

# **INSURANCE LAW REVIEW**

## **Federal Judge Allows Punitive Damage Suit On Claims Practices to Go Forward**

**United States District Court Judge Shirley Wohl Kram in Southern District, New York, has ruled that two homeowners may pursue their action for punitive damages against their insurance company to prove the merits of their allegation that the company engages in practices "designed to frustrate fair and efficient claim settlement.**

**The case came into federal court because of a diversity of location between the plaintiff's insured and defendant insurance company. Judge Kram's decision also held that the insurer, Nationwide, had breached its obligations**

**under its homeowners policy and granted summary judgment on the question of liability.**

**John W. Riordan and Jane Fox, who owned a home in Ossining, New York, purchased a homeowners policy from Nationwide Mutual fire on May 12, 1983 covering the premises and the personal property. They selected the option I which related to "Extended Replacement Cost" coverage on the contents and Option J, "replacement Cost Guarantee" on the premises.**

**On July 17, 1989, while the policy was in full force and effect, the premises and contents were damaged by fire. Riordan and Fox, a husband and wife, retained Steven Seltzer, vice president and general counsel of Goldstein Affiliates, Inc., a New York City firm, as their public adjuster. Mr. Seltzer submitted a sworn statement and proof of loss to Nationwide on October 10, setting the contents loss at \$147,421.49 based on "replacement cost if destroyed or restoration cost if restorable." The proof of loss was accompanied by a 77-page list of items to be replaced or repaired, together with other documentation.**

**Judge Kram, in her summary of the facts of the case, noted that Nationwide did not hire experts to appraise the cost to repair, restore or replace plaintiffs antique furniture until five months after the fire.**

**Also noted by the judge was the homeowners' assertion that the insurer made no offer to settle from the date of the fire through approximately mid-January, despite a willingness on the part of the policyholders to settle the building portion of the claim for the amount recommended by Nationwide's claims adjuster.**

**An unusual aspect of the claim was that following an inquiry by the New York Insurance Department about the settlement. evidently triggered by a complaint from the Riordans, Nationwide, on April 11, 1990, by letter, told the department that it had offered \$53,571.65 as a settlement for the dwelling portion, and \$20,960 for the contents. However, the Riordans said that no such offer was ever made to them and there was no evidence presented to show that the Nationwide letter to the department was circulated to them.**

**According to the decision, John Hahn, the Nationwide adjuster, with 20-years service with the company, testified that his supervisor, Joseph Kenyon, had expressly rejected any settlement on a piecemeal basis. Because of this position, any move to settle the building loss, even though the Riordans had agreed to the Nationwide offer, could not go forward.**

**The judge made it clear that both sides were far apart on the contents loss. The claim was for \$147,421 .49 based in large part on the destruction and damage to antiques. Nationwide's offer was for \$20,000. Judge Kram said there was no indication as to how Hahn and Nationwide reached that figure.**

**In a footnote close to the end of her decision, Judge Kram said that the issue raising the most serious disagreement was the valuation of the Riordans' antiques and other items of an "intrinsic value." She said that although Nationwide was arguing that the antiques are subject to settlement at "actual cash value" rather than "replacement value," Nationwide had failed to explain how actual cash value of an antique differs significantly (if at all) from its replacement value**

**Hahn admitted at his deposition that the policy of Nationwide is to base settlement of a replacement value claim upon actual cash value unless and until the insured replaces destroyed personal property with his or her own**

**funds. The company claims representative also said that it is the Nationwide policy and practice to approach claims settlement on the premise that there are no time constraints within which Nationwide must operate, the judge noted in her decision, alluding to comments made by Hahn at his deposition. According to the judge Mr. Hahn's statements were not restricted the Riordans' loss but were general policies with Nationwide.**

**In the Hahn deposition, he told Jonathan J. Wilkofsky, attorney for the Riordans, that Nationwide had no time constraints on settlements because there was nothing in the policy requiring such constraints. Wilkofsky pressed the claims man on the constraints under New York law but elicited no admission about these requirements.**

**In his notice of cross motion, Mr. Wilkofsky summarized the Hahn deposition, asserting that he was incorrect about the duties, obligations and responsibilities of the company as well about the scope of replacement value coverage, and the specific demand by the insureds for the benefit of replacement value coverage.**

**Wilkofsky stated in his cross motion document that Hahn was incorrect, "and has been incorrect for apparently 20 years. in his assumption that there is no time limit or time constraint obligating the Nationwide Insurance Company to pay or [a] claim." In this regard, Wilkofsky quoted from New York regulations and section 2601 of the Insurance Law to cite the practices, "which by definition engender deceptive acts and practices of an insurance company and mimic exactly the same behavior that Mr. Hahn defended so strongly in his sworn testimony."**

**These were the specific allegations of the Riordans as listed in Judge Kram's decision:**

**"Despite the passage of almost one (1) year and the presentation of countless documents, numerous meetings between the insured's representatives and the insurer. Despite the pleadings and protestations offered by the insureds and their representatives, Defendant has yet either to make payment on Plaintiffs' claim, an offer of compromise on plaintiffs' claim, or to set forth, by way of explanation, any excuse, affirmative defense or rationale of any kind detailing its refusal to do so."**

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**"Furthermore, based upon Hahn's deposition testimony and plaintiffs' claim file, plaintiffs allege that Nationwide has adopted or engendered, with respect to certain categories of claims or insureds a claim settlement policy and practice designed to frustrate fair and efficient claim settlement, in violation of the New York Insurance law and the rules promulgated thereunder. Specifically, plaintiffs allege that Nationwide's policy and practice is to: (a) refuse to settle claims piecemeal even where agreement can be had on the settlement value of a portion of a claim; (b) value claims for adjustment at present cash value despite the insureds' election or replacement value coverage; (c) require insureds replace items out of their own funds before Nationwide will advance monies on a replacement value basis; (d) train adjusters without regard to the requirements of New York Insurance Law and the rules promulgated thereunder; and (e) Compel policyholders to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them. In connection with their Section 349 and punitive damages claims, plaintiffs also allege that Nationwide engages in deceptive acts and advertising, founding such allegations on Nationwide's advertising campaign suggesting prompt and efficient claims settlement, and plaintiffs' own experience with Nationwide's claims settlement practice."**

**The technical defense by Nationwide that the Riordans should be precluded from amending their complaint to assert fraud because it is based on information obtained during discovery, was rejected by the judge. She cited Mr. Hahn's deposition testimony as giving them sufficient reason and she said that sufficient facts were established to state a claim for relief under New York General Business Law, Section 349, relating to deceptive acts or practices. She said that the statute contains no requirement that a plaintiff demonstrate that the "deceptive practice was intentional or reckless, or constituted fraud, in order to state a valid claim for relief. Judge Kram also said that the Riordans' allegations that their injury resulted from Nationwide claim settlement practice and policy violation of the New York insurance Law, "easily satisfies the elements of a claim" under the law.**

**Also rejected by the judge was the Nationwide position that because this action is a first party insurance claim, the nature of the parties' dispute is inherently private, without ramifications to the public at large. She said this was a narrow reading of the Riordans' allegations because they "expressly allege the existence of a claim settlement policy designed to**

deceive certain categories of policyholders; in other words, the public at large."

The judge said that the direct causal connection between the alleged illegal acts of the insurer and its avoidance of its policy obligations set forth "precisely such evidentiary allegations of injury to the public at large as are required to sustain their claim under the General Business Law." She added: "The public injury inherent in such a scheme, if proven, is unquestionable since the alleged deceptive practices go to the very essence of the services Nationwide provides to the public on a grand scale, as well as its obligations to deal with the general public in good faith."

On the punitive damage issue, Judge Kram reviewed existing positions of three departments of the New York Appellate Division. In one instance, relied on by Nationwide, the First Department, she said that the court expressly declined to abrogate a private right of punitive damages in first-party insurance claims. She said that instead, the court, in *Cohen v. New York Property Insurance Underwriting Association*, a 1978 case, stressed "that the test for awarding such damages is a strict one, and is not found in the Insurance Law but rather. . . in case law .

However, Judge Kram also noted that in a 1989 decision by the Second Department, *Rolday v. Allstate*, concluded that the availability of punitive damages in private lawsuits premised on unfair claim practices has been preempted by administrative remedies available to the Superintendent of Insurance pursuant to Insurance Law §601. Judge Kram stated that the First Department has "expressly refused to extend any such 'general view' so as to abrogate the right to maintain a punitive damages claim in a first-party claim." She said that the Second Department's reliance on the *Cohen* decision did not take into consideration the fact that the right of punitive damages was not abrogated. She also noted that the Third and Fourth Departments have adopted the *Cohen* rule so that the Second Department does "not now appear to reflect the prevailing New York view but rather, an extension of existing law, which requires speculation that she would not engage in.

Mr. Wilkofsky, who represented the Riordans, is a member of the firm of Wilkofsky, Friedman, Karel & Cummins of New York City

Attorneys for the defendant Nationwide is Feldman & Rudy of Roslyn Heights, N.Y. Gerald F. Kirby was counsel in this case.