WIGGIN AND DANA *A Newsletter from the Insurance Practice Group at Wiggin and Dana LLP*

INSURANCE NEWS

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We are pleased to share this latest issue of the Wiggin and Dana Insurance Practice Group Newsletter. We circulate this newsletter by e-mail periodically to bring to the attention of our colleagues in the insurance industry reports on recent developments, cases and legislative/regulatory actions of interest, and happenings at Wiggin and Dana. We welcome your comments and questions.

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IN THIS ISSUE

Eight Years after *Bi-Economy* and *Panasia*, What is the Law of Bad Faith in New York?

By Joseph G. Grasso, Wiggin and Dana, and Charles Platto, Law Office of Charles Platto

Prior to 2008, the law of bad faith in New York seemed fairly well established. A claim for bad faith against an insurer, which might give rise to extra contractual compensatory damages, could only be maintained by demonstrating 'gross disregard' to the interests of the policy holder. However, in deciding the *Bi-Economy* and *Panasia* cases in 2008, New York's highest court (the Court of Appeals) appeared to abandon the 'gross disregard' standard and, instead, appeared to hold, in the context of first party claims, that a policyholder can recover consequential damages from an insurer in a coverage dispute, without a showing of bad faith at all.

In the immediate aftermath of these decisions, commentators concluded that it was now a "whole new ball game and there aren't any rules" for insurance coverage disputes in New York. Now, eight years after these decisions were rendered, we have prepared an article reviewing how New York courts have treated the law of bad faith and claims for consequential damages in insurance coverage disputes during that time. Set forth below is a summary of our article.

Our conclusion is that little has changed or been clarified since *Bi-Economy* and *Panasia*. The prior standard for bad faith has not been resurrected, but consequential damages are very rarely awarded. Moreover, the New York courts still seem to require something more than merely demonstrating that the consequential damages were foreseeable by the parties. While policyholders must now show a breach by the insurer of the implied covenant of good faith and fair dealing, the courts have had difficulty reconciling this with the prior standard for bad faith claims or articulating how

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New York Bad Faith Claims CONTINUED

a breach of the implied covenant must be demonstrated. So, we believe it is fair to say that in New York some measure of bad faith must still be shown, and that the bad faith conduct must give rise to consequential damages, but the standard for determining bad faith remains unarticulated.

The New York Court of Appeals acknowledged in *Bi-Economy* and *Panasia* that there is an implied covenant of good faith and fair dealing in every insurance contract, which encompasses the insurer's promise to investigate and pay covered claims in good faith. However, it then appeared to hold that an insured could seek consequential damages in connection with a claim for breach of insurance contract, as a breach of the implied covenant of good faith, without articulating a standard for such breach or a requirement for a showing of bad faith.

The Court in *Bi-Economy* also held that an insured's claim must satisfy certain elements in order to maintain a claim for consequential damages. First, the consequential damages must be reasonably identifiable by the plaintiff. Second, the consequential damages "must have been within the contemplation of the parties at the time the insurance contract was made." To determine whether consequential damages were reasonably contemplated by the parties, courts look to the "nature, purpose and particular circumstances of the contract known by the parties" at the time of execution.

Recent decisions have shown that only when the insured's claim satisfies both of these elements will consequential damages be recoverable against an insurer, but they also seem to require a predicate showing of a breach of the covenant of good faith – again without articulating a standard or necessarily calling it "bad faith." Most of these decisions have arisen in the context of motion practice.

Perhaps because it remains difficult for insureds to recover bad faith/consequential damages in New York, it has been argued that *Bi-Economy* and *Panasia* may also provide for the recovery of attorneys' fees. However, New York courts have for the most part rejected these arguments. Unlike its English counterpart, the American judicial system has the well-established rule that both plaintiff and defendant must pay their own attorneys' fees. The United States Supreme Court has recognized three specific exceptions to this rule that have also been applied in cases interpreting New York law: "(1) when a statute or enforceable contract provides for attorneys' fees; (2) where the prevailing party confers a common benefit upon a class or fund; and (3) when a losing part willfully disobeys a court order or has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons." There is no right to attorneys' fees for an ordinary breach of contract claim under New York law unless the party seeking the fees can establish one of these three exceptions.

Some have argued that *Bi-Economy* and *Panasia* may have added a fourth exception to the rule, i.e., a breach of the duty of good faith and fair dealing by the insurer in a coverage dispute. A handful of lower New York courts have allowed claims for attorneys' fees to proceed, ostensibly based upon this perceived additional exception. However, these decisions run contrary to recent holdings in the both New York appellate courts and courts in other jurisdictions applying New York law, which continue to apply the traditional American rule.

CONCLUSION

Although the legal landscape continues to evolve in the wake of *Bi-Economy* and *Panasia*, the changes wrought by these decisions are not nearly as drastic as many predicted in 2008. However, a few general points can be made. First, it appears that New York, like many other jurisdictions, now has provided a remedy to policyholders for breach of the covenant of good faith and fair dealing in first party coverage disputes. Second, it also appears that instances where insureds recover consequential damages in these disputes remain limited. Lastly, despite a small number of lower court decisions, New York courts and federal courts applying New York law, by and large continue to apply the traditional American rule with respect to attorneys' fees. The anticipated sea change in the wake of *Bi-Economy* and *Panasia* has simply not materialized.

A full version of this article will be published in an upcoming edition of the Insurance Litigation Reporter.

This article was also written with assistance from Sean McAuliffe, Wiggin and Dana Summer Associate, and third year law student at the University of Notre Dame Law School.

FROM
TheCOURTS

Connecticut Supreme Court Holds that Federally Required Insurance for Motor Carriers Does Not Apply to Purely Intrastate Travel

Martinez was a judgment creditor seeking to recover proceeds allegedly due under a commercial motor vehicle insurance policy issued by Empire Fire & Marine Ins. Co. to its insured towing company operating in Connecticut and New York. Martinez had obtained a judgment against the insured for personal injuries she sustained as a result of a motor vehicle accident involving her automobile and a truck operated by an employee of the towing company while en route between the insured's facility in New Haven, CT to a business in Hamden, CT to pick up repair parts to be installed in various tow trucks owned by the company. Pursuant to a federal statute (49 U.S.C. § 31139) governing motor carriers, the towing company was required to maintain minimum levels of financial responsibility to cover its liability arising from its transportation of property in interstate commerce. The policy issued by Empire satisfied that requirement via an endorsement; however, Empire denied responsibility for the towing company's liability claiming that the endorsement applied only to liability arising from interstate transportation and not to any liability for accidents occurring while the truck was on an intrastate trip. The plaintiff claimed that the endorsement covered the towing company's liability for any accident caused by its negligence, or, in the alternative, that if the endorsement applied only to accidents occurring during interstate travel, the accident in which she was injured qualified for coverage because it occurred while the truck was en route to pick up parts that would be installed in the company's tow trucks, which would later move across state lines in interstate commerce.

The trial court granted the defendant's summary judgment motion, concluding that the company's intention to install the repair parts into its vehicles that would subsequently move across state lines did not change the intrastate character of the trip at issue here. The Supreme Court held that the trial court properly granted Empire's motion for summary judgment interpreting federal law and concluded that the endorsement here applied only to liability for accidents involving vehicles traveling in interstate commerce, and there was no genuine dispute that the accident occurred on a trip that was entirely within Connecticut. Therefore, the trip did not qualify as the transportation of property in interstate commerce, as any later movement of the repair parts across state lines after their installation into the company's tow trucks would have been too attenuated from the original journey to be considered part of a practical continuity of movement. Accordingly, the truck was not subject to the financial responsibility requirements on the date of the accident as required by the endorsement. *Martinez v. Empire Fire & Marine Ins. Co.* (SC19390, July 12, 2016) For more information CLICK HERE.

Pennsylvania Superior Court Upholds Coverage B Denial for Peeping Tom and Internet Posting

A group of 37 underlying plaintiffs sued a tanning salon because a third party had videotaped them while using the tanning salon's premises and then posted the

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FROM
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videos online. The plaintiffs claimed that the disclosure of the nude videos caused them humiliation, embarrassment, shame, mental anguish and mental trauma. The underlying negligence action claimed that the tanning salon failed to ensure their safety and failed to secure the premises, leading to the third party's misdeeds. The tanning salon's CGL insurers filed a declaratory judgment action in the Court of Common Pleas, which grated summary judgment for the insurers. On appeal, the court held that the underlying allegations did not trigger coverage under Coverage B of the policy because there was no allegation of personal or advertising injury in the underlying suits. In characterizing the allegations as negligent operation of a business, the court recognized that there was no allegation that the tanning salon took part in making the videos or posting them on the internet. The business did not publish the materials; did not negligently enable the internet posting; nor was it vicariously liable for the third party's actions. Without any claim of invasion of privacy, there was no trigger of coverage. *Penn-American Ins. Co. v. Toni Tomei, Inc., t/a Sunkissed Tanning & Spa*, Case No. 16-0698 (Pa. Super. Ct. May 26, 2016).

Michigan Court of Appeals Finds No Coverage for Faulty Installation of Solar Panels

Mid-Michigan Solar LLC installed solar power systems for a client, which then sued Mid-Michigan alleging that it failed to properly install support posts, threatening the integrity of the unit. Mid-Michigan settled the underlying action but its insurer EMC denied any obligation to defend or indemnify and filed a declaratory judgment action. Under Michigan law, defective workmanship, standing alone, is not the result of an occurrence; thus there was no trigger of coverage. The insurer did not owe coverage in this instance because the underlying action did not allege damage beyond Mid-Michigan's "own work product." *Employers Mutual Cas. Co. v. Mid-Michigan Solar, LLC*, Case No. 325082 (unpublished), Mich. App. April 19, 2016) For more information CLICK HERE.

Health Insurer Cannot Seek Reimbursement from Auto Insurer Under New York Law

New York's highest court ruled that a health insurer does not have standing to seek reimbursement of health care costs from an auto insurer even when a health care provider would have rights to seek payment under the insured's no-fault coverage. Luz Herrera was covered under a health policy issued by Aetna and, simultaneously, under an auto policy issued by Hanover Ins. Co. She was in a car accident and sustained injuries. Herrera received treatment through several health care providers, who sent some of the bills directly to Aetna, which paid the bills and filed a lien against Herrera seeking reimbursement from her in the event she were to recover damages in a personal injury suit against the party responsible for the crash. In reaction to the lien, Herrera filed an arbitration claim against Hanover claiming that she was entitled to no-fault benefits from Hanover. The arbitrators ruled that Herrera lacked standing because the lien had not been satisfied. Herrera assigned her rights against Hanover to Aetna, which sued Hannover for reimbursement. The Court of Appeals ruled that New York state law allows for a policyholder or health care provider that has received an assignment of the insured's rights to seek direct payment from a no-fault auto insurer. Aetna, being neither a policyholder nor a health care provider had no such right.

COMMENTARY – As pointed out by the dissent, Aetna's claim was essentially one for equitable subrogation, which type of claims are not expressly prohibited by the no-fault statutes. We will be interested to follow attempts by health insurers to bring equitable subrogation claims for reimbursement instead of framing the claims as seeking payment as direct assignees of contractual rights. We also note that this ruling may incentivize health insurers to refrain from paying health providers and tell those providers to first seek payment from others. The legislature may wish to address this in the future as it puts a burden on the insured vis-à-vis the lien by the health insurer and/or a burden on the health care provider vis-à-vis the health insurer who does not want to pay because it has no recourse to seek reimbursement as an assignee of the claim. *Aetna Health Plans v. Hanover Ins. Co.*, Case. No. 97 (June 14, 2016) For more information CLICK HERE.

ClientALERT

Tort Liability for Apparent (Not Actual) Agents

By Erika Amarante, Jeffrey Babbin and Robyn Gallagher

In *Cefaratti v. Aranow*, No. SC 19443 (June 14, 2016), the Connecticut Supreme Court resolved a dispute among lower Connecticut courts and recognized tort liability for the acts of an apparent agent. *See* 321 Conn. 593. The Court spelled out the parameters for apparent agency liability in a medical malpractice case. In so doing, the Court expressly overruled a series of Connecticut Appellate Court decisions spanning three decades.

Cefaratti involved a surgeon, Dr. Jonathan Aranow, who had left a surgical sponge in the patient's abdominal cavity during gastric bypass surgery at Middlesex Hospital. The hospital argued that it could not be liable for the surgeon's alleged malpractice because the surgeon, who had hospital privileges, was not the hospital's agent or employee.

To access the remainder of the Client Alert on this development, CLICK HERE.

FROM TheREGULATORS

Property & Casualty

Connecticut has issued a Notice permitting the use of claims-made policy forms for Cyber Liability coverages, which are typically endorsements to general liability or other businessowners' policies. The Notice can be accessed HERE.

Life & Annuities

Continuing the trend of focusing on the asymmetric use of the death master file, Missouri and West Virginia have become the latest states to change laws so that insurers using the files to cut off annuity payments must also use the files to search for beneficiaries of life insurance policies. Both states have enacted laws based on the NCOIL Model Act.

Connecticut has amended Conn. Gen. Stat. 38a-323a to remove the 55 and older age restriction on when an automobile or homeowners insurance policyholder may designate a third party to receive notice of cancellation or nonrenewal from an insurer. Under the new version of the statutes, all policyholders are to be given this option.

Maryland now prohibits insurers from refusing to insurer an individual, or charging a different rate for an individual, solely for reasons associated with the applicant's future lawful travel, with an exception for where there is a bona fide differences in risk exposure have been substantiated by the use of relevant data from at least one independent reliable source; however, the U.S Department of State travel advisories do not qualify as the sole source of data for this purpose. House Bill 803 – Freedom to Travel Act – is effective October 1, 2016.

Individual and Group Policies

The Pennsylvania Insurance Department issued Notice 2016-05 that regulates the notice requirement in individual policies and in group master policies and certificates of coverage so that notice is "sufficiently conspicuous" and states that the insurer complies with applicable federal civil rights laws and does not discriminate on numerous specific bases.

Corporate Governance Disclosure

The trend for reporting of corporate governance disclosures continues. Included in the states that are new in requiring the disclosure are CT, FL, IA, NE, RI and VT. NH and OH have governance disclosure requirements in the pipeline.

About Wiggin and Dana's Insurance Practice Group

The Wiggin and Dana Insurance Practice Group provides international, national and regional insurers, reinsurers, brokers, other professionals and industry trade groups with effective and efficient representation. Our group members regularly advise clients in connection with coverage issues, defense and monitoring of complex claims, regulatory proceedings, policy wordings, internal business practices, and state and federal investigations. We also represent clients in insurance and reinsurance arbitrations. We have broad experience in many substantive areas, including property, commercial general liability, inland and ocean marine, reinsurance, E&O, D&O and other professional liability, environmental, energy and aviation. A more detailed description of the Insurance Practice Group, and biographies of our attorneys, appear at www.wiggin.com.

About Wiggin and Dana LLP

Wiggin and Dana is a full service firm with more than 135 attorneys serving clients domestically and abroad from offices in Connecticut, New York, Philadelphia and Washington, DC. For more information on the firm, visit our website at www.wiggin.com.

AttorneyNOTES

Joe Grasso will be attending the IUMI conference in Genoa, Italy and the IMCC conference in Malahide, Ireland in September.

Michael Menapace participated in the Summer Meeting of the Association of Insurance Compliance Professionals – New England Chapter. Michael was installed as the 2016/2017 Treasurer of the Hartford County Bar Association – the oldest bar association in the United States. IUMI is in Genoa Sept 18-21. IMCC is in Malahide Ireland.

Michael Thompson and **Michael Menapace** participated in the 2016 ARIAS-U.S. Spring Conference.

Michael Thompson attended the IACP one-day conference in New York on June 2nd and will be attending its annual Fall Conference in Sonoma, California in September.