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Changing landscape of insurer bad faith and consequential damages

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Introduction

New York's reputation as a stable insurance market for over 40 years has served to discourage litigation for allegations of bad-faith claims handling by insurers.(1) However, two recent decisions of the New York Court of Appeals – *Bi-Economy Market, Inc v Harleysville Insurance Co* (NY 2008) and *Panasia Estates, Inc v Hudson Insurance Co* (NY 2008) – mark a decisive change in this landscape and have given insurers cause to take notice.(2)

Prior to *Bi-Economy* and *Panasia*, the seminal Court of Appeals case regarding insurer bad faith was *Sukup v State of New York*.(3) Ordinarily, a policyholder seeking to litigate an insurer's alleged acts of bad faith claims handling (ie, a refusal to pay an insurance claim or a delay in determining coverage) was generally relegated to seeking direct damages through pleading a cause of action for breach of the insurance contract. The policyholder seldom sought extra-contractual damages, including consequential damages, as the appeal court set forth stringent standards under *Sukup* for when an insured is permitted to recover extra-contractual damages.

The appeal court now appears to have implicitly overruled *Sukup* through *Bi-Economy/Panasia.* The unsettling effect on New York law in the aftermath of *Bi-Economy/Panasia* is apparent in recent New York state and federal court decisions, and extend as far as a US district court in Kansas (applying New York law).(4)

Sukup standard

Consequential damages

In *Sukup* the appeal court utilised the general term 'extra-contractual damages'. Generally, insurers which are found liable for bad-faith claims practices face two types of extra-contractual damages in New York – punitive and consequential damages. However, since punitive damages awards are rarely given under New York law,(5) the only available extra-contractual damages in coverage litigation are often consequential damages.

In breach of contract actions the non-breaching party will ordinarily seek general damages – that is, damages arising directly from the alleged breach. Special or consequential damages are damages that do not arise directly from the breach, but are recoverable in limited circumstances.(6) The purpose of consequential damages is to place the insured in the position that it would have been in had the insurance contract been performed. Examples of common consequential damages sought by plaintiffs are lost profits and attorney's fees.(7)

The appeal court has subsequently defined 'consequential damages' as those damages that do not flow directly from a breach of contract, but are proximately caused by a breach, and are damages "within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting".(8)

Sukup *decision*

In *Sukup v State of New York* Sukup brought an action for breach of contract against the State Insurance Fund for its refusal to pay Sukup's claims under a workmen's compensation policy. Sukup also sought extra-contractual damages in the form of consequential damages – here, the attorney's fees incurred in litigating the question of coverage under the workmen's compensation policy. Regardless of the fact that the

appeal court ultimately found that the insured was entitled to coverage, the court declined to award Sukup attorney's fees. Separate and apart from the issue of attorney's fees – where extensive case law exists which militates against such an award(9) – the appeal court set forth a roadmap in *Sukup*, favourable to insurers, for when a policyholder could recover extra-contractual damages in connection with coverage litigation.

Sukup *roadmap*

Interwoven throughout *Sukup* is the implication that extra-contractual damages cannot be awarded where the pleading consists solely of a cause of action for breach of contract. In order for courts to even reach the issue of extra-contractual damages, the claimant must set forth an allegation of bad faith of the insurer within the pleading, independent of the breach of contract claim.(10) The *Sukup* court searched the record to find evidence of bad faith on the part of the insurer, but was unable to find any.(11)

The *Sukup* court delineated an elevated level of insurer bad faith that a plaintiff needed to show before the court could consider an award of extra-contractual damages. Simply showing an arguable difference of opinion between the policyholder and insurer over coverage was insufficient to impose extra-contractual liability on an insurer. Instead, the insurer must be shown to have exercised such bad faith in denying coverage that:

- no reasonable insurer would, under the given facts, be expected to assert non-coverage; and
- the insurer evidenced a gross disregard for its policy obligation in asserting non-coverage.(12)

In effect, even if the insurer was incorrect in asserting non-coverage, the insurer is not automatically liable for bad faith and the damages resulting therefrom. Instead, so long as the insurer's position as to non-coverage was "arguable" and the insurer's action did not rise to the level of "gross disregard for its policy obligations", the insurer is shielded from any liability for extra-contractual damages.(13)

Bi-Economy* and *Panasia

Forty-one years after *Sukup,* the New York Court of Appeals decisions in *Bi-Economy* and *Panasia* marked a key change of significant concern to insurers in coverage litigation.

Bi-Economy *decision*

In *Bi-Economy* the policyholder, a small wholesale and retail meat market, secured coverage for lost business income in the event of a fire, commonly referred to as 'business interruption insurance'.(14) A major fire subsequently occurred, resulting in complete loss of food inventory and structural damage to the building and equipment. Bi-Economy submitted claims to its insurer, Harleysville Ins Co, allegedly in a timely manner and pursuant to the terms of the insurance contract. The insurer advanced sums covering only portions of the claims, and the parties first submitted to alternative dispute resolution, where Bi-Economy was eventually awarded additional damages. Bi-Economy then commenced an action against its insurer, seeking additional damages not awarded in alternative dispute resolution, and asserted causes of action for:

- bad-faith claims handling;
- tortious interference with business relations; and
- breach of contract.

Bi-Economy sought consequential damages, in its breach of contract claim, for the complete "demise of its business operation in an amount to be proved at trial". Bi-Economy argued that its business collapsed as a result of the insurer's breach of contract, characterised by the insurer's delay of payments and failure to pay timely the full amount of its lost business income claim, a loss that it alleged was both reasonably foreseeable and contemplated by the parties at the time of contracting.(15)

In opposition, Harleysville cited several contractual provisions excluding coverage for consequential loss and moved for partial summary judgment dismissing Bi-Economy's breach of contract cause of action. Initially, the breach of contract cause of action was dismissed by the lower courts. On appeal, notwithstanding the arguments proffered in the dissenting opinion,(16) the appeal court rejected the insurer's arguments that consequential damages could not be recovered because the policies contained an express exclusion for coverage of "certain consequential losses". The court distinguished consequential 'losses' from consequential 'damages', and stated that the loss exclusion referred to delay caused by third-party actors or from the "[s]uspension, lapse or cancellation of any license, lease or contract", and did not bar the insured from seeking consequential or additional damages stemming from the insurer's injurious conduct.(17) The *Bi-Economy* court thus subsequently reinstated the breach of contract claim, and more importantly, permitted Bi-Economy to seek consequential damages in connection with its breach of contract claim – a holding at odds with the court's opinion in *Sukup*.

In *Bi-Economy* the appeal court reasoned that the consequential damages for loss of business were within the damages that should have been reasonably contemplated by the parties since the nature of the policy was business interruption coverage (ie, to ensure that Bi-Economy had the financial support necessary to sustain its business operation in the event of a disaster). Thus "what the insured planned to do with [the insurer's] payment [of its claims] – was at the very core of the contract itself";(18) that is, Bi-Economy's reliance on the insurer's prompt payment would itself sustain its business.

The court's reasoning underscores a larger policy at work. As noted by the dissent,(19) the court essentially permitted a claim for damages that, while termed 'consequential', are in fact punitive, as an insured is permitted to seek extra-contractual damages in connection with an insurer's bad faith. Here, the bad faith alleged was an insurer's alleged failure to address or pay timely an insured's claims, on account of no more than an arguable difference of opinion.(20) This is far removed from the *Sukup* standard for alleging bad faith, defined as an insurer which, in gross disregard, asserts non-coverage where no reasonable insurer, under the given facts, would be expected to assert same.

In permitting the plaintiff to seek consequential damages in connection with a breach of contract, the court reasoned that, since a covenant of good faith and fair dealing is implied to exist in every contract, a breach of the implied covenant of good faith is interwoven in every breach of contract claim. The court further reasoned that in purchasing an insurance contract, an insured has also bargained for "peace of mind, or comfort, of knowing that it will be protected in the event of a catastrophe".(21) Thus, the implied covenant of good faith of the insurer encompasses the insurer's promise to investigate and pay covered claims in good faith. Alternatively stated, where an insurer fails to act promptly or pay a claim in full, an insured is bereft of the benefit of its bargain, and may seek consequential damages against an insurer for acting in breach of covenant. As noted by the dissent, plaintiffs may now term allegations of bad faith into a "breach of the covenant of good faith and fair dealing".(22)

The *Bi-Economy* court set forth the following criteria in assessing the permissibility of a claim for consequential damages in coverage litigation where an insured seeks "additional damages caused by a carrier's injurious conduct – in this case, the insurer's failure to timely investigate, adjust and pay [a] claim":

- the party breaching the contract is liable for those risks foreseen or which should have been foreseen at the time the contract was made;
- it is only necessary that loss from a breach is foreseeable and probable – it is not necessary for the breaching party to have foreseen the breach itself or the particular way the loss occurred; and
- to determine whether consequential damages were reasonably contemplated by the parties, courts must look to the "nature, purpose and particular circumstances of the contract known by the parties", as well as "what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made".(23)

In essence, an insured's claim for consequential damages in a pleading may survive dispositive motion practice based on the face of the pleading, so long as the consequential damages can be said to have been proximately caused by a breach, and a tenable argument is proffered that consequential damages were reasonably contemplated by the parties based on the nature, purpose and circumstances of the contract.

Panasia *decision*

The New York Court of Appeals similarly permitted consequential damages to be sought in connection with a breach of contract cause of action in *Panasia,* which was rendered the same day as *Bi-Economy,* with the same dissenting opinion attached. Panasia owned commercial rental property and had a commercial property insurance policy with Hudson Insurance Company covering damage to its property while undergoing renovation. During the policy period, damage to the building was caused by rain, which entered the building through an opening in the roof (opened for the purposes of construction work). Panasia claimed it promptly notified its insurer of its loss, but that the insurer failed to investigate the claim timely and incorrectly denied the claim on the grounds of wear and tear, resulting in Panasia's lost rents and interest.(24)

Panasia commenced an action against its insurer for breach of contract, in which it sought both direct and consequential damages. The insurer pointed to, among other defences, its contractual exclusion for "any consequential loss". The lower courts denied Hudson's motion to dismiss Panasia's claims for consequential damages. On appeal, the appeal court agreed with the lower courts and held that the insurer's motion was properly denied and that the insurer's contractual exclusion for consequential loss did not bar the recovery of consequential damages. The *Panasia* court noted that the

relevant remaining query was whether the consequential damages sought by Panasia were foreseeable damages as the result of the insurer's breach – that is, whether the consequential damages were "within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting". In the absence of a record as to this issue, the court remanded the issue to the lower court to determine.(25)

Of particular significance in the *Panasia* ruling was the court's characterisation of its own holding in *Bi-Economy*:

"*As we explained in* Bi-Economy*…consequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted in an insurance contract context, so long as the damages were 'within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting.*"(26)

Based on what appears to be nothing more than the court's citation to its own holding in *Bi-Economy* as its reasoning,(27) the *Panasia* court has permitted consequential damages to be sought in connection with a breach of contract claim.

Aftermath of *Bi-Economy* and *Panasia*

Courts' reliance on "implied covenant of good faith and fair dealing" circumvents* Sukup *standard

In *Sukup* the New York Court of Appeals was quick to emphasise the pleading requirement that a separate cause of action for bad faith had to be alleged in order to reach consideration of extra-contractual damages and that, even if met, the allegations of insurer bad faith in denying coverage had to rise to the level of gross negligence and be one that lacked any arguable basis.(28) Thus, it was not uncommon for policyholders in this type of suit to also claim, in addition to breach of contract, a separate tort claim for breach of the insurer's covenant of good faith and fair dealing. Policyholders have used the breach of covenant of good faith and fair dealing tort claim as another vehicle to seek separate or additional damages. However, before *Bi-Economy/Panasia*, insurers would often succeed in moving to dismiss the tort claim under the argument that the tort claim was nothing more than a duplication of the breach of contract claim, and insufficient to support an independent cause of action for additional damages.(29)

While *Sukup* stood for the proposition that a breach of contract claim alone was insufficient to sustain a claim for consequential damages, the court implicitly overruled *Sukup* by opening the door in *Bi-Economy/Panasia* to the permissibility of consequential damages claims to be sustained by nothing more than a breach of contract claim. That is, bad faith allegations need not be independently delineated in a separate cause of action to sustain a claim for consequential damages. Instead, bad faith allegations may be deemed incorporated within a breach of contract claim, since a breach of contract may be deemed to encompass a breach of the contract's implied covenant of good faith and fair dealing, and such breach is tantamount to bad faith.

The silence of the appeal court in *Bi-Economy* and *Panasia* connotes the beginning of a slippery slope that should leave insurers concerned, as the court both omitted any reference to *Sukup* and failed to articulate the level of insurer bad faith that must be alleged in order to sustain legally an insured's demand for consequential damages as a result thereof. Therefore, the *Bi-Economy/Panasia* decisions result in the loss of a double layer of protection for insurers against bad faith claims – the high court abandoned its prior holding that there must be an independent claim for bad faith of the insurer, and that even if asserted independently, such claim must evidence an egregious level of bad faith of the insurer such that no reasonable insurer would have asserted non-coverage given the same facts.

Through *Bi-Economy* and *Panasia,* insurers are now exposed, in regard to consequential damages, to the risk of the insured's potential recovery of more than the stated value of their policies on account of what may be an insurer's reasonable delay or denial of a claim. As set forth in the dissenting opinions of *Bi-Economy* and *Panasia,* which reference the conceptual errors regarding consequential damages and the implied covenant of good faith and fair dealing that were made by the majority,(30) lower courts are left to resolve the resulting tension: on one hand, under *Sukup*, whether insurer bad faith must be alleged through separate allegations of gross negligence or an independent tort claim evidencing egregious bad faith before a claim for consequential damages can be sustained; or on the other hand, whether, under *Bi-Economy/Panasia*, claims for consequential damages in connection with barebones allegations of insurer bad faith are sufficient to be sustained, where the bad-faith allegations are incorporated into breach of contract claims. It is apparent in recent decisions that various courts have not resolved this tension in favour of insurers.(31)

***Survey of cases post*-Bi-Economy/Panasia**

An examination of how New York state and federal courts are following *Bi-Economy/Panasia* reveals a reversed trend that is of great concern to insurers.(32) Before *Bi-Economy/Panasia*, it was customary for courts to assess the sufficiency of bad-faith allegations of an insurer first as a threshold determination before assessing

the permissibility of an insured's claim for consequential damages in connection with the same. In the wake of *Bi-Economy/Panasia*, in assessing the sufficiency of claims for consequential damages at the pleading level, the courts' decision appears to hinge on the sufficiency of the claim for consequential damages. That is, provided that the allegations pertaining to the description and extent of consequential damages are sufficiently pled,(33) courts are generally permitting claims for consequential damages to be sustained at the pleading stage.

Thus, courts appear to gloss over any requirement to assess the sufficiency of the insurer bad faith allegations – allegations of any delay or denial of claims by an insurer appear to suffice. Some courts even expressly state that foreseeability of consequential damages does not have to shown at the pleading stage.(34)

A summary analysis of recent cases citing to *Bi-Economy/Panasia* is set forth below:

- The breadth of cases applying *Bi-Economy/Panasia* extend beyond first-party insurance actions to third-party insurance actions(35) and insureds by assignment to insurance policies.(36)
- Timely amendments to complaints to include claims for consequential damages are permitted by courts.(37)
- Where both breach of contract and breach of covenant are alleged, some courts dismiss the breach of covenant claim on account of redundancy with the breach of contract claim, and sustaining the claims for consequential damages.(38)
- Other courts permit both breach of contract and breach of covenant claims to be separately maintained, and permitting consequential damages to be sought in connection with the same.(39)
- Where only breach of contract is alleged, courts are still sustaining claims for consequential damages stemming from such breach, where bad faith allegations are incorporated within the breach of contract claim as a breach of the implied covenant of good faith and fair dealing.(40) Of additional concern to insurers is that some courts are sustaining claims for attorney's fees at the pleadings level,(41) although other courts continue to dismiss claims for legal expenses.(42)
- However, insurers are not without recourse, as some courts have articulated that some level of bad faith must be alleged before permitting claims for consequential damages in connection with same.(43)
- Courts continue to deny claims for punitive damages in connection with bad-faith allegations.(44)

Permissibility of timely amendments to complaint to include claims for consequential damages

In *De Martino* the plaintiff secured a policy which included a provision for business interruption loss.(45) The plaintiff sought to amend her complaint to include consequential damages, including loss of business, attorney's fees and other damages. Harleysville, in opposing the motion to amend, argued that the plaintiff could not support her claim for consequential damages. The *DeMartino* court permitted the plaintiff to amend her complaint to add consequential damages, citing to *Panasia* and reasoning that the parties contemplated that plaintiff would be insured for losses sustained by a delay in payment and repair to her premises based on the policy's business interruption clauses. Additionally, the court clarified in a subsequent ruling that the plaintiff could also amend the complaint to include claims for attorney's fees and other consequential damages.(46)

Where both breach of contract and breach of covenant are alleged, courts have sustained claims for consequential damages even while dismissing the breach of covenant claim

Courts, while dismissing breach of covenant claims in light of its companion breach of contract claim, have sustained claims for consequential damages, reasoning that a breach of covenant is interwoven in every breach of contract claim.(47)

***Authelet*:** In *Authelet*, the plaintiff alleged breach of contract, breach of the covenant of good faith and fair dealing, fraud and bad faith. The plaintiff sought punitive damages in connection with its bad-faith claim and consequential damages in connection with its breach of the implied covenant of good faith. Nationwide filed a motion for summary judgment seeking, among other remedies, to dismiss the breach of contract and breach of implied covenant claims, as well as to dismiss the plaintiff's demands for attorney's fees and litigation expenses. The *Authelet* court upheld the breach of contract claim, and directed – citing *Bi-Economy/Panasia* as its reasoning – that allegations contained within the breach of the implied covenant claim should be incorporated into plaintiff's breach of contract claim. The court rejected the claim for punitive damages for insufficient evidence that Nationwide's conduct was egregious and directed at the public. The court additionally rejected the plaintiff's claim for attorney's fees. However, the court permitted plaintiff's claim for consequential damages, exclusive of legal expenses, to survive dispositive motion practice.

***Handy*:** In *Handy* the plaintiff alleged breach of contract for failure to pay a covered risk

and breach of the covenant of good faith and fair dealing for American International's alleged failure to investigate claims before denying coverage. The plaintiff's breach of contract cause of action included allegations of bad faith denial of claims and included claims for consequential damages stemming from American International's delay and failure to investigate. The plaintiff's breach of covenant cause of action included a claim for legal expenses among other damages. American International filed a motion to dismiss the breach of duty of good faith claim and additionally sought to dismiss the request for consequential damages as well as claim for legal expenses. American International argued that consequential damages cannot be sought by the plaintiff since the plaintiff has not pled bad faith as an independent tort, where such tort additionally shows the level of bad faith rose to one that was egregious in nature.

The *Handy* court partially granted the insurer's motion by dismissing the breach of covenant claim and dismissing the plaintiff's request for attorney's fees. However, the court noted that all allegations for the breach of covenant claim would be incorporated into the cause of action for breach of contract. The court denied the insurer's motion with respect to consequential damages and upheld the plaintiff's claim for such damages, citing *Bi-Economy* and *Panasia*. Of particular concern to insurers is the *Handy* court's interpretation of the holdings of *Bi-Economy/Panasia*,(48) and the court's reasoning that:

"*[w]hile ordinarily damages arising from a breach of contract will be limited to the contract damages necessary to redress the wrong (citation omitted), in the insurance contract context, an insured may pursue a claim for consequential damages, as plaintiff does here, based on defendants' claimed breach of the covenant of good faith.*"

The court further reasoned that under *Bi-Economy/Panasia*, consequential damages were within the contemplation of the parties, as:

"*the purpose of this environmental pollution liability policy was to ensure that the business paying for and conducting the pollution remediation, the insured, had the financial support to conduct and finish the remediation when the costs went beyond the self-insured retention amount for pollution conditions identified in the remedial plan, and to pay third-party claims for clean-up costs of the pollution conditions.*"

Thus, the court found that an insurer in these circumstances may be supposed to have assumed that "if it breached its obligations under the contract to timely investigate in good faith and pay covered claims it would have to respond in damages for damages to plaintiff's business".

***Bunge*:** In *Bunge* the insured alleged that it incurred remediation and settlement costs with respect to contamination at various sites, and sought indemnification and defence costs from underlying litigations. The insured also sought extra-contractual damages, including consequential damages and attorney's fees, in connection with its breach of covenant claim and allegations therein as to the alleged bad faith actions of one of its insurers, Travelers Casualty and Surety Company. Travelers moved for summary judgment on all such damage claims. As a threshold matter, the court ruled that the substantive law of New York would control the litigation. While the court dismissed the insured's claim for breach of the duty of good faith and fair dealing, holding that such claim was duplicative of the breach of contract claim, the court also upheld the claim for consequential damages. The court cited *Bi-Economy/Panasia* and noted that Travelers had not proffered a counter-argument that the claimed consequential damages were not reasonably foreseeable or within the contemplation of the parties when the policies were issued.

Other courts have permitted both breach of contract and breach of covenant claims to be alleged as separate causes of actions, permitting consequential damages to be sought in connection with same

***Chernish*:** In *Chernish* the plaintiff alleged breach of contract, breach of the covenant of good faith and fair dealing and breach of the New York General Business Law for deceptive acts and practices. The plaintiff alleged various acts constituting bad faith in the breach of covenant claim, including delay of payment of claims, requesting unreasonable and repeated production of documents, unreasonable settlement offers before engagement of counsel, unlawful surveillance and denial of coverage of legitimate claims. The plaintiff alleged that her consequential damages included loss of the benefit of the bargain, loss of insurance benefits including peace of mind, pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, attorney's fees and expenditure of unreasonable amounts of time in pursuing her claims.

Massachusetts Mutual filed a motion for judgment on the pleadings for failure to state a claim, specifically seeking, among other things, dismissals of the breach of covenant cause of action and claims for consequential damages. Specifically, Massachusetts Mutual stated that the plaintiff could not recover consequential damages for emotional injury. Notwithstanding, the *Chernish* court upheld both the plaintiff's cause of action for breach of covenant and her claim for consequential damages.

Perhaps of most concern to insurers is that the court, without much analysis, sustained

the plaintiff's emotional injuries as part of the claim for consequential damages. Despite the definition in *Bi-Economy* of consequential damages as quantifiable damages,(49) the *Chernish* court's reasoning consisted of stating in broad strokes that *Bi-Economy/Panasia* marked a key change in the spectrum of insurance bad faith litigation. The court then perfunctorily stated that it found the plaintiff's alleged consequential damages to have been contemplated by the parties as the probable result of a breach of contract, since, substituting the appropriate facts – here, the name of the insurer, type of insurance and damages at issue – into the court's formulaic rendition of the *Bi-Economy* holding meant that the disability income insurance would have made Massachusetts Mutual aware that if it breached its obligations under the contract to investigate in good faith and pay covered claims it would have to respond in damages to the plaintiff.

Quick Response: In *Quick Response* the insured, BBL Construction Services, LLC, entered into a contract with a third party, Quick Response Commercial Division, LLC, which was responsible for repairing damage to the covered premises. Quick Response, insured by assignment, brought an action against the insurer under a builder's risk insurance policy for the insurer's failure to cover cost of repairs for loss to covered premises. BBL Construction then assigned its rights under the Travelers policy to Quick Response.(50) Quick Response commenced an action against Travelers for breach of contract for failure to cover the cost of repairs, as well as for breach of covenant, and sought 18% interest, as well as attorney's fees and costs associated with litigating this matter. Travelers moved to dismiss the claim for breach of covenant and claim for attorney's fees and interest.

The *Quick Response* court denied Travelers' motion on both counts, holding that it was premature to dismiss the breach of covenant claim and additionally held that under *Bi-Economy/Panasia*, consequential damages may be sought in connection with a breach of contract action so long as the claims are adequately pled,(51) which the insured had done in the present case by pleading its claim for past and accruing interest, attorney's fees and costs. Of additional concern to insurers is footnote 5 of the opinion, in which the court, citing to *Chernish,* misconstrued *Bi-Economy/Panasia* by stating that while Quick Response "will ultimately need to make a showing of foreseeability to recover the [consequential] damages, such a showing is not necessary at the pleading stage".(52)

Where only a breach of contract has been alleged, courts continue to sustain claims for consequential damages in connection with a breach of contract claim

***Chaffee*:** In *Chaffee* the plaintiffs alleged breach of contract and violation of New York unfair trade practice regulations. The court noted that the plaintiffs properly included allegations of the breach of the implied covenant of good faith and fair dealing as part of their claim for breach of contract. The plaintiffs also sought consequential damages for "distress, aggravation and inconvenience in an amount exceeding $150,000".(53) The *Chaffee* court set forth little analysis in its reasoning, other than a citation to Bi-Economy for the proposition that consequential damages are available in a breach of contract action so long as they are "brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting". Of particular concern to insurers is that the court upheld the plaintiffs' claim for consequential damages – here, for distress, aggravation, and inconvenience – under a blanket statement that these damages may have been "liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made".

***Woodworth*:** In *Woodworth* the policyholders brought an action against their insurer to recover amounts under a homeowner's insurance policy when the insureds' home was completely destroyed by an explosion and fire. The insureds alleged that the insurer prevented them from rebuilding their home by paying too little for the loss, and by refusing to negotiate an estimate for replacement cost, and commenced an action for, among other claims, breach of contract. The insurance policy contained a provision that covered "reasonable additional living expenses" for the shortest time required to repair the premises, not to exceed 12 months. Part of the plaintiffs' breach of contract claim was the alleged failure of the insurer to pay plaintiffs the cost of their living expenses. The plaintiffs sought to amend their complaint to add this claim for consequential damages.

Erie Insurance Company filed a motion for partial summary judgment on the insureds' claim seeking additional living expenses beyond 10 months, maintaining that plaintiffs could have rebuilt their house within 10 months, and that in any event, the policy limit would only cover up to 12 months of living expenses. The plaintiffs, in opposition, contended that they were entitled to recover all of their living expenses to date, where expenses beyond the 12-month policy limit were recoverable as consequential damages under *Bi-Economy*.

The *Woodworth* court made it clear that it would have been willing – following *Bi-Economy/Panasia* – to award plaintiffs all living expenses, including expenses beyond the 12-month policy limit, as the expenses constituted consequential damages resulting from a breach and were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting. The court stated:

"*the clear purpose of the insurance policy was to insure that Plaintiffs'house would be rebuilt or replaced promptly, and that in the meantime, Plaintiffs would not have to pay additional living expenses while the old house was uninhabitable…. the very purpose of additional living expense coverage would have made Defendant aware that if it failed to act in good faith, and breached the policy in such a way as to hinder Plaintiffs from rebuilding their home, it would cause Plaintiffs to incur additional living expenses until such time as the house was replaced.*"

However, because the plaintiffs' prior motion to amend their complaint to seek consequential damages was untimely, and ultimately denied on that basis alone, the *Woodworth* court stated, with noticeable reluctance, that the plaintiffs' complaint failed to state a claim for consequential damages sufficiently. As such, the court did not award the plaintiffs more than 12 months of living expenses.

***Savino*:** In *Savino* a policyholder brought an action against her insurer, The Hartford, for the insurer's refusal to pay for certain medical expenses related to an automobile accident. Hartford moved for summary judgment to dismiss, among others, the plaintiff's claims for consequential damages. The court denied Hartford's motion and sustained the plaintiff's claims for consequential damages, reasoning that the plaintiff's allegations of bad faith or fraud contained sufficiently detailed allegations and further relied on *Bi-Economy* that a "a recovery for compensatory damages may be viable".

***Stern*:** In *Stern* a policyholder sought consequential damages against Charter Oak for breach of insurance contract in connection with the insurer's failure to pay certain losses arising from an armed robbery at the plaintiff's jewellery store. The Appellate Division held that the plaintiff's claims for consequential damages should be reinstated in light of *Bi-Economy*, citing that the insurance policy's contractual exclusion for consequential losses, similar to the exclusion in *Bi-Economy,* did not bar the plaintiff from seeking consequential damages from Charter Oak.

***Bread & Butter*:** In *Bread & Butter, LLC v Certain Underwriters at Lloyd's London* a policyholder sought consequential damages in connection with the alleged failure of Certain Underwriters at Lloyd's, London to timely and properly remit payments on claims under a commercial property/general liability insurance policy. The court, without further analysis, cited *Bi-Economy/Panasia*, and sustained the plaintiff's claims for consequential damages.

Some cases leave insurers hopeful that courts will not sustain claims for consequential damages without some showing of bad faith
***Simon*:** In *Simon v Unum Group* the policyholder brought an action against his insurers under a disability income protection policy for the insurers' denial of certain claims and delay in processing others. Unum Group and other defendant-insurers moved for summary judgment on the grounds that, among other things, the plaintiff had failed to demonstrate that he was entitled to consequential damages.

The court held that consequential damages are not available to a plaintiff by the mere recital of a breach of contract claim. Instead, the court reasoned that under *Bi-Economy/Panasia,* the plaintiff must additionally show that there has also been a breach of the implied covenant of good faith and fair dealing; that is, that the defendants "lacked good faith in processing his claim".

The court found that contrary to the plaintiff's allegations, Unum Group conducted a thorough investigation into certain of the plaintiff's claims, and appeared to continually reassess the plaintiff's claim each time new information was received. With respect to Unum Group's delay in processing other claims, the court noted that the insurers' delay was preceded by their repeated requests to the plaintiff for certain financial information which the plaintiff failed to provide on the basis of a differing interpretation of the terms of the policy – thus, such delay was not in bad faith but was the result of a difference in the parties' interpretation of the terms of the policy. At other points, the court noted that Unum Group's delay was caused in part by the plaintiff's own tardiness – there were multiple instances of the plaintiff's delay in responding to insurers' document requests and the plaintiff produced certain documents on the day of the discovery deadline. The court thus granted Unum Group's motion with respect to dismissing plaintiff's claim for consequential damages, as the plaintiff could not show bad faith by the insurers.

***OK Petroleum*:** Of particular interest to insurers is the *OK Petroleum* decision, in which the court expressly referenced both *Sukup* and *Bi-Economy* in its analysis regarding bad faith, and limited *Bi-Economy*'s application. The plaintiffs in *OK Petroleum* are engaged in the regional distribution of gasoline and fuel oil. The plaintiffs were named as defendants in product liability litigation involving alleged product defects of gasoline containing a certain chemical compound. The plaintiffs alleged breach of contract, breach of the implied covenant of good faith and fair dealing and deceptive business practices, in connection with their insurers' non-coverage of certain defence obligations in the underlying litigation. Travelers moved to dismiss, among other things, the breach of covenant claim.

The plaintiffs' allegations of insurers' bad faith consist of insurers':

- failure, or refusal, to pay the plaintiff's legal fees;
- disclaimer of defense obligations for certain product liability claims; and
- inadequate investigation of claims.

The court noted at the outset that case law is divided as to whether a breach of covenant claim is always duplicative of a breach of contract claim. The court then applied *Bi-Economy* for the proposition that implicit in contracts of insurance is a covenant of good faith and fair dealing. However, the court continued in its analysis to hold that a breach of covenant claim is not deemed duplicative where additional allegations exist in the breach of covenant claim – here, additional allegations pertaining to bad faith.

In such instances where bad-faith allegations are pled in the context of a contract claim, the court held that the bad-faith allegations must evidence the egregious level articulated in *Sukup* in order to survive a motion to dismiss, such that plaintiffs must show "such bad faith in denying coverage that no reasonable carrier would, under the given facts, be expected to assert it". Here, the court found that the bad faith alleged was no more than an arguable difference of opinion, and dismissed plaintiffs' breach of covenant claim for failure to meet the requirement under *Sukup.*

Survey of how courts have ruled regarding whether plaintiffs may include attorney's fees as part of a claim for consequential damages(54)
***Chernish*:** In *Chernish*, despite Massachusetts Mutual's argument that an insured may not recover the legal expenses incurred in bringing an action to settle its rights under an insurance policy, the *Chernish* court upheld the plaintiff's claim for legal expenses, with little more than a citation of *Bi-Economy* and a note that this decision has changed insurance bad faith litigation.

***Quick Response*:** The court in *Quick Response* sustained an assignee-insured's claim for consequential damages of 18% interest as well as attorney's fees and costs associated with litigating the matter. However, the agreement itself between the insured and the assignee expressly provided for payment of 18% interest in the event of unpaid invoices, and also provided for payment of attorney's fees associated with any actions instituted to pursue payment of invoices.

***Haym Salomon*:** In *Haym Salomon* the policyholder alleged, among other things, breach of contract, bad faith denial of coverage and breach of the covenant of good faith and fair dealing, in connection with the insurer's refusal to cover the replacement of the insured's air conditioning unit. The policyholder sought punitive damages in connection with its bad faith claim.

The policyholder filed a motion for partial summary judgment against its insurer as to its claims. The *Haym* court denied summary judgment on the breach of contract claim on account of the existence of genuine issues of material fact. The court dismissed the plaintiff's breach of covenant claim as it was deemed duplicative of its breach of contract claim, and further dismissed plaintiff's claim for punitive damages for failure of the plaintiff to prove the required elements for punitive damages.

The court also dismissed the plaintiff's bad faith claim, citing to a lower court case, *Grinshpun v Travelers*,(55) which applied the *Sukup* standard, and found that the plaintiff failed to show "such bad faith of the insurer in denying coverage that no reasonable carrier would, under the given facts, be expected to assert it".

***Bunge*:** Similarly, the *Bunge* court cited that as a general rule, "an insured cannot recover legal expenses in a controversy with a carrier over coverage, even though the carrier loses the controversy and is held responsible for the risk". Furthermore, the court additionally cited *Sukup* for the proposition that in order to recover legal expenses, the plaintiff would have to show such bad faith of the insurer in denying coverage that "no reasonable carrier would, under the given facts, be expected to assert it."

However, the *Bunge* court ultimately declined to consider the claim for attorney's fees as it was deemed premature and would ordinarily be considered appropriate after trial on the claim for breach of contract.

***Authelet*:** The *Authelet* court rejected the plaintiff's claim for attorney's fees or legal expenses incurred in bringing the action, citing that an insured may not recover attorney's fees or legal expenses where the insured is seeking to determine its rights under an insurance policy, under the authority of *New York Univ v Continental Ins Co.*

***Handy*:** The *Handy* court dismissed the plaintiff's claim for attorney's fees and other legal amounts incurred in prosecution of claim (finding that under *New York Univ v Continental Ins Co*, it is well settled that an insured may not recover legal expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy).

Comment

Policy implications

Despite the existence of legitimate and justifiable reasons for an insurer's denials of claims or delays in assessing claims, the *Bi-Economy/Panasia* landscape creates an increasing likelihood of litigation by insureds. Insureds may bring causes of actions and seek consequential damages therein for an alleged failure by an insurer to timely investigate, adjust and pay claims,(56) or even for allegedly undervaluing a claim.(57) Courts are increasingly citing *Bi-Economy/Panasia* to sustain claims for consequential damages at the pleadings stage. The increasing litigation costs, as well as the possibility that the court may ultimately grant consequential damages in favour of the plaintiff, changes the case valuation for insurers. Of additional concern to insurers is that courts are not only applying *Bi-Economy/Panasia* to different types of insurance policy (eg, homeowner's insurance,(58) commercial property insurance,(59) disability income insurance(60) and automobile insurance(61)), they are also expanding its application beyond the first-party insurance context to third-party claims as well.(62) While an insurer will have its opportunity to present its defences throughout the litigation, these developments pose a significant concern.

Moreover, the result of these emerging trends is to place insurers effectively on notice that courts, in determining whether to sustain claims for consequential damages, will hinge their determination on the very purpose of an insurance policy and what a policyholder planned to do with an insurer's payment of claim.(63) That is, a large part of the courts' analysis focuses on what appears to be an objective review of the type of insurance policy at issue and what can be considered a "foreseeable" risk or loss. Of great concern to insurers is that courts are, in essence, broadly defining "consequential damages" to encompass all "reasonably foreseeable damages" that are "proximately caused" by a breach.(64)

Examples where courts have discussed the foreseeability of consequential damages are:

- a court's finding that the very purpose of a business interruption policy, what the insured planned to do with its payment under the policy, was at the core of the contract itself, such that the collapse of a policyholder's business is a sustainable consequential damage under a breach of covenant claim;(65)
- a court's finding that the very purpose of living expense coverage under a homeowner's insurance policy would have made an insurer aware that breaching the policy would result in consequential damages of additional living expenses, beyond the policy limit, to the insured;(66) and
- a court's finding that the purpose of an environmental pollution liability policy was to ensure that the business paying for remediation had the financial support to finish the remediation and to pay third-party claims for clean-up costs.(67)

That said, some courts have sustained claims for consequential damages where damages do not necessarily appear to be objectively "foreseeable", and the court's meager analysis consists of a mere citation to *Bi-Economy/Panasia*.(68) Other courts seem to have misconstrued *Bi-Economy/Panasia* altogether, and have found that a showing of foreseeability of consequential damages is not necessary at the pleading stage.(69) Perhaps of most concern to insurers are courts which have sustained consequential damages for emotional damages, damages that do not appear, on their face, to be quantifiable(70) nor reasonably foreseeable from the nature of the policy, such as:

- damage claims of mental anguish and loss of enjoyment of life, in connection with an alleged breach of covenant under a disability income insurance policy;(71) and
- damage claims of distress, aggravation and inconvenience, in connection with an alleged breach under a homeowner's insurance policy.(72)

While courts cite that an additional component of their analysis consists of reviewing the parties' negotiations as to the insurance contract – effectively a subjective component, in which courts examine the nature, purpose, particular circumstances of the contract known by the parties, including whether awarding consequential damages were contemplated by the parties in the event of breach – this component does not appear to have been examined in much detail by the courts. Instead, courts appear to have evaluated claims for consequential damages based largely on the objective review referenced supra, and once sustained, subsequently relegate the subjective analysis component to fact discovery, as an issue to be examined at a later point in determining the merits of the sustained claim for consequential damage.(73)

National implications

New York appears to be following in the steps of other states, such as New Jersey,(74) Pennsylvania(75) and Utah,(76) which recognise the availability of consequential damages to policyholders in coverage actions.(77) Other states have also promulgated a statutory requirement that an insurer conduct a reasonable investigation before denying insurance coverage.(78)

***True ramifications of* Bi-Economy/Panasia**

In considering the possibility that they may face claims for consequential damages arising out of an alleged breach of contract or breach of the duty of good faith and fair dealing, insurers are well advised to keep in mind the view of Justice Smith in his dissenting opinions of *Bi-Economy* and *Panasia:*

"The 'consequential' damages authorized by the majority, though remedial in form, are obviously punitive in fact.

The majority achieves this by changing labels: Punitive damages are now called 'consequential' damages, and a bad faith failure to pay a claim is called a 'breach of the covenant of good faith and fair dealing."

Insurers will fear that juries will view even legitimate claim denials unsympathetically, and that insurers will thus be exposed to damages without any predictable limit.

This attempt [by the majority] to punish unscrupulous insurers will undoubtedly lead to the punishment of many honest ones. Under today's opinions, juries will decide whether claims should have been paid more promptly, or in larger amounts; whether an insurer who failed to pay a claim did so to put pressure on the insured, or from legitimate motives, or from simple inefficiency; and whether, and to what extent, the insurer's slowness and stinginess had consequences harmful to the insured. All these very difficult, often nearly unanswerable, questions will be put to jurors who will usually know little of the realities of either the insured's or the insurer's business….

The result of the uncertainty and error that the majority's opinions will generate can only be an increase in insurance premiums. That is the real 'consequential damage' flowing from today's holdings."(79)

Indeed, *Bi-Economy/Panasia* and its progeny appear to have started down the slippery slope that Justice Smith feared.

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Endnotes

(1) See Jeffrey M Winn, "Consequential Damages and Insurance Bad Faith", *New York Law Journal*, February 18 2009; Robin L Cohen and Joseph D Jean, "State Insurer Bad Faith After '*Bi-Economy*' and '*Panasia*'", *New York Law Journal*, March 17 2009.

(2) Both decisions were rendered on February 19 2008, with *Panasia* following *Bi-Economy. Bi-Economy*, 10 NY3d 187 (NY 2008); *Panasia Estates, Inc v Hudson Insurance Company*, 10 NY 3d 200 (NY 2008).

(3) 19 NY 2d 519 (NY 1967).

(4) Federal*: Woodworth v Erie Insurance Company*, No 05-cv-6344, 2010 US Dist LEXIS 98761 (WDNY September 21 2010); *OK Petroleum Distribution Corp v Travelers Indemnity Co*, No 09-Civ-10273 (SDNY July 15 2010); *Haym Salomon Home For the Aged, LLC v HSB Group, Inc*, No 06-CV-3266 (EDNY January 20 2010); *Quick Response Commercial Division, LCC v Travelers Property Casualty Company of America*, No 1:09-cv-00651 (NDNY October 14 2009); *Simon v Unum Group*, No 07-cv-11426-SAS (SDNY August 21 2009); *Chernish v Massachusetts Mutual Life Insurance Company*, No 5:08-cv-0957 (GHL) (NDNY February 10 2009); *Chaffee v Farmers New Century Ins Co*, No 5:04-cv-1493, 2008 US Dist LEXIS 74334 (NDNY September 24 2008); *US Fire Ins Co v Bunge North America, Inc,* No 05-2192-JWL, 2008 US Dist LEXIS 59737 (D Kan August 4 2008) (applying New York law).

State: *LMK Psychological Services, PC v State Farm Mutual Automobile Insurance Company*, 2009 NY Slip Op 02481 (NY April 2 2009); *Stern v Charter Oak Fire Ins Co*, 59 AD3d 930 (4th Dept February 6 2009); *Hoffman v Unionmutual Stock Life Ins Co*, 51 AD3d 633 (2d Dept May 6 2008); *De Martino v Harleysville Worcester Ins Co*, No 113314/08, 2010 NY Slip Op 30178(U) (NY Sup Ct January 21 2010), clarified decision in *De Martino v Harleysville Worcester Ins Co*, No 113314/08 (NY Sup Ct September 9 2009); *Bread & Butter, LLC v Certain Underwriters at Lloyd's London*, 885 NYS 2d 710 (NY Sup Ct April 8 2009), reargument denied, 2009 NY Misc LEXIS 5456 (NY Sup Ct September 1 2009); *Savino v Hartford*, 23 Misc 3d 1116(A) (NY Sup Ct March 25 2009); *Authelet v Nationwide Mut Ins Co*, No 03-15522, 2008 WL 4771700 (NY Sup Ct October 24 2008); *Handy & Harman v American Intern Group Inc*, No 115666/07, 2008 WL 3999964 (NY Sup Ct August 25 2008).

(5) Punitive damages are assessed by "way of punishment to the wrongdoer and example to others". *Bi-Economy,* 10 NY 3d 187(NY 2008) (at *7 of uncorrected Court of Appeals publication). In general, punitive damages are not available for breach of an insurance contract unless the plaintiff shows both " 'egregious tortious conduct' directed at the insured claimant and 'a pattern of similar conduct directed at the public

generally' ". *Panasia* (Smith, J, dissenting) (quoting *Rocanova v Equitable Life Assur Socy Of US,* 83 NY 2d 603 (1994). As such, punitive damages are rarely awarded in New York, as the defendant must be shown to have engaged in a fraud on the public. *New York University v Continental Insurance Co*, 87 NY 2d 308 (NY 1995).

(6) *Bi-Economy*, 10 NY 3d 187 (NY 2008).

(7) *See infra*, n 8, regarding attorney's fees.

(8) *Panasia*, 10 NY 3d 200 (NY 2008) (at *3 of uncorrected Court of Appeals publication). But see the dissent's characterisation of consequential damages as a means of "measuring the harm done when a party fails in some non-monetary performance", a term inapplicable to insurance contracts, which are:

"*contracts for the payment of money, [where] the parties have already told us what damages they contemplated; … payment equal to the losses covered by the policy, up to the policy limits*." *Panasia*, 10 NY 3d 200 (NY 2008) (Smith, J, dissenting) (at *4 of dissenting opinion of uncorrected Court of Appeals publication).

(9) In general, and in the absence of a special agreement, an insured cannot recover legal expenses from its insurer where the expenses were incurred in litigation to establish the insured's right to coverage under an insurance policy. *Sukup v State of New York*, 19 NY 2d at 519, 522 (citing *Doyle v Allstate Ins Co*, 1 NY 2d 439; *Manko v City of Buffalo*, 296 NY 905). This principle applies even if the insurer loses the controversy and is held responsible for the coverage. *Id.*

(10) "The claim alleges a 'breach of contract'…in denying coverage under the policy and certain damages which accrued to claimant from this. There was no amendment to the claim to assert bad faith…." *Sukup*, 19 NY 2d at 521.

(11) The Court of Appeals was clear to differentiate bad faith from breach of contract, and further clarified that "[i]t is not a breach of contract per se for a carrier [insurer] to deny that its policy covers a particular event" or to assert non-coverage of a claim. *Sukup*, 19 NY 2d at 521.

(12) *Sukup*, 19 NY 2d at 522.

(13) "The record shows merely an arguable case in which the carrier was held wrong. That is not enough to impose liability beyond the terms of the contract." *Sukup*, 19 NY 2d at 522.

(14) *Bi-Economy*, 10 NY 3d 187 (NY 2008).

(15) *Bi-Economy* (at *3 of uncorrected Court of Appeals publication).

(16) The dissent noted that the majority misunderstood the purpose of business interruption insurance – to "compensate the insured for a business interruption that has already occurred, not to prevent one from occurring. If the insured's business is never interrupted, there can be no claim under a business interruption policy." *Bi-Economy*, 10 NY 3d 187 (Smith, J, dissenting) (at *5 of dissenting opinion of uncorrected Court of Appeals publication).

(17) *Bi-Economy* (at *10-11 of uncorrected Court of Appeals publication).

(18) *Bi-Economy* (at *6 of uncorrected Court of Appeals publication). But see *Bi-Economy*, 10 NY 3d 187(NY 2008) (Smith, J, dissenting, sets forth distinction of the type of policy with the consequential damages claimed) (at *5-6 of dissenting opinion of uncorrected Court of Appeals publication).

(19) The dissent noted that the majority seems "fundamentally to misunderstand the purpose of business interruption insurance – which is to compensate the insured for a business interruption that has already occurred, not to prevent one from occurring." *Bi-Economy*, 10 NY 3d 187 (Smith, J, dissenting, at *5 of uncorrected Court of Appeals publication).

(20) *Bi-Economy* (Smith, J, dissenting) (at *1-3 of dissenting opinion of uncorrected Court of Appeals publication); *Panasia*, 10 NY 3d 200 (NY 2008) (Smith, J, dissenting) (at *1-3 of dissenting opinion of uncorrected Court of Appeals publication).

(21) *Bi-Economy* (at *7 of uncorrected Court of Appeals publication).

(22) *Bi-Economy* (at *1 of dissenting opinion of uncorrected Court of Appeals publication); see also n 29, *infra.*

(23) *Bi-Economy* (at *5-6, 11 of uncorrected Court of Appeals publication) (citing, *inter alia*, *Ashland Mgt v Janien*, 82 NY 2d 395 (NY 1993); Restatement [Second] of Contracts § 351;3 Farnsworth, Contracts § 12.14 (2d ed 1990)). But see n 29, *infra,* regarding the dissent's definition of consequential damages.

(24) *Panasia*.

(25) *Panasia* (at *3 of uncorrected Court of Appeals publication).

(26) *Panasia* (at *3 of uncorrected Court of Appeals publication).

(27) The dissent notes that while *Panasia* did not involve business interruption coverage, the majority nonetheless appeared to uphold the legal sufficiency of Panasia's claim for consequential damages based on a "simple citation to *Bi-Economy*." *Panasia*, 10 NY 3d 200 (NY 2008) (Smith, J, dissenting) (at *5-6 of dissenting opinion of uncorrected Court of Appeals publication).

(28) 19 NY 2d at 520.

(29) See Jeffrey M Winn, "Consequential Damages and Insurance Bad Faith", *New York Law Journal*, February 18 2009; Robin L Cohen and Joseph D Jean, "State Insurer Bad Faith After '*Bi-Economy*' and '*Panasia*'", *New York Law Journal*, March 17 2009.

(30) The dissenting opinions point to several conceptual errors in *Bi-Economy* and *Panasia* in relation to consequential damages and the covenant of good faith and fair dealing.

(31) See generally Section III.B, *infra.* Of particular concern to insurers is that some lower courts are permitting allegations of insurer bad faith to be incorporated into a plaintiff's breach of contract claim. See Section III.B(ii) and (iv), *infra.*

(32) See n 4, *supra,* for a listing of state and federal cases.

(33) See generally Section III.B(i) – (v), *infra.*

(34) See *Quick Response* (citing *Chernish*).

(35) See *OK Petroleum*; *Bunge*; *Handy & Harman*.

(36) See *Quick Response*.

(37) See *De Martino*; see also *Hoffman*.

(38) See *Bunge*; *Hoffman*; *Authelet*; *Handy & Harman*.

(39) See *Quick Response*; *Chernish*.

(40) See *Woodworth*; *Chaffee*; *Stern*; *Savino*; *Bread & Butter, LLC*.

(41) See *Haym*; *Quick Response*; *Chernish*; *Bunge.*

(42) See *Authelet*; *Handy & Harman*.

(43) See *OK Petroleum*; *Simon*.

(44) See *Haym*.

(45) *De Martino* (building owner brought an action against Harleysville under a policy insuring building for the insurer's failure to timely respond to plaintiff's claims and for undervaluing loss sustained from demolition, excavation and construction work performed on building).

(46) *Id*; see also *Hoffman* (court permitted policyholder to amend its complaint to incorporate allegations of bad faith).

(47) See *Hoffman* (court, citing *Bi-Economy/Panasia*, permitted policyholder to incorporate allegations of bad faith into insured's breach of contract claim for Unionmutual's denial of claims under a disability insurance policy); *Authelet*; *Handy & Harman*; *Bunge*.

(48) The *Handy* court cites *Panasia* for the proposition that consequential damages are available to a policyholder for an insurer's failure to properly investigate the insured's loss. The *Handy* court additionally cites *Bi-Economy* for the proposition that consequential damages resulting form the breach of the covenant of good faith may be asserted in an insurance contract context.

(49) *Bi-Economy* (at *7 of uncorrected Court of Appeals publication).

(50) In footnote 4, the court stated that the status of an insured as an assignee, under a insurance policy, does not affect the right of the assignee to seek consequential damages from the insurer. *Quick Response* (at *5 n 4 of uncorrected New York District Court publication).

(51) The court did note in a footnote that while not necessary at the pleading stage, an insured will "ultimately need to make a showing of foreseeability to recover the [consequential] damages." *Quick Response* (at *5 n 5 of uncorrected New York District Court publication).

(52) *Quick Response* (at *5 n 5 of uncorrected New York District Court publication) (citing *Chernish*). The *Quick Response* court cites *Chernish* for the proposition that allegations of the foreseeability of consequential damages are not necessary in the pleading stage. *Id.*

(53) Complaint, ¶¶ 51 – 53.

(54) The survey of cases in this section regarding claims for attorney's fees in connection with bad faith claims of insurers are exclusive of New York's no-fault automobile insurance laws, which contain separate provisions providing for attorney's fees and interest. See *LMK*.

(55) In *Grinshpun v Travelers Casualty Company of Connecticut* the insurer moved to dismiss plaintiffs' bad faith claim and claim for unspecified damages (2009 WL 1025747, at *3 (NY Sup Ct March 11 2009)). The court denied the insurer's motion, citing that under *Sukup* a cause of action to recover legal expenses where an insurer denies a claim in bad faith should be recognized, though the bad faith must rise to the level delineated in *Sukup. Id.* The *Grinshpun* court further categorized *Bi-Economy/Panasia* as showing that an insured is permitted to seek consequential damages that were "within the contemplation of the parties at the time of contracting when an insurer acts in bad faith in disavowing coverage. [These cases] expand the situations in which extra-contractual damages may be sought, but they neither disturb *Sukup*…." *Id* at *4. The court did not find *Bi-Economy/Panasia* on point with the issues in the *Grinshpun* case since plaintiffs did not allege they suffered any other damages as a consequence of the insurer's bad faith refusal to pay their claims. *Id.* Thus, the *Grinshpun* court attempted to reconcile *Sukup* with *Bi-Economy* and *Panasia* by circumscribing the requirement of showing the high level of bad faith articulated in *Sukup* as applying only to claims for legal expenses and not as to other types of consequential damages. *Id.*

(56) *Bi-Economy* (at *10-11 of uncorrected Court of Appeals publication).

(57) *De Martino*.

(58) *Authelet*.

(59) *Bread & Butter, LLC*.

(60) *Chernish*.

(61) *Savino*.

(62) See *OK Petroleum*; *Bunge*; *Handy & Harman*.

(63) *Bi-Economy* (at *6 of uncorrected Court of Appeals publication) (court found that under a business interruption insurance policy, "the purpose of the agreement – what the insured planned to do with its payment – was at the very core of the contract itself").

(64 *Bi-Economy* (at *7 of uncorrected Court of Appeals publication).

(65) *Bi-Economy*; *see also De Martino*.

(66) *Woodworth*.

(67) *Handy & Harman*.

(68) See *Panasia* (court merely cited *Bi-Economy* and did not discuss the foreseeability of consequential damages). See also *Bunge; Stern*; *Bread & Butter, LLC*; *Savino*; *Authelet.*

(69) See *Quick Response*.

(70) *Bi-Economy* (at *7 of uncorrected Court of Appeals publication) (court defined consequential damages as quantifiable).

(71) See *Chernish*.

(72) See *Chaffee*.

(73) See Section III.B, *supra.*

(74) See, eg, *New Jersey Mfrs Ins Co v National Cas Co*, 923 AD 315 (NJ Super Ct App Div 2007).

(75) See *Woodworth* (plaintiff acknowledged that a separate lawsuit in Pennsylvania against insurers for bad faith might have had a better chance of success than in New York).

(76) See *Beck v Farmers Ins Exch*, 701 P2d 795 (Utah 1985).

(77) See *Bunge*.

(78) See, eg, Massachusetts Gen Laws ch 176D, § 9(d).

(79) *Bi-Economy* (Smith, J, dissenting) (at *1, 2, 3, 6 of dissenting opinion of uncorrected Court of Appeals publication); *Panasia* (Smith, J, dissenting) (at *1, 2, 3, 6 of dissenting opinion of uncorrected Court of Appeals publication).