

Damages Beyond The Policy Limits

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The New York Court of Appeals recently rendered two important insurance coverage decisions in *Bi-Economy Market, Inc. v. Harleysville Insurance Co. of New York*, No. 14, slip op. (N.Y. Feb. 19, 2008) (“*Bi-Economy*”) and *Panasia Estates, Inc. v. Hudson Insurance Co.*, No. 15, slip op. (N.Y. Feb. 19, 2008) (“*Panasia*”) that are certain to have a dramatic effect on the relationship between New York policyholders and their insurers.

Prior to the recent pronouncement by the Court of Appeals in *Bi-Economy* and *Panasia*, New York law was somewhat unsettled regarding whether a policyholder was entitled to recover damages in excess of the stated limits of the policy. But, for the first time, in *Bi-Economy* and *Panasia*, the New York Court of Appeals recognized the viability of policyholders’ claims for consequential dam-

ages in excess of the stated limits of the insurance policy. And while New York has historically been viewed by some as a less progressive jurisdiction for policyholders, several New York decisions, including, the Appellate Division, First Department’s, decision in *Acquista v. New York Life Insurance Co.*, 730 N.Y.S.2d 272 (App. Div. 1st Dep’t 2001), and *Eurospark Industries, Inc. v. Massachusetts Bay Insurance Co. (In re Eurospark Industries, Inc.)* 288 B.R. 177 (Bankr. E.D.N.Y. 2003), set the stage for the Court of Appeals’ decisions in *Bi-Economy* and *Panasia*. Taken together, *Acquista*, *Eurospark*, *Bi-Economy*, and *Panasia* offer important lessons on how policyholders should plead their cases against recalcitrant insurance companies and should go a long way toward changing the manner in which insurance companies respond to their policyholders in New York.

SETTING THE STAGE FOR CONSEQUENTIAL DAMAGES

Prior to 2001, New York courts generally limited punitive damages in insurance coverage disputes to policy limits unless the policyholder could “not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pat-

tern of similar conduct directed at the public generally.” *Rocanova v. Equitable Life Assurance Soc’y of U.S.*, 612 N.Y.S.2d 339, 342-43 (1994). But in *Acquista*, the First Department held that a policyholder could recover consequential damages beyond the limits of its policy for damages that result from a breach of the duty to investigate, bargain for, and settle claims in good faith. See *Acquista*, 730 N.Y.S.2d at 278.

Federal courts initially criticized the First Department, and called into question the progress initially signaled by *Acquista*. For example, in *Brown v. Paul Revere Life Insurance Co.*, the U.S. District Court for the Southern District of New York noted that *Acquista* was contrary to the New York Court of Appeals’ opinions in *Rocanova* and *New York University*. No. 00CIV. 9110(KMW)(HBP), 2001 WL 1230528 (S.D.N.Y. Oct. 16, 2001): “The Appellate Division [in *Acquista*] agreed with the plaintiff in *Acquista* and concluded that the dismissal of plaintiff’s tort claim constituted error. There does not appear to be any basis on which to distinguish *Acquista* from *Rocanova* and *New York Univ.*” See *Brown*, 2001 WL 1230528, at *5. The U.S. Court of Appeals for the Second Circuit and the U.S. District Court for the Southern District of New York cited this observation favorably. See *Harris v. Provident*

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Life & Accident Ins. Co., 310 F.3d 73 (2d Cir. 2002); *see also Cont'l Info. Sys. Corp. v. Fed. Ins. Co.*, 02 Civ. 4168(NRB), 2003 U.S. Dist. LEXIS 682 (S.D.N.Y. Jan. 16, 2003).

In *Eurospark*, 288 B.R. 177, the court noted that “[t]he *Acquista* decision has been met with disapproval.” *Id.* at 186. Although *Eurospark* ultimately turned upon the insured’s failure to plead that consequential damages were within the contemplation of the parties at the time of contracting, *Id.* at 187-88, the decision is important because in agreeing with *Acquista*, *Eurospark* identified the critical distinction between *Acquista*, *Rocanova*, and *New York University* — *Rocanova* and *New York University* addressed the ability to seek punitive damages in insurance cases, while *Acquista* addressed consequential damages that arose from the breach. Specifically, the court stated:

Rocanova and *New York Univ.* are distinguishable, however, from *Acquista*. ... In both *Rocanova* and *New York Univ.*, the Court of Appeals of New York only addressed the inability of the plaintiff to plead a tort upon which punitive damages may be based. In neither case was the issue of consequential contract damages addressed. Both cases only addressed the limited circumstances in which damages in excess of contract damages may be awarded. *Id.* at 186 (citations and internal quotation marks omitted).

***BI-ECONOMY AND PANASIA:*
CLAIMS FOR DAMAGES IN EXCESS
OF POLICY LIMITS ARE AVAILABLE
IN NY**

After several years of equivocation by several New York courts on the viability of claims for damages beyond the limits of insurance policies, *Bi-Economy* and

Panasia build upon the initial groundwork laid by *Acquista* and have now clarified that policyholders can bring claims against their insurance carriers for consequential damages beyond the limits of the insurance policies. Importantly, these decisions also distinguish “consequential losses” from “consequential damages.” As a result, while carriers take the position that “consequential losses” stemming from a third party’s failure to perform an obligation might be excluded

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ed from coverage, *Bi-Economy* and *Panasia* make clear that “consequential damages” that result from the carrier’s failure to perform under the insurance contract are not.

THE *BI-ECONOMY* DECISION

Bi-Economy was a wholesale and retail meat market in Rochester, NY. In December 2002, a fire damaged *Bi-Economy*’s building and business-related equipment, and destroyed a significant amount of *Bi-Economy*’s inventory. At the time of the fire, *Harleysville* insured *Bi-Economy* under a property policy that provided business interruption coverage for a period of up to one year.

Upon submission of *Bi-Economy*’s claim, *Harleysville* disputed the claim but advanced \$163,161.92. Thereafter,

Bi-Economy and *Harleysville* submitted the dispute to an alternative dispute resolution process known as an insurance “Appraisal Process.” While the dispute was pending for more than a year, *Harleysville* offered to pay only seven months of *Bi-Economy*’s lost business income claim, even though the policy provided for a full 12 months of coverage. Ultimately, the appraiser awarded *Bi-Economy* \$407,181 as the actual cash value (“ACV”) on the building, and further determined an ACV of \$140,000 for the contents, maxing out the policy’s contents coverage. Although *Harleysville* was obligated to indemnify for the fire loss, it took unreasonable actions to delay, and made only low-ball offers so as to avoid payment of the full amount of insurance proceeds owed on the losses. Prior to the fire, *Bi-Economy* had been a thriving wholesale/retail meat-selling market operation serving the Rochester, NY community, including city residents and restaurants. But *Bi-Economy* never reopened after the fire.

In October 2004, *Bi-Economy* commenced an action in New York State Supreme Court against *Harleysville*. *Bi-Economy* asserted that *Harleysville* improperly failed to pay the full amount of its lost business income claim and delayed payment for its building and contents damage. *Bi-Economy* asserted causes of action for bad faith claims handling, tortious interference with business relations, and breach of contract, and sought consequential damages for “the complete demise of its business operation in an amount to be proved at trial.” *Harleysville* moved for partial summary judgment on *Bi-Economy*’s breach of contract claim on the ground that the contract excluded “consequential loss.” The New York Supreme Court granted the motion, and the Appellate Division affirmed.

The Court of Appeals determined that a policyholder can maintain a cause of action seeking consequential damages suffered as a result of the insurer's failure to promptly evaluate, adjust, and pay a business interruption claim. In so determining, the Court of Appeals also held that policyholders may obtain damages in excess of the limits of the policy where the damages are the "natural and probable consequence of the breach."

With respect to Bi-Economy's business interruption insurance coverage, the Court of Appeals unambiguously determined that such coverage is designed "to ensure ... the financial support necessary to sustain business operation[s] in the event a disaster occurred." *Bi-Economy*, slip op. at 8. For that coverage to be effective, the carriers providing said business interruption coverage must promptly, honestly, and adequately evaluate claims "so that in the aftermath of a calamitous event, as Bi-Economy experienced here, the business could avoid collapse and get back on its feet as soon as possible." *Id.* at 10.

In *Bi-Economy*, the Court of Appeals determined that Bi-Economy's insurance carrier either did foresee, or should have, that if it breached its contractual obligations by failing to promptly adjust and pay Bi-Economy's claim, then Bi-Economy might lose the value of its business. In situations such as these, consequential damages are warranted because "limiting an insured's damages to the amount of the policy, *i.e.*, money which should have been paid by the insurer in the first place, plus interest, does not place the insured in the position it would have been in had the contract been performed." *Id.* at 9.

THE PANASIA DECISION

In *Panasia*, the policyholder, a commercial real estate owner in Manhattan, submitted a claim to its commercial property insurance carrier for damages that the policyholder's building sustained during a rainstorm while the building was undergoing construction. Panasia alleged that the insurance carrier unreasonably delayed adjusting the claim and, later, wrongfully denied coverage. Panasia commenced a lawsuit against Hudson Insurance Company not merely for the direct water-related damages caused by the rainstorm, but also for lost rents, interest on money borrowed to repair the damaged property, and additional consequential damages that it incurred.

The Court of Appeals held that the policyholder could maintain its suit for damages in excess of the policy limits for a claim arising under the policy's "Builders Risk Coverage." Moreover, the Court of Appeals determined that a policyholder may sustain a cause of action for damages beyond the limits of its policy for consequential damages resulting from its insurance carrier's breach of its duty to investigate, bargain for, and settle claims in good faith.

The court also announced its agreement with the New York Appellate Division, First Department's recognition, in *Acquista v. New York Life Insurance Co.*, that a policyholder may not be made whole by recovering merely the limits of the insurance policy. In some instances, such as the one present in *Panasia*, policyholders are entitled to damages in excess of the policy limits where their insurer has breached the implied covenant of good faith and fair dealing and the limits of the policy will not remedy the policyholders' loss.

CONCLUSION

Acquista and *Eurospark* opened the door for policyholders to seek consequential damages in New York. But *Bi-Economy* and *Panasia* effectively limit the reach of *Rocanova* and *New York University* and make clear that consequential damages are in fact available in New York. *Bi-Economy* and *Panasia* likely will have immediate and significant ramifications for the post-loss relationship between policyholders and their insurers. For example, *Bi-Economy* and *Panasia* should now permit New York juries to determine various types of "consequential" damages such as loss of business enterprise value, lost rents, and interest on money borrowed in an attempt to recover from the breach. Both decisions should also provide incentive for insurance companies conducting business in New York to respond to their policyholders expeditiously and in good faith. Critical to any impact that *Bi-Economy* and *Panasia* may have will be the circumstances that surround the particular loss, and policyholders should be careful to properly allege claims for consequential damages to avoid dismissal, as was the case in *Eurospark*, for failing to plead that consequential damages were contemplated by the parties prior to contracting.

