous actors are not using their platforms to take advantage of vulnerable Coloradans during a disaster period and request a response by close of business on Jan. 25, 2022. Although the letters were addressed to certain companies, Colorado’s price gouging law applies to any landlord or rental property, including those who do not use the platforms.⁴⁵

⁴⁰ C.R.S. § 6-1-730

⁴¹ C.R.S. § 6-1-730(1)(a)(I)

⁴² C.R.S. § 6-1-730(2)

⁴³ C.R.S. § 6-1-730(5)(f)

⁴⁴ Colorado Attorney General’s Office, *Attorney General Phil Weiser Urges Online Real Estate Companies to Combat Price Gouging in Wake of Marshall Fire*, <https://coag.gov/press-releases/1-20-22/> (Jan. 20, 2022).

⁴⁵ *Id.*

Many tenants and displaced homeowners in eastern Boulder County faced surging rental prices in the wake of the Marshall Fire. Aside from sending letters, however, it remains unclear what legal action, if any, has been taken to enforce Colorado's new price gouging law.

Unlike other provisions of the Colorado Consumer Protection Act, Colorado's price gouging law is not currently enforceable in a private action. A subsection of the law provides: "This section is enforceable solely by, and at the discretion of, the attorney general or the district attorney with jurisdiction over the conduct at issue."⁴⁶

This limitation is problematic because it curtails the law's enforcement mechanism. For example, if a disaster survivor falls victim to certain "bait and switch" advertising, they can hire an attorney to bring a private action.⁴⁷ But if a disaster survivor falls victim to price gouging, their remedies are often limited to filing a complaint with the government.

Eliminating the price gouging law's enforcement limitation would strengthen protections for disaster survivors, and allow the law to fulfill its stated purpose. Nevertheless, if a disaster does fall victim to price gouging during a qualifying disaster period, they should contact the Attorney General's Office or their local district attorney.

V. Habitability

In the wake of the Marshall Fire, tenants found themselves living in properties that were contaminated by toxic smoke, ash, and soot. Often, this can render the premises uninhabitable.

Where fire damage is so extensive that it cannot be remediated, a landlord may have a right to terminate the lease.⁴⁸ But where a landlord continues to lease the premises and collect rent from their tenant, they have a duty to ensure the property is habitable.⁴⁹

Under Colorado law, every residential lease contains an implied warranty of habitability where the landlord is deemed to warrant that the residential premises is fit for human habitation.⁵⁰

A landlord breaches the Implied Warranty of Habitability if the residential premises is in a condition that (1) materially interferes with the tenant's life, health, or safety, or (2) is otherwise unfit for human habitation, and, after receiving written notice of the condition, fails to commence remedial action within (1) twenty-four hours, or (2) ninety-six hours, respectively.⁵¹

⁴⁶ C.R.S. § 6-1-730(4)

⁴⁷ See C.R.S. § 6-1-105(1)(n); C.R.S. § 6-1-113(1).

⁴⁸ See C.R.S. § 38-12-503(6).

⁴⁹ See C.R.S. § 38-12-503(1)

⁵⁰ *Id.*

⁵¹ C.R.S. § 38-12-503(2)

In the years preceding the Marshall Fire, changes to Colorado's Warranty of Habitability went into effect.⁵² One key change was a new requirement that landlords must provide tenants with a comparable property or hotel room after they receive notice from the tenant that the leased property is in a condition that materially interferes with their life, health, or safety.⁵³ This requirement, however, is only triggered if the tenant requests alternative housing.⁵⁴

In the event a landlord breaches Colorado's Implied Warranty of Habitability, additional remedies are available to tenants.⁵⁵ Upon qualifying written notice, a tenant may terminate the lease.⁵⁶ Upon qualifying written notice, a tenant can deduct repair costs from his or her rent.⁵⁷ A tenant may also bring a civil action against the landlord for his or her actual damages.⁵⁸ A court may also award injunctive relief.⁵⁹

In most cases, tenants must satisfy strict procedural requirements before they can invoke these remedies. If a rental unit is not habitable, the tenant should speak with an attorney.

VI. Retaliation

When habitability issues arise, tenants are often concerned about lodging a complaint out of fear their landlord will retaliate. This puts many tenants in a situation where they are concerned about their life, health, or safety, but are reluctant to ask the landlord to take action out of fear they could be rendered homeless.

Colorado law provides that a landlord shall not retaliate against a tenant by increasing rent or decreasing services, or by bringing or threatening to bring an action for possession in response to the tenant having made a good faith complaint to the landlord or a government agency concerning certain specified conditions such as mold, heat, or plumbing, or any condition that materially interferes with the tenant's life, health, or safety.⁶⁰

Colorado law also prohibits such retaliation in response to the tenant organizing or becoming a member of a tenants' association or similar organization.⁶¹

In the wake of the Marshall Fire, tenants lodged complaints concerning the penetration of smoke, ash, and soot in their rental units. Certain landlords failed to take proper remedial action and/or subsequently retaliated.

⁵² C.R.S. § 38-12-503

⁵³ C.R.S. § 38-12-503(a)

⁵⁴ *Id.*

⁵⁵ C.R.S. § 38-12-507

⁵⁶ C.R.S. § 38-12-507(1)(a)

⁵⁷ C.R.S. § 38-12-507(1)(e)

⁵⁸ C.R.S. § 38-12-507(1)(d)

⁵⁹ C.R.S. §§ 38-12-507(1)(b) and (d.5)

⁶⁰ C.R.S. § 38-12-509(1)(a); *see* C.R.S. § 38-12-505(1).

⁶¹ C.R.S. § 38-12-509(1)(b)

If a landlord retaliates against a tenant in violation of Colorado law, the tenant may terminate the rental agreement and recover either three months' periodic rent, or three times the tenant's actual damages, plus court costs and reasonable attorney fees.⁶²

If a tenant has been retaliated against for making a good faith complaint about habitability, they should speak with attorney.

CONCLUSION

When disaster strikes, survivors are often left in a vulnerable position. Meanwhile, certain bad actors may seize on a disaster as an opportunity to profit. If a disaster survivor has been taken advantage of or mistreated, Colorado law may provide remedies.

After the Marshall Fire, Hennessy PLLC partnered with East County Housing Opportunity Coalition (ECHO) to provide no-cost legal services to Marshall Fire survivors. Much credit is given to ECHO and many other organizations that are committed to making Boulder County a better place to live.

⁶² C.R.S. § 38-12-509(2)