



# Legal ALERT!

## INSURANCE COVERAGE & REGULATION

Anthony J. Piazza  
585.295.4420  
apiazza@hblaw.com

Gary H. Abelson  
David B. Cabaniss  
John R. Casey  
William C. Foster  
Alexandra Maloney  
Dennis R. McCoy  
Thomas J. O'Connor  
Judith M. Sayles  
Mark T. Whitford  
Joseph A. Wilson

## Court Permits Claim to Proceed Against Homeowners' Insurer for Violation of General Business Law Section 349

On January 12, 2010, the Appellate Division, Second Department, ruled that, under certain circumstances, insureds could proceed with an action against their homeowners' insurer seeking to recover for an alleged violation of the New York General Business Law §349, as well as punitive damages and attorneys' fees. *Wilner vs. Allstate Insurance Company*, \_\_\_\_\_ A.D. 2d \_\_\_\_\_.

The plaintiffs brought suit to recover under an Allstate Deluxe Plus Homeowners' Policy insuring their real property which was damaged as a result of an October, 2005 rainstorm causing the collapse of a hillside on the plaintiffs' property, destroying a retaining wall, felling several trees, and other damage. Plaintiffs alleged three causes of action, including that defendant breached the insurance contract by refusing to pay for the damage, refused to provide a defense to the plaintiffs in a criminal proceeding instituted by the Village of Roslyn for damage to Village property resulting from the collapse, and a claim that the defendant violated General Business Law § 349, on the grounds that the insurance policy required them to protect the insurance company's subrogation rights by instituting an action at plaintiffs' expense against the Village prior to the expiration of the statute of limitations when the defendant had not made a decision on their claim.

Section 349 of the General Business Law provides that deceptive acts or practices in the conduct of any business or service in New York are unlawful. The statute allows any person who has been injured by an alleged violation of the statute to bring an action to recover actual damages or \$50, whichever is greater, and gives the Court discretion, if the Court finds the defendant willfully or knowingly violated the section, to award reasonable attorneys' fees to the plaintiff.

After commencement of suit, the company moved to dismiss the second and third causes of action, including the demand for punitive damages and attorneys' fees arguing that the alleged violation of Section 349 did not involve consumer-oriented conduct, and that nothing the defendant did was deceptive or misleading. Furthermore, the insurer asserted that the subrogation condition referred to by the plaintiffs could not reasonably be construed to require an insured to file a lawsuit against anyone prior to payment of the claim.

The Deluxe Plus Homeowners' Policy at issue contained the following pertinent provision:

When we pay for any loss, an insured person's right to recover from anyone else becomes ours up to the amount we have paid. An insured person must protect these rights and help us enforce them.

Plaintiffs opposed the defendant's motion to dismiss, and sought discovery of other claims files relating to the October storm filed under the Deluxe Plus Homeowners'

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Policy. Supreme Court granted defendant's motion to dismiss the second cause of action, but denied the motion to dismiss the third cause of action alleging a violation of General Business Law §349, as well as the claim for punitive damages and attorneys' fees. The Court also granted the plaintiffs' motion to compel discovery. Defendant appealed.

The Appellate Court noted that General Business Law §349 has been applied to insurance matters, including allegations of intentional misrepresentation concerning coverage, and allegations that an insurer makes a practice of delaying and then denying a claim without reference to its liability. In response to the defendant's assertion that the alleged misconduct was not consumer-oriented, but involved a private dispute, the Court noted that in the third cause of action, the plaintiffs alleged "that the insurance policy, which requires that they protect the defendant's subrogation interest while their claim is being investigated, compelled them to institute a suit against the Village before the statute of limitations expired. This provision, according to the plaintiffs, 'in effect forces Plaintiffs to litigate a claim on Allstate's behalf if Allstate's investigation of the claim exceeds the statute of limitations.'" The plaintiffs further alleged that the provision was contained in every Allstate Deluxe Plus Homeowners' policy, and the Appellate Court concluded:

[T]he conduct complained of has a 'broad impact on consumers at large' and is thus consumer-oriented<sup>\*\*\*</sup>. In essence, the plaintiffs are alleging that the defendant purposely failed to reach a decision on the merits of their insurance claim in order to force the plaintiffs to bring a suit against the Village before the statute of limitations expired because, if they did not do so, the defendant could refuse reimbursement of the claim on the ground that the plaintiffs had failed to protect the defendant's subrogation rights<sup>\*\*\*</sup>. Accepting the plaintiffs' allegations as true<sup>\*\*\*</sup>, the plaintiffs have successfully pleaded conduct on the part of the defendant which was misleading in a material way.

The Court further found that the language of the subrogation provision in the policy was ambiguous in that it did not explain how the insured was to "protect [the defendant's] rights and help<sup>\*\*\*</sup> enforce them. <sup>\*\*\*</sup>Under the circumstances of this case, the reasonableness of the plaintiffs' belief as to their responsibilities under the contract of insurance is a question of fact, and should be determined by the fact finder<sup>\*\*\*</sup>."

The Court found that under the General Business Law § 349, the plaintiff could recover actual damages in any amount and treble damages up to \$1,000. "Moreover, the plaintiffs may seek both treble damages and punitive damages (see *Volt Sys. Dev. Corp. v. Ratheon Co.*, 155 A.D.2d 309, 309; *Bianchi v Hood*, 128 A.D.2d 1007.)" The Court noted that the plaintiffs were not seeking punitive damages on the breach of contract claim against the insurer, but only on the General Business Law § 349 claim. With respect to the plaintiffs' claim for attorneys' fees, the Court held that "[s]ince General Business Law § 349(h) provides that the court has the discretion to award reasonable attorneys' fees, the plaintiffs' request for attorneys' fees should not be dismissed."

This case is an unique new interpretation of the standard subrogation provision of this homeowners' policy demonstrating the Court's liberal construction of claims under General Business Law § 349. It is significant in that it may allow more insureds to sue for punitive damages in connection with the alleged violation of the General Business Law, and to obtain broad based discovery regarding the same. Based on this decision, we anticipate more first party claims asserting punitive damages in connection with alleged violations of General Business Law §349. ■

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