

PRESS RELEASE

Friday, November 17, 2017

The Second Circuit found that certain auto insurers may have committed deceptive practices and breached their insurance contracts with customers by failing to pay sufficient amounts on repair claims for labor rates, labor hours, OEM parts, and other deficiencies, in two decisions handed down earlier this month. The court did not make a final finding, but found that the repair shop had gathered enough evidence to be permitted to go to trial on those claims.

In the pair of decisions in *Nick's Garage, Inc. v. Progressive* and *Nick's Garage, Inc. v. Nationwide*, the Second Circuit largely reversed a lower court's decisions which had dismissed the cases for lack of evidence. The court's decisions were based in part on the legal standard applicable to summary judgment motions and found that the insurers had failed to meet their burden of showing the repair shop could not support its claims. The court also analyzed some of the evidence put forward by Nick's and made a number of findings that could have significant impact for the industry.

First, the court clarified how the "*prevailing competitive labor rate*" should be measured. It found that the competitive labor rate should not be measured by what insurers could negotiate as a result of the extra leverage given to them by the high volume of claims they deal with. Instead, the court found that the proper measure of the prevailing competitive rate was the rate that a one-off consumer customer or insurer without a high volume advantage would pay coming in for one repair. The appellate court remanded the case to the lower court for a determination at trial as to what that rate was, among other things.

In the shorter companion case, *Nick's Garage, Inc. v. Nationwide*, the court looked at the impact of line item concessions and labor hour padding on the prevailing competitive labor rate. The court noted that Nick's Garage "*presented evidence that Insurer and other insurance companies had a practice of masking the true effective labor rate it paid to repair shops by offering repair shops 'labor rate concessions' when it had difficulty reaching agreed prices with the repair shops. These concessions - either in the form of lump sum payments or allotting additional labor hours for repairs - had the disguised effect of paying repair shops more money for labor, while maintaining the appearance (in estimates summaries and subrogation data) of paying the lower labor rate it included in its estimates*" provided to the repair shop. The court found this created an issue for trial as to whether Nationwide purported to pay "*market labor rates in accordance with its policy obligations while systematically offering lower-than-market rates.*"

On the issue of non-OEM parts, the Court in the *Nick's v. Progressive* case found that even though the insurance policy language explicitly permitted the use of non-OEM parts, that did not mean the insurer could automatically pay only for non-OEM parts in every repair. The court noted that under New York regulations, no matter what the policy said, non-OEM parts can only be used if they "equal or exceed the comparable OEM crash part in terms of fit, form, finish, quality and performance." The court pointed to evidence put in by the repair shop and its industry expert that gave specific examples of how non-OEM parts often do not meet the New York standard, such as because of fit issues, differences in the strength of the material used to create the non-OEM parts, differences in fasteners, and so on. Again, the court remanded for a determination at trial as to whether the non-OEM part would have satisfied that requirement for each individual auto repair at issue.

The court also rejected a defense raised by the insurer that there was no claim for breach of the insurance contract, since the insurer negotiated in good faith. The court noted that New York regulations required the insurer to negotiate in good faith, and, separately, the policies and regulations required the insurers to pay the amount necessary to repair the vehicle to pre-loss condition or replace it. The court essentially said that those two obligations were independent of each other so that it was possible an insurer negotiated in good faith but still did not pay the amount required under the policy. Therefore, the court found the insurer could not prove it satisfied its contractual obligation simply by showing it had negotiated in good faith.

Finally, the court found that Nick's claims were not barred by the existence of New York Insurance Law 2601, which gives the New York attorney general (but not private parties) the right to sue insurers for unfair claims settlement practices.

Nick's Garage, Inc. is represented by Cecelia R.S. Cannon of Bousquet Holstein, PLLC in Syracuse, NY. The cases are *Nick's Garage, Inc. v. Progressive Casualty Insurance Company et al.*, Second Circuit Docket No. 15-1426-cv, and *Nick's Garage, Inc. v. Nationwide Mutual Insurance Company*, Second Circuit Docket No. 15-1445-cv. The *Progressive* decision is available [here](#). The *Nationwide* decision is available [here](#).