

**NEW YORK HIGH COURT FINDS CONSEQUENTIAL DAMAGES  
AVAILABLE TO POLICYHOLDERS BRINGING FIRST-PARTY INSURANCE  
COVERAGE AND BAD FAITH CLAIMS**

Two new decisions of the New York Court of Appeals (New York's highest court) promise to change the face of insurance coverage litigation in New York. In Bi-Economy Market, Inc. v. Harleystown Insurance Co. of New York, slip op., No. 14 (N.Y. Feb. 19, 2008) and Panasia Estates, Inc. v. Hudson Insurance Co., slip op., No. 15 (N.Y. Feb. 19, 2008), the Court of Appeals held that two policyholders who sought recovery for their insurers' bad faith breach of their insurance policies could assert claims for "consequential damages."

"Consequential damages" are losses, other than the benefits provided by a contract, which are suffered by one party to the 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 their insurers' failure promptly to investigate and pay claims. The Bi-Economy Market and Panasia Estates cases were certified to the Court of Appeals by the Appellate Division, in order to address whether such consequential damages were available.

Under New York law, consequential damages are available for a breach of a contract if there is evidence to show 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 such damages. See e.g., Kenford Co. v. County of Erie, 540 N.Y.S.2d 1 (N.Y. 1989). Previously, courts had held that consequential damages were not available to policyholders unless their insurance policies contained a provision indicating that the parties contemplated that the insurer would pay such damages. See, e.g., Sweazey v. Merchants Mut. Ins. Co., 571 N.Y.S.2d 131 (N.Y. App. Div., 3d Dep't 1991). Few, if any policies, contain such a provision.

In the Bi-Economy Market and Panasia Estates cases, the Court determined that consequential damages are available even in the absence of a policy provision permitting their recovery.

In the Bi-Economy Market case, a family-owned meat market suffered a fire which destroyed its food inventory and damaged both its building and its equipment. The market's owners had purchased a property and business interruption insurance policy, which covered both property damage and loss of business income. The owners alleged that it took their insurer, Harleystown, over a year to pay their full claim for property damage and Harleystown never agreed during that time to pay their full claim for lost business income. By reason of the insurer's delay, the meat market was not able to reopen.

In their suit against Harleystown for breach of contract and bad faith claims handling, the owners of the market claimed that Harleystown's breach of contract had caused their business to collapse, and they sought damages for that loss. They argued that the loss of their business was foreseeable and contemplated by the parties when the policy was sold, and should be recoverable as consequential damages.

In deciding that the market's owners could seek consequential damages for the 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." Slip op. at 5 (quotation omitted). In order to decide if consequential damages were reasonably contemplated when the parties made their contract, courts should look to, among other things, the "nature, purpose and particular circumstances of the contract known by the parties . . ." Id. (quotation omitted).

In the case of the market, the purpose of the contract at issue--a business interruption insurance policy--was to ensure that the market had the financial support needed to sustain its business operations in the aftermath of an insured catastrophe. Another purpose was to receive insurance proceeds promptly so that if such a disaster occurred, the business could avoid collapse and resume operations as soon 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 or denial of claim payments.

The result was similar in the Panasia Estates case, with the Court of Appeals deciding that the policyholder there may be able to assert a claim for consequential damages. In Panasia Estates, 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 deny the claim. In suing Hudson for breach of contract and bad faith, Panasia asserted claims for consequential damages, as well as insurance benefits. The Court of Appeals sent the case back to the trial court, for the trial court to consider whether the consequential damages claimed by Panasia were a foreseeable result of Hudson's breach of its policy.

In light of these two new court decisions, New York policyholders harmed by their insurers' bad faith breach of contract are more likely to be "made whole" by New York courts.