

HIGH COURT FINDS CONSEQUENTIAL DAMAGES AVAILABLE TO POLICYHOLDERS IN BAD FAITH CLAIMS AGAINST CARRIERS



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It's always enjoyable, and rare, to be able to write about good judicial decisions affecting the industry. Two decisions by New York's highest court present such an opportunity. They promise to change, for the better, the face of insurance coverage litigation in New York.

In *Bi-Economy Market, Inc. v. Harleysville Insurance Co.*, and *Panasia Estates, Inc. v. Hudson Insurance*, the New York Court of Appeals held that policyholders seeking recovery for their insurers' bad faith breach could assert claims for "consequential damages" against the carrier. This is an extraordinary break from past legal precedent.

"Consequential damages" are losses, other than, and in addition to, the benefits provided by a contract (such as an insurance policy) which are suffered by one party to a contract as a result of the other party's breach. In the insurance context, consequential damages are those losses other than insurance benefits that are suffered by policyholders arising from, for example, their insurers' failure to promptly investigate and/or pay claims.

Generally, under New York law, consequential damages have historically been available for a breach of a contract if, and only if, there is evidence that the parties signing the contract "reasonably contemplated," or, if they had thought about it, "would have contemplated," that the breaching party would be responsible for same.

However, previously, courts had held that consequential damages were not available to policyholders in New York State unless their insurance policies contained a specific provision indicating that the parties contemplated that the insurers exposure would pay such damages. Few, if any, policies contain such a provision.

In the *Bi-Economy Market* and *Panasia Estates* cases, the court determined that consequential damages would be available to policyholders even in the absence of a specific policy provision permitting their recovery.

In the *Bi-Economy Market* case, a family-owned market suffered a fire which destroyed its inventory and damaged both its building and equipment. The market's owner had purchased a property damage and business interruption insurance policy, which covered both property damage and loss of business income (i. e., business "interruption" coverage). The owners alleged that it took their insurer, Harleysville Insurance Co., over a year to pay their full property damage claim, and that Harleysville never agreed during that time to pay their full claim for lost business income. By reason of the insurer's delay, the market was not able to reopen at all. The very purpose of the business interruption coverage was frustrated by the carrier.

In their subsequent suit against Harleysville for breach of contract and bad faith claims handling, the owners of the market claimed that Harleysville's breach of contract had caused their entire business to collapse, and they sought damages for that significant extended loss. They argued that the loss of their business was foreseeable and contemplated by the parties when the policy was issued, and should be recoverable as consequential damages, greatly expanding the carrier's exposure.

In deciding that the market's owners could seek consequential damages for the total loss of their business, the Court of Appeals found that, for consequential damages to be awarded, it "is not necessary for the breaching party to have foreseen the breach itself or the particular way the loss occurred, rather, "[i]t is only necessary that loss from a breach is foreseeable and probable." In order to decide if consequential damages were reasonably contemplated when the parties made their contact, courts should now look to, among other things, the "nature, purpose and particular circumstances of the contract known by the parties . . ."

In the case of the market, the very purpose of the policy itself - business interruption insurance - was to make certain that the market had the financial support needed to sustain its business operations in the aftermath of an insured catastrophe. Another fundamental purpose, the court correctly reasoned, was to receive insurance proceeds promptly, so that if such a disaster occurred, the business could maintain cash flow, avoid collapse, and resume operations as quickly as possible.

The Court of Appeals held that these purposes would, or should, have made Harleysville aware that, if it breached its policy with the market to investigate and pay covered claims promptly, it would have to pay damages to the market's owners for the loss of their business, or any other additional damages suffered as a result of Harleysville's delay and/or denial of claim payments.

The result was similar in the *Panasia Estates* case. There, the policyholder made a claim under its Builders Risk Insurance Policy for water infiltration experienced when the roof of its building was opened in order to perform construction work. The insurer, Hudson Insurance Company, allegedly took three months to investigate and then denied the claim. In suing Hudson for breach of contract and bad faith, Panasia also asserted claims for consequential damages, in addition to property damage. The Court of Appeals indicated that the court below should consider whether the consequential damage claimed by Panasia when the "foreseeable result" of Hudson's breach of its policy.

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In light of these well-reasoned holdings, New York policyholders harmed by an insurer's bad faith breach, by either wrongfully denying and/or delaying the payment of insurance proceeds, are more likely to be made whole.

As indicated, this is a major break with past legal precedent. Carriers, in the context of business interruption coverage litigation, will have a significantly greater, well deserved, exposure for unreasonable delay in either the payment of insurance proceeds or the wrongful handling and/or denial of claims. Henry L. Goldberg may be contacted by email, hgoldberg@goldbergaconnolly.com or by telephone, 516-764-2800.

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