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NY Court: Insured May Recover Consequential Damages Absent Insurer Bad Faith

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On December 15, 2009, New York's Appellate Division for the First Department held that an insured need not allege or prove that its insurer acted in bad faith in order to recover consequential damages stemming from the insurer's breach of the policy. *Panasia Estates, Inc. v. Hudson Insurance Company*, 2009 NY Slip. Op. 09284.

As previously reported in this blog (see, e.g., [here](#) and [here](#)), in the companion decisions of *Panasia Estates, Inc. v. Hudson Insurance Company* and *Bi-Economy v. Harleysville*, the New York Court of Appeals overturned longstanding precedent and held that an insured could, in limited circumstances, recover consequential damages as a result of the insurer's breach of the policy.

Subsequent cases applied *Panasia* and *Bi-Economy* to other policies, including for example to disability insurance in *Hoffman v. Unionmutual Stock Life Ins. Co.*, 857 N.Y.S.2d 680 (App. Div. 2d Dep't 1008), a first party claim under a homeowner's policy in *Chaffee v. Farmers New Century Ins.*, No. 5:04-CV-1493 (N.D.N.Y., Sept. 24, 2008), a third party liability coverage in *Silverman v. State Farm Fire & Cas. Co.*, 867 N.Y.S.2d 881 (N.Y. Sup. Ct. 2008), an environmental pollution liability policy in *Handy & Harman v. AIG*, 2008 WL 3999964 (N.Y. Sup. Ct. 2008), and to a no-fault insurance case in *Laura Savino v. The Hartford*, 2009 N.Y. Slip. Op. 30823 (Sup. Ct. Suffolk Co. Mar. 25, 2009). For a discussion of those cases, see [here](#), [here](#) and [here](#).

Despite the numerous decisions spawned by the Court of Appeals' decisions in *Panasia* and *Bi-Economy*, however, the issue of whether an insured must allege and prove that its insurer acted in bad faith in denying coverage in order to recover consequential damages remained unclear—until now. Following the Court of Appeals' decision in 2008, *Panasia* sought to amend its complaint to add a separate cause of action for consequential damages based on breach of contract. Although the trial court granted *Panasia's* motion, it stated that "[t]hese type of damages are to be called consequential damages and are triggered solely by a breach of contract in bad faith." Both parties appealed that ruling to the Appellate Division for the First Department, which reversed the order of the trial court and denied *Panasia's* motion for leave to amend its complaint, holding that "[p]laintiff is correct in arguing that the motion court erred by stating that consequential damages do not lie for breach of an insurance contract absent bad faith, since the determinative issue is whether such damages were 'within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting'.... However, the motion to

amend the complaint should not have been granted since the breach of contract claim that plaintiff sought to add was duplicative of its existing claim for breach of the implied covenant of good faith.... Furthermore, contrary to defendants' contention, plaintiff's claim for consequential damages in its cause of action for breach of the implied covenant of good faith was not insufficiently pled. The reference to such damages as 'special' in Bi-Economy...was not intended to establish a requirement of specificity in pleading."

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You can find the decision [here](#).

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RESOURCES

- Excess and Surplus Lines Manual
- Industry Webinars
- Insurance and Reinsurance Review
- AIDA Reinsurance and Insurance Arbitration Society, ARIAS-US
- AIDA Reinsurance and Insurance Arbitration Society, ARIAS-UK
- Association Internationale de Droit des Assurances
- Association of Bermuda Insurers and Reinsurers
- Association of British Insurers (ABI)
- Association of Insurance and Risk Managers (AIRMIC)
- Association of Professional Insurance Women
- Bermuda Captive Owners Association
- Bermuda Insurance Institute
- Bermuda International Business Association
- Bermuda Under 40s (Re)

- Insurance Group
- British Insurance Brokers' Association (BIBA)
 - Brokers and Reinsurance Markets Association
 - Chartered Insurance Institute (CII)
 - Comité Européen des Assurances (CEA)
 - Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS)
 - European Commission - Internal Market – Insurance
 - Excess/Surplus Lines Claims Association
 - Financial Services Authority (FSA)
 - HM Treasury
 - Insurance Institute of London (IIL)
 - International Association of Insurance Supervisors (IAIS)
 - International Underwriting Association of London (IUA)
 - LexisNexis Insurance Law Center
 - Lloyd's
 - Lloyd's Market Association (LMA)
 - London Market Insurance Brokers' Committee (LMBC)
 - Market Reform
 - National Association of Insurance Commissioners
 - National Conference of Insurance Legislators (NCOIL)
 - Reinsurance Association of America
 - U.S. Reinsurance Under 40s Group
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