Docket as: Response

David Harner
9 Mt. Laurel Lane
Danbury, CT 06811 (203) 470-3462

Honorable Cathy Seibel
The Hon. Charles L. Brieant, Jr.
Federal Building and United States Courthouse
300 Quarropas St.
White Plains, NY 10601-4150

June 22,2011 RE: Harner v. Allstate Insurance Company, et al, No. 11CV-02933-CS

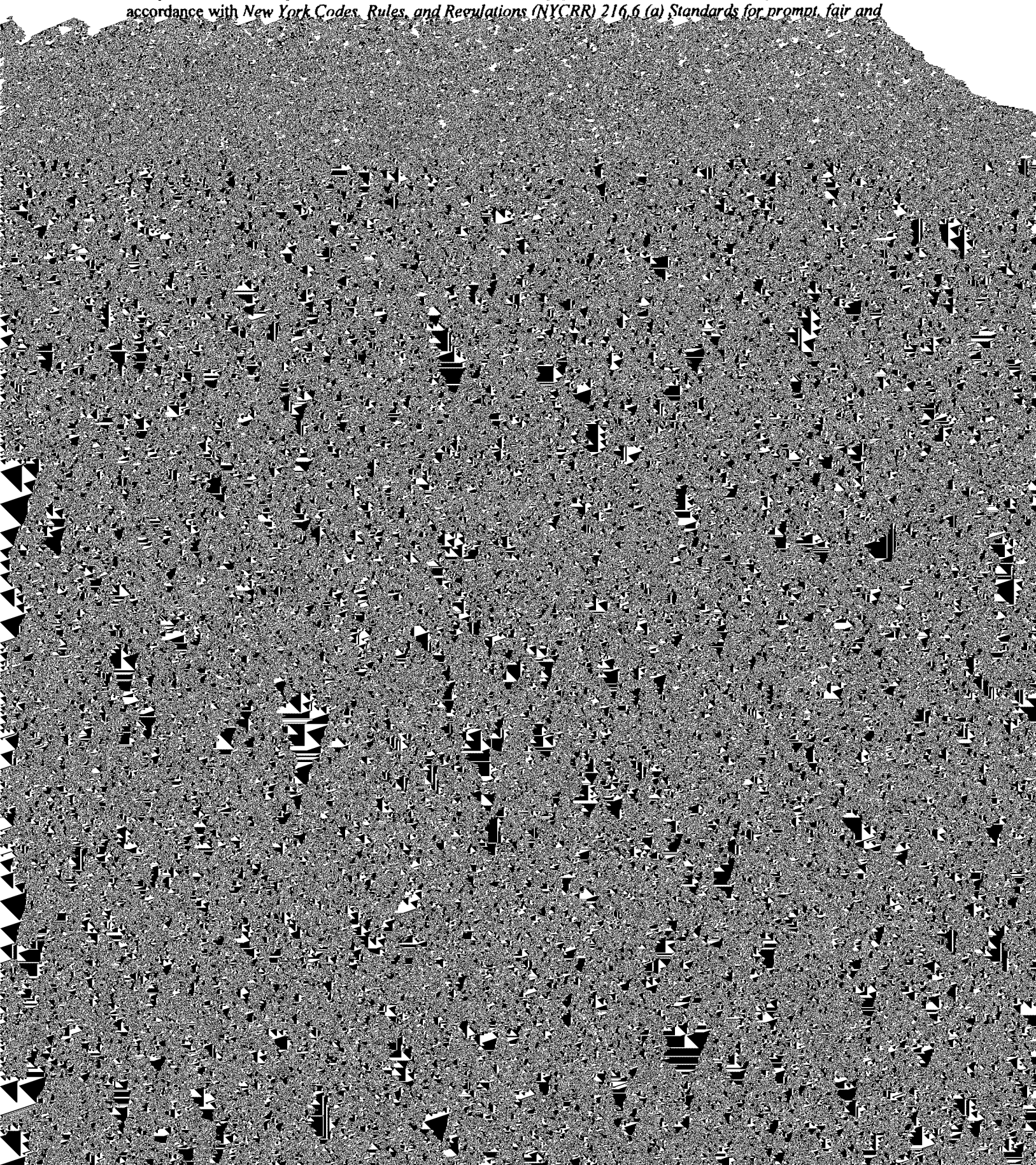
Dear Judge Seibel,

The plaintiff begs the courts forgiveness, as he cannot possibly address the defendants' six pages of responses in three pages. Regarding the deficiencies in the complaint, the plaintiff originally filed this action in New York State Supreme Court, where, in the past, the plaintiff was instructed not to include evidence within his complaint. In addition, the plaintiff would ask the Court to take into consideration that he had ten days to form this' response, versus the ten weeks allowed to the defendants to answer his complaint. The plaintiff states that the defendants have failed to deny any allegations in the plaintiff's complaint.

plaintiff shall prove conclusively the value of his services in accordance with *Civil Practice Law and Rules (CPLR) Rule 4533-a, Prima facie proof of damages,* (which states in relevant part):

> "An itemized bill or invoice, receipted or marked paid, for services or repairs of an amount not in excess f two thousand dollars is admissible in evidence and is prima facie evidence of the reasonable value and necessity of such services or repairs itemized therein in any civil action….." ;

The plaintiff shall also prove the failure of the defendants to pay the reasonable value of the plaintiff's services in accordance with *New York Codes, Rules, and Regulations (NYCRR) 216.6 (a) Standards for prompt, fair and*



claimant in New York by a person not having a New York Independent Adjusters license, (as in the case of the

"Non-Insurer" defendants) this would be without effect, as those persons have no license, right, justification, or authority to perform such counsel.

Regarding Mr. Dunham's fourth and fifth paragraphs: Mr. Dunham takes the plaintiff's allegation's in his complaint out of context. In complaint ¶ 199, the plaintiff clearly states: "The **PLAINTIFF** has no contract, agreement, arrangement, or accord, with any insurer, the defendant **PGW,** the defendant **LYNX,** the defendant **BELRON,** or the defendant **SAFELITE, regarding billing or charges** ....." (emphasis added)

In his complaint ¶ 205, plaintiff alleges the contracts that have been breached. In his amended complaint, plaintiff shall clarify that the plaintiff had verbal contracts with the defendant insurers regarding his customers' insurance coverages that would pay for his services, and those commitments made by those insurers to pay such claims, and / or their failure to inform the plaintiff of any limitations of coverages. The plaintiff shall supply witness statements and recordings of telephone communications with the defendants to support his allegations.

Plaintiff's claim for breach of contract may also be explained by one of three ways.

One: In accordance with *NYCRR 216.7 (2), Standards for prompt, fair and equitable settlement of motor vehicle physical damage claims*, which states in pertinent part:

> (2) Such designated representative may legally act on the insured's behalf.

The plaintiff, as assignee, is acting on behalf of the insured to collect policy proceeds due under their contract with the insurer for repairs performed by the plaintiff, and where the insured has assigned to the plaintiff the right to collect for said repairs. Indeed, New York case law supports this fact, see: "(*James McKinney & Son v Lake Placid 1980 Olympic Games*, 61 NY2d 836, 838 [1984]) stating: "Only where there is a properly executed assignment does an assignee become the "real party in interest" and acquire standing to enforce the rights of an assignor.", and (*Leon v Martinez*, 84 NY2d 83, 88 [1994], citing 4 Corbin, Contracts § 879, at 528 [1951]), stating: "[T]o effect an assignment . . . there [must] be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right in the things [or rights] assigned"

Two: The plaintiff is acting in accordance with *New York Uniform Commercial Code (UCC) Section 2 – 210. (4), Delegation of performance; Assignment of rights*, that states in pertinent part:

> (4) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties."

Three: The plaintiff states that he has fulfilled the requirements of New York law *Sec. § 3013. Particularity of statements generally*. Which states:

"Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

Whereas sufficiently particular notice has been given to the defendants that would allow them to understand the reason for this cause of action. If the title of this cause of action is misstated, the plaintiff will rename it as "FAILURE TO PAY COVERED INSURANCE CLAIMS FOR REPAIRS PERFORMED AND COMPLETED BY THE PLAINTIFF AS ASSIGNEE" or "ILLEGAL EVASION OF INSURANCE CLAIMS" or similar.

The defendants have failed to raise any issues regarding the plaintiff's demands for payment for work performed after receiving pertinent communications boldly stating "**NOTICE OF CLAIM**" via Certified Mail, Return Receipt Requested, asking the insurer "If for any reason, you believe that this claim is not your responsibility, please contact me in writing with those reasons at the address above." Included with each '**NOTICE OF CLAIM**" were copies of each insured's Work Order, Invoice, and Assignment of Policy Proceeds. The plaintiff shall enter into evidence dozens of these "**NOTICE OF CLAIM**" letters, relevant to all insurer defendants. The defendant insurers had a "duty and obligation" to respond to these communications in accordance with *New York law Sec. 2601. (2) Unfair claim settlement practices, penalties,* which states in pertinent part:

Any of the following acts by an insurer, if committed without just cause and performed with such frequency as to indicate a general business practice, shall constitute unfair claim settlement practices:

(2) failing to acknowledge with reasonable promptness pertinent communications as to claims arising under its policies;

and: *NYCRR 216.4 (b) Failure to acknowledge pertinent communications*, which states in pertinent part:

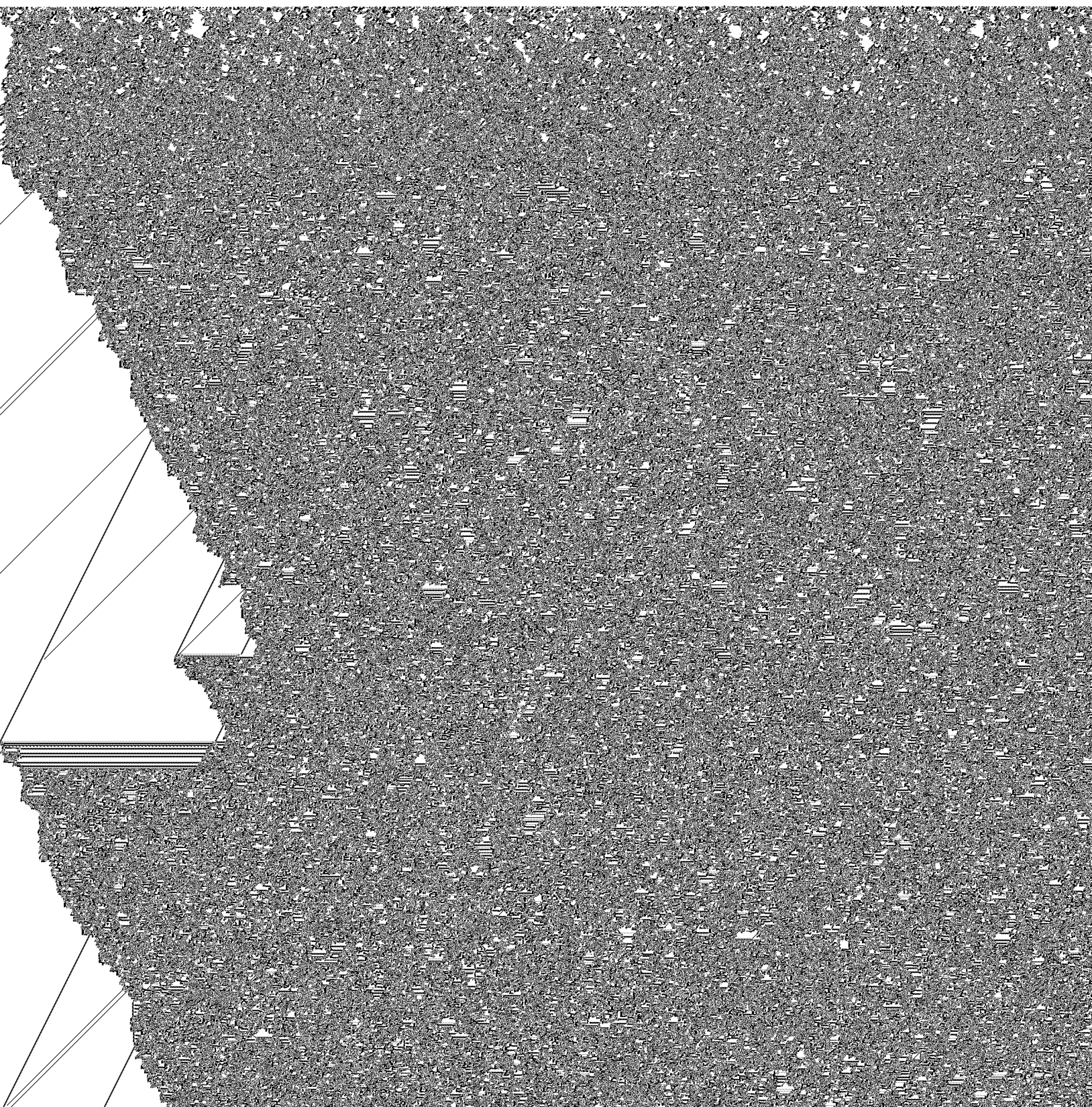
(b) An appropriate reply shall be made within 15 business days on all other pertinent communications.

The insurer defendants have, as a regular course of business, continuously failed to respond to said communications or deny responsibility for payment of these claims, and therefore have forfeited their right to do so in accordance with the common law doctrine of estoppel by silence, have failed to offer any opposing evidence showing overcharges on the plaintiff's part, and justly, the plaintiff will be moving for Summary Judgment concerning this first cause of action.

The plaintiff states that there is the implied contract of "good faith" associated with the business transaction between the plaintiff, the insured, and the persons responsible for paying for repairs covered by insurance. The plaintiff clearly states in ¶205 of his complaint that the insured persons the plaintiff is representing have contracts with the

are performed consciously, regularly, and harm the plaintiff.

Regarding Mr. Dunham's seventh paragraph: *Rocanova v. Equitable Life Assurance Soc'y, 83 N.Y. 2d 603, 614, 634 N.E. 2d 940, 944, 612 N.Y. S. 2d 339, 343 (1994)* is in direct conflict with a more recent decision *Acquista v. New York Life Ins. Co., (285 AD2d 73, 78 [1st Dept. 2001])* where the Appellate Division majority hardly concealed its disagreement with *Rocanova* when stating: "Therefore, in order to ensure the availability of an appropriate and sufficient remedy, we adopt the reasoning of the Beck court that there is no reason to limit damages recoverable for breach of a duty to investigate, bargain, and settle claims in good faith to the amount specified in the insurance policy. Nothing inherent in the contract law approach mandates this narrow definition of recoverable damages. Although the policy limits define the amount for which the insurer may be held responsible in performing the contract, they do not define the amount for which it may be liable upon a breach." *(Beck v. Farmers Ins. Exch., 701 P.2d 795, 801, supra.)*



maintained, by these contracts. Insurer defendants have instructed the plaintiff that they will not pay the plaintiff if he refuses to transact business with a third party administrator hired by them. The plaintiff shall address any

Regarding Ms. Schaeffer's eighth paragraph: In the plaintiff's complaint, he complains about the refusal of the defendants to allow the free market to supply the consumer with lower costs through his extraordinarily high windshield repair to replacement ratio. This ratio provides significantly lower costs for damaged windshield restoration. Ms. Schaeffer has failed, or refused, to grasp the essence of this complaint, as it clearly states *ad infinitum*, that the plaintiff is bringing lower costs to the consumer through his business practices, and that the defendants are doing everything in their power to prevent the plaintiff from bringing these lower costs to the consumer.

Regarding Ms. Schaeffer's ninth paragraph: See plaintiff's response to Mr. Dunham's twelfth paragraph above.

The questions needing a decisive answer in this action are:

1. How are the "reasonable" repair shop charges defined ?

2. Are services (labor) defined as a commodity within the definition of "reasonable" repair shop charges ?

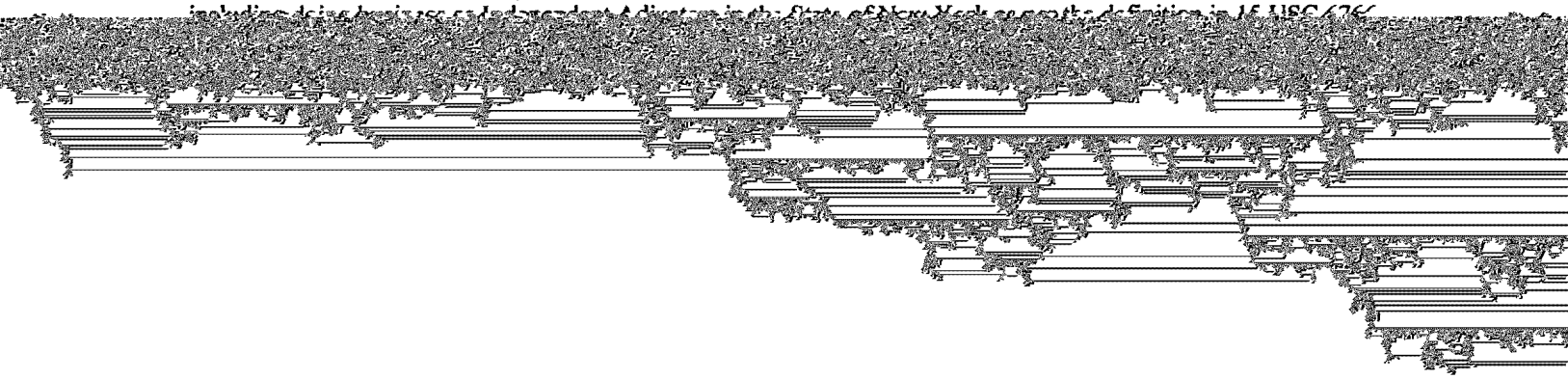
3. Are insurers allowed, as a regular course of business, to ignore an assignee's claims without fear of retribution from the assignee ?

4. Are insurers allowed to require claimants to "do business" with a third party entity under the threat of refusing to pay for the claim if the claimant refuses to do so ?

5. Are/ third party administrator employees that are not licensed as Independent Adjusters in the State of New York allowed to give counsel to insurance claimants in the State of New York that would tend to steer those customers away from the plaintiff, without fear of retribution ?

6. Are insurers "doing business" as an auto glass business if they grant exclusive claim management and adjusting authority to an auto glass company ?

7. Are auto glass companies in the insurance business if they are performing services related to insurance



CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2011, copies of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS REQUEST FOR PRELIMINARY HEARING** was served by first class mail to counsel of record for the parties below.

TO: Benito Delfin, JR, for Allstate Insurance Company
SNR Denton US LLP
1221 Avenue of the Americas
New York, NY 10020

TO: Brian P. Henry, for Hanover Ins. Co.
Robinson & Cole, LLP
280 Trumbull St.
Hartford, CT 06103-3597

TO: Marshal P. Potashner, for Liberty Mutual Fire Ins. Co.
and Peerless Insurance Co.
Jaffe & Asher, LLP
600 Third Ave., 9th Floor
New York, NY 10016

TO: Matthew J. Gaul, for Metropolitan Group Ins.
Steptoe & Johnson, LLP
750 Seventh Ave.
New York, NY 10019

TO: Michael R. Nelson, for Progressive Northwestern
Nelson, Levine, Deluca & Horst, LLC
One Battery Park Plaza, 32nd Floor
New York, NY 10004

TO: Stephen M. Lazare, for Travelers Home & Marine Ins.
Lazare, Potter & Giacovas, LLP
950 Third Ave., 15th Floor
New York, NY 10022

TO: Fiona A. Schaeffer, for Belron US Inc.
and Safelite Group, Inc.
Jones Day
222 East 41st Street
New York, NY 10017-6702

TO: Michael P. Versichelli, for GEICO General Ins. Co.
and USAA Casualty Ins. Co.
Rivkin Radler, LLP
926 RXR Plaza
Uniondale, NY 11556-0926

TO: David W. Kenna, for Hartford Ins. Co. of Illinois
The Hartford Financial Services Group
One Hartford Plaza
Hartford, CT 06155

TO: Andrea Schillaci-Altreuter, for Merchants Preferred Ins.
and Unitrin Auto & Home Ins.
Hurwitz & Fine, PC
1300 Liberty Building
Buffalo, NY 14202

TO: William P. Harrington, for Nationwide Ins. Co. of America
Bleakley, Platt & Schmidt, LLP
One N. Lexington Ave., PO Box 5056
White Plains, NY 10602-5056

TO: Douglas W. Dunham, for State Farm Mutual
Skadden, Arps, Slate, Meagher & Flom, LLP
Four Times Square
New York, NY 10036-6522

TO: John Morio, for Pittsburgh Glass Works, LLC
and Lynx Services, LLC
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
150 E. 42nd St.
New York, NY 10017

_____ _____

David W. Harner
9 Mountain Laurel Lane
Danbury, Connecticut 06811
(203) 470-3462

Date