



NEW YORK'S APPELLATE DIVISION, FIRST DEPARTMENT,  
RULES THAT INSUREDS ARE ENTITLED TO EXTRA-CONTRACTUAL  
DAMAGES AGAINST THEIR INSURER FOR FAILURE TO PAY  
INSURANCE BENEFITS, EVEN ABSENT PROOF OF BAD FAITH.

On February 19, 2008, the New York Court of Appeals issued its landmark decisions in Panasia Estates, Inc. v. Hudson Insurance Company and Bi-Economy Market, Inc. v. Harleysville Insurance Company, holding that an insurance carrier that wrongfully delays payment or denies coverage to its insured may be liable for consequential damages or other extra-contractual damages suffered by the insured, even if those damages exceed the coverage limits of the policy. Despite the Court of Appeals's decisions having been predicated on basic principals of contract law, a debate subsequently ensued as to the reach of the Court's decision. The majority of attorneys and commentators commenting on the decisions suggested that the Court's decision to allow consequential damages was limited solely to instances where the insured can prove that the insurer acted in bad faith, as had been alleged by Panasia and Bi-Economy their complaints. On December 15, 2009, the First Department weighed in on the debate and ruled that bad faith is not required.

On a further appeal in the Panasia v. Hudson case (2009 NY Slip Op 09284), the appellate division unanimously ruled that the right to consequential damages is not dependent upon proof of the insurer's bad faith conduct. The issue came before the court on cross-appeals of Panasia's motion to amend its complaint to assert a new cause of action seeking consequential damages for an ordinary, non-bad faith breach of the insurance contract. While the motion court granted the motion to amend the complaint, it contradictorily ruled that the Court of Appeals's decisions in Panasia and Bi-Economy only permitted consequential damages for a bad faith breach of the insurance contract, stating that "[a]dditional damages suffered by an insured as a result of an insurer's excessive delay or improper denial, 'are to be called consequential damages and are triggered solely by a breach of contract in bad faith.'" (emphasis added). However, on appeal, the First Department reversed the motion court's decision and ruled:

Plaintiff is correct in arguing that the motion court erred by stating that consequential damages do not lie for breach of an insurance contract absent bad faith, since the determinative issue is whether such damages were 'within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting.'

Accordingly, bad faith is not a prerequisite to consequential damages, and as long as an insured can establish that the insurer breached the insurance policy (for example by denying a covered loss) and that the insured's consequential damages were within the contemplation of the parties (i.e., reasonably foreseeable), the insured is entitled to an award of consequential damages.<sup>1</sup>

If you have any questions,  
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<sup>1</sup> Michael S. Zicherman, Esq., a partner in Peckar & Abramson's New Jersey office, successfully represented Panasia before the Court of Appeals and in this current appeal before the First Department.