

NY Insurance Cases Cut Back Consequential Damages Claims

Law360, New York (June 04, 2014, 1:07 PM ET) -- Claude Monet once said, “[A] landscape does not exist in its own right, since its appearance changes at every moment, but the surrounding atmosphere brings it to life.” In the last six months, numerous decisions from New York and the federal government have colored the atmosphere for insureds seeking consequential damages against insurance companies based on their alleged breach of the covenant of good faith and fair dealing — and the atmosphere is bleak.



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These rulings add to the body of decisions exploring this topic in the wake of the New York Court of Appeals' 2008 decisions in *Bi-Economy Market v. Harleysville Insurance Co. of New York*[1] and *Panasia Estates Inc. v. Hudson Insurance Co.*[2] Decided on the same day, these decisions marked a significant development in New York insurance coverage litigation. They held that policyholders could assert claims for consequential damages resulting from a breach of the insurance contract when certain conditions are met.[3] Recent New York decisions, however, illustrate how exceptional such instances will be.

In nearly all of these recent decisions, the courts have found there is no separate cause of action beyond breach of contract for bad faith claims handling or breach of the implied covenant of good faith and fair dealing in New York. Such claims will often be dismissed as duplicative of a breach of contract claim as they frequently stem from the same underlying facts.[4] While consequential damages may, in fact, be recoverable against insurance companies, such damages rest on a breach of contract count and the covenant of good faith and fair dealing implied in every contract in New York.[5]

These recent decisions have also more clearly articulated the purpose of consequential damages and the burden on the party seeking them against an insurance company. As noted in *Bi-Economy*, consequential damages are designed to compensate a party for reasonably foreseeable damages, and must be proximately caused by the breach and proven by the party seeking them.[6] Recent decisions have also confirmed that consequential damages must be both quantifiable and identifiable.[7] Moreover, while it is possible to recover consequential damages when they are alleged as part of a breach of contract claim against an insurer, these damages “must have been within the contemplation of the parties at the time the contract was made.”[8]

This was precisely the ruling in the Feb. 26, 2014, decision in *Orient Overseas Associates v. XL Insurance America Inc.*[9] Defendant Westport Insurance Corp. succeeded on its motion to dismiss the plaintiff's claim for bad faith claims handling of a Superstorm Sandy loss. While the court held there is no separate cause of action for bad faith claims handling in New York, it acknowledged the possibility of recovering consequential damages against an insurance company. Nevertheless, the court found these damages must be alleged as part of a breach of contract claim, and the damages sought must be quantifiable, identifiable and must have been within the contemplation of the parties at the time the contract was made.

Orient was followed by several federal and state court decisions that reached similar conclusions. The U.S. District Court for the Eastern District of New York addressed these issues while confronting another Superstorm Sandy loss in *433 Main Street Realty LLC v. Darwin National Assurance Co.*[10] There, the insured asserted that its insurer breached the implied covenant of good faith and fair dealing by mishandling the claim, delaying payment and allegedly applying an incorrect flood deductible.

The district court was not persuaded by the insured's argument that those allegations were sufficient to plead conduct that went "above and beyond" breach of contract and dismissed the count for breach of the implied covenant of good faith and fair dealing as redundant. The court held that "the fact that [the d]efendant has not paid what [the p]laintiffs believe is owed under the [p]olicy is the crux of [the p]laintiffs' breach of contract claim and does not present an independent factual predicate for a breach of the covenant of good faith and fair dealing." [11]

The district court also found the claim was redundant given the plaintiffs failed to establish facts different from those supporting the alleged breach of contract count. The court noted that its dismissal of the breach of the covenant of good faith and fair dealing claim did not necessarily preclude plaintiffs from claiming consequential damages beyond the policy limits on their breach of contract claim based on its allegations of bad faith.

Just a few weeks ago, on May 14, 2014, the U.S. District Court for the Southern District of New York echoed these sentiments in *County of Orange v. The Travelers Indemnity Co.*[12] The court ruled on a defendant insurer's partial motion to dismiss a dispute with its policyholder over property damaged resulting from Hurricane Irene and Tropical Storm Lee. The insured alleged its insurer improperly delayed and denied its insurance claim without investigation or timely explanation and filed an action that included a claim for breach of the implied covenant of good faith and fair dealing. The insured sought consequential damages as part of this claim.

The court dismissed the insured's claim for breach of the covenant of good faith and fair dealing as duplicative of its breach of contract count. The court explained:

A claim for ... breach of the implied covenant of good faith and fair dealing must ... be dismissed where it seeks to recover damages that are intrinsically tied to the damages allegedly resulting from the breach of contract. ... The facts giving rise to the two claims are the same: That Travelers did not perform its

contractual duties as it had agreed to under the insurance policy. The delay and lack of investigation address the same ultimate grievance of failure to comply with the agreement.[13]

Ultimately, the court found that the consequential damages alleged were inherently tied to the breach of contract claim because they are a result of the alleged failure of the insurer to comply with the terms of the policy.

Similarly, in *Kings Infiniti Inc. v. Zurich American Insurance Co.*,[14] the Supreme Court of New York, Kings County, dismissed a claim alleging that an insurer breached the implied covenant of good faith and fair dealing with regard to losses arising out of Superstorm Sandy. Among other claims, the policyholder alleged a separate cause of action for breach of the implied covenant of good faith and fair dealing seeking both compensatory and punitive damages. The plaintiffs alleged that the insurer breached this covenant by, in part, refusing to pay for covered losses under the policy, interpreting the policy in an unreasonable manner solely to avoid coverage, inventing “spurious grounds” for avoiding coverage and forcing plaintiff to initiate litigation.

The court held that plaintiffs’ claim for breach of the implied covenant of good faith and fair dealing was not distinct from its breach of contract claim and should be dismissed. The court explained that the claims arose from the same set of facts and sought identical damages. The court noted:

[P]laintiffs do not allege that they sustained any consequential damages as a result of defendant’s breach of the insurance contract which would entitle them to recovery beyond the limits of the policy, but only that they were deprived of the benefits of insurance coverage under the policy and have incurred attorneys’ fees and costs in bringing the action. Thus, plaintiffs’ fifth cause of action fails to state a viable independent cause of action and is redundant and duplicative of their breach of contract claims, mandating dismissal.[15]

A number of additional New York state court decisions in the past several months have reached the same conclusion, including, for example, *Bartlett v. Nationwide Mutual Fire Insurance Co.*[16] and *Jane Street Holding LLC v. Aspen American Insurance Co.*[17]

As the legal landscape continues to evolve regarding consequential damages claims against insurance companies, commonalities are emerging: typical allegations of insurer misconduct will not support a cause of action separate and apart from breach of contract; consequential damages may be recoverable within a breach of contract claim, but such damages must be identifiable, quantifiable and must have been contemplated by the parties at the time the contract was entered. Such damages must be recognized for what they are: perhaps as rare as a Monet.

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Disclaimer: The authors of this article and their firm represent defendant Westport Insurance Corp. in the Orient Overseas Association v. XL Insurance American Inc. et. al. litigation, which is still pending. A notice of appeal has been filed from the cited decision.

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[1] Bi-Economy Market. v. Harleystown Insurance Co. of New York, 10 N.Y. 3d 187 (2008).

[2] Panasia Estates Inc. v. Hudson Insurance Co., 10 N.Y. 3d 200 (2008).

[3] *Id.* at 203, citing Bi-Economy at 192.

[4] See, for example, Orient Overseas Associates v. XL Insurance Co., et. al., No. 652292/2013, 2014 N.Y. Misc. LEXIS 867 (Feb. 26, 2014), at *4.

[5] *Id.*

[6] Bi-Economy at 193.

[7] Orient Overseas, at *6-7.

[8] *Id.*

[9] *Id.*

[10] 433 Main Street Realty LLC v. Darwin National Assurance Co., No. 14-CV-587, 2014 U.S. Dist. LEXIS 55940 (E.D.N.Y. April 17, 2014).

[11] *Id.* at *8-9.

[12] County of Orange v. The Travelers Indemnity Co., No. 13-CV-06790, 2014 U.S. Dist. LEXIS 66451 (S.D.N.Y. May 14, 2014).

[13] *Id.* at *5-8.

[14] Kings Infiniti Inc. v. Zurich American Insurance Co., 43 Misc. 3d 1207 (A), No. 501914/2013, 2014 N.Y. Misc. LEXIS 1480 (Kings Cnty. April 3, 2014).

[15] *Id.* at 21-23.

[16] Bartlett v. Nationwide Mutual Fire Insurance Co., No. 12-CV-435-A, 2013 U.S. Dist. LEXIS 22320 (W.D.N.Y. Feb. 19, 2013).

[17] Jane Street Holding LLC v. Aspen American Insurance Co., No. 13-CV-2291, 2013 U.S. Dist. LEXIS 182110 (S.D.N.Y. Dec. 31, 2013).