# Connecticut Law Tribune

Week of June 17, 2013
Vol. 39, No. 24 • $10.00

An ALM Publication


# BODY BLOW

## JUDGE ADDS $20 MILLION IN PUNITIVES TO AUTO REPAIR LAWSUIT

By THOMAS B. SCHEFFEY

In what is believed to be the largest unfair trade practices award of its kind ever issued in Connecticut, a Stamford complex litigation judge has awarded $20 million in punitive damages to a class of auto body repair shops.

The decision opens the way for an appeal to the state Supreme Court, which may set the stage for a re-examination of the consumer law's controversial "cigarette rule." That rule holds that a blend of immoral or socially objectionable acts, even if technically legal, can be unfair trade practices.

In early June, Stamford Superior Court Judge Alfred J. Jennings Jr. added $20 million to the $14.7 million award a jury awarded in November 2009, when it found the Hartford Fire Insurance Company engaged in a scheme to unfairly decrease the rates it paid for auto body repairs.

The Hartford used a group of pre-approved "direct repair providers" who agreed to accept lower rates for a high volume of work, said plaintiffs' lawyer David Slossberg, of Milford's Hurwitz, Sagarin Slossberg & Knuff. The Hartford, in turn, would not pay any body shop higher rates than those paid to the direct repair providers. That put pressure on independent auto repair appraisers to write lower than market value estimates, or not get work, Slossberg said.

**David A. Slossberg, left, represents auto body shop owners who recently won a $20 million punitive damages award. He is joined by plaintiff Anthony Ferraiolo and associate Nicole Najam, of Milford's Hurwitz, Sagarin, Slossburg & Knuff.**

The original complaint alleged that The Hartford was "steering" the business of auto insurance policyholders to the select group of approved repair shops. A second count alleged that this practice was designed to force down the hourly labor rate for auto body work in Connecticut. After a 17-day trial

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in 2009, the jury awarded nearly $15 million on the labor rates claim, but cleared the insurance company on the steering claim.

The jury's verdict was expressed through a series of answers to specific questions. Jurors specifically found that the insurer's pressure on hourly rates offended public policy because it interfered with the ethical duties of auto damage appraisers. A Code of Ethics promulgated by the Connecticut Insurance Department requires appraisers to render impartial appraisals.

Jennings, in a 20-page opinion, wrote that the jury found "the neutrality and independence of licensed vehicle damage appraisers has been seriously compromised, thereby diluting public confidence in their role and the respect they should be afforded as state licensees."

The Hartford was represented at trial by Thomas D. Rohback, of Axinn Veltrop, who referred questions about the case to a corporate spokesman, Thomas Hambrick, who said: "We are disappointed in the ruling and plan to appeal."

New Haven-based Wiggin and Dana is expected to handle the appeal.

**Attorney Thomas D. Rohback, who represented The Hartford at trial, had asked that the initial $15 million verdict in favor of the auto body shop owners be set aside completely and that no punitive damages be awarded.**

### Large Class Size

The class action originally involved 1,000 Connecticut body shops, but the number of plaintiffs has grown to an estimated 1,500 shops. The very size of the class is an aggravating factor in determining punitive damages, Jennings wrote. It shows, he stated, "the breadth and extent to the damage cause by defendant's misconduct."

The Connecticut Unfair Trade Practices Act provides remedies for economic practices that are immoral or harmful to the public, even if they violate no specific law. The Connecticut statute is modeled on the Federal Unfair Trade Practices Act, and violations of both acts have been interpreted through a three-prong test known as the "cigarette rule," which grew out of cases challenging television ads for tobacco products.

To be an unfair trade practice under the cigarette rule, a plaintiff must prove a defendant's conduct "offends public policy as it has been established by statutes, the common law or other established concept of unfairness," or secondly, that it is "immoral, unethical, oppressive or unscrupulous." The rule's third prong defines an unfair trade practice as actions that cause "substantial injury to consumers, competitors, or other business persons" without a countervailing public benefit.

In the past 40 years, the interpretations of the cigarette rule have diverged. On the federal level, in the early 1980s, the Federal Trade Commission revised its view of the cigarette rule, and focused squarely on the third prong of the rule, the part that requires parties to prove substantial injury to consumers, competitors or business.

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Meanwhile, the Connecticut Supreme Court has repeatedly said it would like to clear up the question of whether Connecticut should still follow all three "prongs" of the cigarette rule, or just use the one now focused on by the FTC.

Jennings specifically cited the rule, and noted in his opinion that no specific statute needs to be violated to amount to a CUTPA violation. He wrote that it can be a blend of various measures of unfairness, or a "penumbra" of unfair acts. He quoted from the jury charge that "a plaintiff need not show a literal violation of a statute or regulation or other established concept of unfairness," so long as a blend of unfair practices are shown. Defendants have long protested that this gives them no clear picture of what will be against the law.

### No Windfalls

In the current decision, it fell to Jennings to set the punitive damages after the jury's finding of actual damages. He took into account the "large net worth of The Harford," which was approximately $12 billion to $13 billion, in order to fashion an award that has meaningful "deterrent motivation." He noted that the purpose of punitive damages was neither to enrich nor to compensate the plaintiffs, and was not supposed to be a windfall.

The plaintiffs had requested punitives of $59 million, or four times the jury's award of $14,765,556. The actual award is a multiple of approximately 1.35 times the jury award.

Explaining the basis for punitive damages, Jennings cited some specific examples of controlling behavior. An email on April 17, 2000 from Louis J. Chasse of The Hartford's claims department was sent to the insurer's appraisers. It said the "Prevailing Rate" for auto body repair and painting had been $38 an hour for the previous five to seven years. At the end of 1999, "we began experiencing a movement by body shops to raise labor rates to $42 and higher." He wrote that "we have been able to mitigate this increase" by authorizing appraisers to write into their appraisals "concession in order to obtain an agreed price" to lower the labor rate. Such concessions, he added, have become necessary "on the majority of appraisals written."

Jennings wrote that The Hartford's statements show "a heavy dose of control." He also noted a pattern of secrecy which, in his eyes, indicated a "knowing and purposeful disregard" of the appraisers' Code of Ethics. Appraisers were instructed not to put anything in writing about labor rates, Jennings wrote.

Next, Jennings had to decide the appropriate level of punitive damages. The language of CUTPA simply authorizes a court to award punitive damages "in its discretion." One guidepost is the 2003 U.S. Supreme Court case of *State Farm v. Campbell*, which struck down a $145 million punitive award in Iowa when the compensatory damages awarded by the jury were $1 million.

Reading tea leaves, some scholars have construed the high court as suggesting that a tenfold multiple might be a reasonable outer limit of fair punitives. No such formula has been established, however.

Jennings noted that the harm caused by The Hartford "was purely economic." None of the body shop plaintiffs were physically harmed. The court did find, Jennings wrote, that The Hartford engaged in "a reckless disregard of the rights of the appraisers under their Code of Ethics," but not any reckless disregard of the health or safety of anyone.

As such, the Hartford's misconduct was "a mixed bag," he wrote.

David L. Belt, a partner of Slossberg's, is a co-author of Connecticut's top treatise on CUTPA law. So is Robert Langer, a former assistant attorney general who is now a partner at Wiggin and Dana. Langer is participating in the defense appeal with Jonathan M. Freiman, who heads the firm's appellate department. Neither Langer nor Freiman would comment on the case. ■