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Insurance News

A Newsletter from the Insurance Practice Group at Wiggin and Dana LLP

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We are pleased to share this latest issue of the Wiggin and Dana Insurance Practice Group Newsletter. Our intent is to 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.

Wiggin and Dana Insurance Practice Group

For more information about our Insurance Practice Group or this newsletter please contact:

Timothy A. Diemand
Hartford
860.297.3738
tdiemand@wiggin.com

Joseph G. Grasso
Philadelphia
215.988.8312
New York
212.490.1700
jgrasso@wiggin.com

Michael Menapace
Hartford
860.297.3733
mmenapace@wiggin.com

New York and Bad Faith: Two Years After *Bi-Economy* and *Panasia*

By Joseph G. Grasso, Rachel Lebejko Priester, Alison Weir, and Charles Platto.[1]

In February 2008, the New York Court of Appeals decided *Bi-Economy Market Inc. v. Harleysville Ins. Co. of New York,* 10 N.Y.3d 187 (Ct. App. 2008) and *Pan Estates, Inc. v. Hudson Ins. Co.,* 10 N.Y.3d 200 (Ct. App. 2008), holding that in certain cases involving first party business interruption and property claims, insurers could be liable for consequential damages - without regard to policy limits - for breach of contractual obligations. These decisions remarkably did not address decades of New York precedent that had established and shaped the law of "bad faith" and extra-contractual damages, based on a required showing of "gross disregard" directed toward the insured.

A. The Decisions

Bi-Economy and *Panasia* interpreted first party business interruption and property policies and the policyholders' claims for damages in excess of policy limits. In each case, the insurer delayed investigating, processing, and making payments on the claim, and each insured incurred additional damages beyond policy limits. The Court found that the insurers breached their contractual obligations and that they were liable for resulting foreseeable consequential damages. But the facially narrow rulings in *Bi-Economy* and *Panasia* raised more questions than they answered. First and foremost, is a finding of bad faith or a breach of the covenant of good faith and fair dealing necessary for an insured to recover damages in excess of policy limits? If so, what standards govern an insurer's conduct and any finding of bad faith? Do these apparently new principles (which may or may not require a finding of bad faith) apply to third party claims such as those resulting from failure to defend or settle, which have always required a finding of bad faith? Are the rules on punitive damages implicated or affected?

Bi-Economy and *Panasia* have been cited a number of times by courts in and outside of New York and have been discussed in numerous secondary sources. Somewhat surprisingly, however, most cases merely note that the decisions exist, and do not interpret or substantively apply the decisions. Perhaps this rather cavalier treatment is a product of the early procedural stages of the cases (such as on motion practice), and we must allow more time for courts to apply the decisions to different factual contexts after evidence has been developed. Or perhaps the lower courts have been reluctant to set, or have had difficulty in setting, new standards in the absence of further guidance from the Court of Appeals.

B. Subsequent Developments

In the thicket of subsequent case law, what is becoming clear is that a party seeking consequential, extracontractual damages must allege a breach of the covenant of good faith and fair dealing. But what action or inaction constitutes such a breach has yet to be settled.

The most significant development occurred late last year in *Panasia* itself. Following the 2008 Court of Appeals decision, Panasia moved to amend its complaint to add a separate cause of action for consequential damages based on breach of contract. The trial court granted the motion, and both sides appealed. The Appellate Division agreed with Panasia

Attorney Notes

As co-chair of the federal practice section of the Hartford County Bar Association, Michael Menapace moderated a CLE panel seminar on The Basics of Federal Practice and will host a seminar in April 2010 on Experts in Federal Court Litigation - From Engagement through Trial.

Timothy A. Diemand and Joseph G. Grasso plan to attend the annual meeting of the Inland Marine Underwriters Association in Williamsburg, VA in May 2010.

Joe Grasso will also attend the biennial seminar of the San Francisco Board of Marine Underwriters in May 2010.

Michael Menapace will attend the ARIAS U.S. Spring Conference in Coronado, CA in May 2010.

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,'" but also held that the motion to amend should not have been granted "since the breach of contract claim that plaintiff sought to add was duplicative of its existing claim for breach of the implied covenant of good faith." 889 N.Y.S.2d 452, 452-53 (1st Dept. 2009). The court took the opportunity to correct the defendant's misperception that the claim was insufficiently pled, noting that "[t]he reference to such damages as 'special' in *Bi-Economy Mkt.* (10 N.Y.3d at 192) was not intended to establish a requirement for specificity in pleading." *Id.* at 453.

While this decision confirms that a separate *cause of action* is not necessary to support a claim for consequential damages, an *allegation* of the breach of the covenant of good faith and fair dealing appears to be necessary. However, in *Simon v. Unum Group,* 2009 WL 2596618 (S.D.N.Y. Aug. 21, 2009), a New York federal court denied a consequential damage claim absent a finding of bad faith.

Based on the decisions to date following *Bi-Economy* and *Panasia*, we offer the following comments on the questions noted above:

1. **Is a finding of bad faith required for extracontractual, consequential damages in excess of policy limits?** The majority in *Bi-Economy* and *Panasia* essentially held in the context of first party property and business interruption coverage that a breach by the carrier of its implied contractual obligations of good faith and fair dealing would give rise to a claim for foreseeable consequential damages without regard to policy limits. An express requirement of that decision is a breach of the covenant of good faith and fair dealing by the insurer. Thus, a mere breach of an express contractual or policy provision, without more, should not be enough to support such a claim. In other words, there must be a finding of a breach of the duty of good faith and fair dealing. This point seems clear, but it immediately gives rise to a second question: Is a breach of the duty of good faith the same as bad faith? We do not know, although we think the answer should be yes. The only decision following *Bi-Economy* and *Panasia* we have found which appears to address this issue is *Simon*, in which the court held that absent bad faith, a delay in processing did not give rise to a claim for consequential damages. 2009 WL 2596618, at *7. While the recent Appellate Division decision in *Panasia* confirms that consequential damages may lie for a breach of the covenant of good faith, it does not reach the question of what is the standard for measuring good faith.

2. **To the extent it appears that at a minimum, Bi-Economy and Panasia require a breach of the duty of good faith and fair dealing to support an award of extra-contractual damages, how is this measured? What is the standard? Is it different from the traditional rules in New York relating to bad faith?** As discussed in our original articles, in a series of cases in the mid nineties, beginning with *Pavia* and including *Soto, Rocanova and NYU v. Continental,*[2] the New York Court of Appeals established a clear standard for bad faith, based on a finding of "gross disregard" for the insured's interests. Whether *Bi-Economy* and *Panasia* measure a breach of the covenant of good faith and fair dealing by this standard or some lesser or different standard remains unclear. Without guidance in *Bi-Economy* and *Panasia* or subsequent cases to date, we think the traditional "gross disregard" standard should apply.

About Wiggin and Dana's Insurance Practice Group

Highly regarded and deeply experienced, 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 defend clients faced with individual lawsuits and class actions-both at trial and on appeal; and 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, and aviation.
A more detailed description of the Insurance Practice Group, and biographies of our attorneys appear at www.wiggin.com.

3. **Do Bi-Economy and Panasia apply to third party coverage, where there was already an established bad faith standard?** In our ABA article in August 2008[3], we said there was no apparent difference between first party and third party contexts. But upon reflection, we would argue that there is. In *Bi-Economy* and *Panasia,* the Court struggled to establish a remedy for extra contractual consequential damages in first party coverage situations, where no such remedy previously existed, while making clear that the decisions were limited to the circumstances of those cases. By contrast, a remedy long has existed under the law of bad faith in the third party coverage context, and *Bi-Economy* and *Panasia* did not address that issue. Courts considering *Bi-Economy/Panasia* in the context of third-party claims, however, have not distinguished third-party claims from first party claims. In *U.S. Fire Insurance Co. v. Bunge North America, Inc.,* 2008 WL 3077074 (D. Kan. Aug. 4, 2008), the court dismissed the plaintiff's bad faith claim as unsupported by an independent tort, but allowed the claim for consequential damages as a result of the breach of the covenant of good faith and fair dealing to proceed. *Id.* at *16. Likewise, in *Handy & Harman v. American International Insurance Group, Inc.,* 2008 N.Y. Slip Op. 32366(U), 2008 WL 3999964 (Sup. Ct. New York Co. Aug. 25, 2008), the court ruled consequential damages "were within the contemplation of the parties as a probable result of the breach at the time of, or prior to, contracting" for liability coverage. The court opined, "[a]n insurer in these circumstances fairly may be supposed to have assumed, when the insurance contract was made, that if it breached its obligations under the contract to make timely investigations in good faith and pay covered claims it would have to respond in damages for damages to plaintiff's business."

4. **Have the rules on punitive damages been affected?** We believe that this is the one question that can be answered firmly: "No." The dissent in *Bi-Economy* and *Panasia* expressed concern that the rules for punitive damages established in *Rocanova* and *New York Univ. v Continental* were being abandoned. However, the majority expressed an intent to allow compensatory, not punitive, damages and that the standards for punitive damages remained intact.

C. Conclusion

With the passing of the two-year anniversary of *Bi-Economy* and *Panasia,* we wondered what has happened in the wake of those seemingly revolutionary decisions. The answer is not much. 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 - but whether New York has abandoned or limited the long-established principles of bad faith and the applicable requirements and standards for awarding punitive damages remains to be seen. We would urge that the courts in New York carefully consider this issue and the questions above in resolving future cases.

[1] Mr. Grasso is a current co-Chair of Wiggin and Dana's National Insurance Practice Group. Ms. Weir is an associate with Wiggin and Dana and Ms. Priester is a former associate who now works at The Hartford; they are both former federal judicial law clerks. Mr. Platto is the principal of The Law Offices of Charles Platto in New York and is Adjunct Professor of Insurance Law and Litigation at Fordham Law School as well as a Vice Chair of the American Bar Association Tort and Insurance Practice Section Insurance Coverage Litigation Committee. He was formerly Chair of the National Insurance Practice Group of Wiggin and Dana LLP. A version of this article appeared in the March 8, 2010 issues of the Insurance Litigation Reporter and another is expected to appear in the summer 2010 newsletter of the Insurance Coverage Litigation Committee of the Tort, Trial & Insurance Practice Section of the American Bar Association.

[2] Pavia v. State Farm Mutual Auto. Ins. Co., 82 N.Y.2d 445 (1993); Rocanova v. Equitable Life Assurance Soc., 83 N.Y.2d 718 (1994); New York Univ. v. Continental Ins. Co., 83 N.Y.2d 603, 615 (1994); Platto, et al "New Developments in the New York Law of Good Faith and Bad Faith," ABA Insurance Coverage Litigation Committee Newsletter, 8 (Summer 2008); Platto, et al. "New York's 'Good Faith' Standard-What Does it Mean for 'Bad Faith'?," 30-6 Ins. Litigation R. 165, 165 (Apr. 23, 2008).

[3] Platto, et al "New Developments in the New York Law of Good Faith and Bad Faith," ABA Insurance Coverage Litigation Committee Newsletter, 12.

From the Courts

The following case summary is taken from the Wiggin and Dana Appellate Practice Group Supreme Court Update. To view the entire Update, click here. If you would like to be added to the Update mailing list, click here.

Shady Grove Orthopedic Associates., P.A. v. Allstate Insurance Co. **(08-1008),** in which the Court found that federal courts could hear class actions asserting statutory interest claims created by New York law notwithstanding New York law forbidding such claims to be tried as class actions.

Under New York Civil Practice Law § 901(b), "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." The issue for the Court in ***Shady Grove Orthopedic Assocs. PA. v. Allstate Insurance Co.,*** was whether Federal Rule of Civil Procedure 23 ("Rule 23") trumped this provision, opening the federal court's doors to class actions asserting New York statutory interest claims that would not be permitted in New York state courts. Five Justices of the Court found that it did. Justice Scalia, joined by the Chief, Stevens, Thomas, and Sotoymayor found that there was a direct and unavoidable conflict between Rule 23 and § 901(b) because both rules answered the same question differently. Rule 23 provides that a class action "may be maintained" if its criteria are met and § 901(b) provides that the same class action "may not be maintained" if it seeks statutory penalties. Because "Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met," Rule 23 governs, unless the Rule exceeded its statutory authority under the Rules Enabling Act, 28 U.S.C. § 2072, which authorized the Court to promulgate rules of procedure for federal courts, provided that those rules "shall not abridge, enlarge, or modify any substantive right."

Scalia (now not joined by Stevens, and so representing only a plurality of the Court), next explained that the analysis of whether a particular Federal Rule exceeds the authorization of the Rules Enabling Act focuses on the nature of the Federal Rule itself, rather than the nature of the state law it supplants, relying heavily on the Court's 1941 decision in *Sibbach v. Wilson.* Under this approach, if a Federal Rule arguably regulates procedure, it survives. Rule 23, which governs only the "manner and means" by which litigants' rights are enforced, passed that test. Justice Stevens parted ways with the plurality on this issue. In his view, the plain language of the Rules Enabling Act states that Federal Rules "shall not abridge, enlarge or modify any substantive right." Therefore, if there is a conflict between a Federal Rule and a state law that is "substantive," the Federal Rule cannot apply. Scalia (joined now only by the Chief and Thomas) admitted that there was "something to" Stevens' textual argument, but argued that stare decisis and pragmatic concerns were paramount as Stevens approach would replace "a single hard question of whether a Federal Rule regulates substance or procedure [with] hundreds of hard questions, forcing federal courts to assess the substantive or procedural character of countless state rules. . ." (Interesting role reversal . . . Stevens arguing plain meaning and Scalia relying on stare decisis!) Stevens would also conclude that a state procedural rule that is "so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy" also must be given effect in federal courts. § 901(b), which facially applies even to claims based on federal or other state law, looked more like a policy judgment about which lawsuits should proceed in a class form in New York courts, rather than a rule aimed at defining the scope of any right or remedy. Therefore, it did not pass Stevens' unique test.

The dissenters, led by Justice Ginsburg, would find no conflict between Rule 23 and § 901(b). In their view, § 901(b) was really intended as a restriction on the availability of statutory damages. There was no reason to read Rule 23, which is focused on the requirements for certification, so broadly as to supplant this limitation on remedy, particularly in light of *Erie's* mandate that federal courts apply state substantive law and federal procedural law. In the end, ***Shady Grove*** will undoubtedly result in numerous state laws aimed at limiting class actions being found inapplicable in federal courts. However, given the nature of the Court's fractured opinion, there is significant room for states to attempt to craft limitations that are framed as restrictions on remedies rather than on the class action device itself.

Connecticut Supreme Court affirms summary judgment in favor of insurer because claims were outside policy period. In *National Waste Associates, LLC v. Travelers Casualty & Surety Co. of America,* 294 Conn. 511 (2010), the Connecticut Supreme Court affirmed and adopted the trial court's decision granting summary judgment in favor of Travelers on a claim that Travelers had breached its contract with its insured by failing to defend or indemnify the insured in an employment action. The Court noted that Travelers' claims made policy was effective from February 15, 2007 to February 15, 2009, and the lawsuit for which the insured sought coverage was brought on May 12, 2007. Travelers noted, however, that the plaintiff in the underlying lawsuit, a former employee of the insured, had claimed wrongful actions by the insured in connection with the plaintiff's pursuit of unemployment benefits in 2005. The policy excluded claims "underlying or alleged in any prior or pending civil, criminal, administrative or regulatory proceeding . . . as of or prior to the applicable [p]rior and [p]ending [p]roceeding [d]ate set forth in [the policy declarations]." The Court referred to Connecticut precedent holding unemployment proceedings are "administrative" and concluded the unemployment proceedings here qualified for the exclusion.

Second Circuit weighs in on insurer's right to name counsel and insured's obligation to protect interest in light of possible claim. In *New York Marine & General Insurance Company v. Lafarge No. Am.,* 2010 U.S. App. LEXIS 5307 (2d Cir. March 15, 2010), the U.S. Second Circuit Court of Appeals reviewed coverage issues relating to a barge that came loose from its moorings during Hurricane Katrina, allegedly contributing to the breach of a levee. The insured, Lafarge, did not own the barge but had a "Transportation Agreement" with the barge's owner for short-term use of it (and of other barges).

On September 9, 2005, shortly after Hurricane Katrina, a Wall Street Journal article questioned whether the specific barge at issue was improperly moored by Lafarge, thus giving rise to the devastation to New Orleans' Lower Ninth Ward. Lafarge retained a national law firm to consider and respond to a potential mass tort action, a second national law firm to conduct a maritime investigation, and a local New Orleans law firm. Lafarge notified its primary liability insurer (New York Marine & General) of the potential claims against Lafarge and told the insurer it had retained one law firm to investigate. Eleven days later, Lafarge informed the primary insurer that it had retained the other two law firms. Pursuant to the policy's "Naming Clause," the insurer responded with the names of six New Orleans law firms on its panel list as approved defense counsel for Lafarage. Lafarge never responded to the list, and the insurer advised Lafarge that it would not pay for three large law firms it had not approved.

Starting in November 2005, actions were filed against Lafarge in what "predictably enlarged and rapidly mutated into litigation of substantial magnitude and complexity," now referred to as the Katrina Barge Litigation. The primary insurer paid the fees of the approved defense counsel and Lafarge's expert fees and costs, exhausting the $5 million primary

policy limit. Lafarge also sued its P&I club (a mutual insurance association), claiming that it was entitled to coverage by that insurer as well.

Lafarge argued that, pursuant to a "protection clause," in the P&I coverage, it had no choice but to retain counsel immediately to protect its (and its insurers') interests in light of the potentially catastrophic exposure it faced. Lafarge also argued that having selected reasonable and capable counsel for its defense, it should not have had to accept potentially less-qualified replacement counsel. The Second Circuit held that Lafarge was entitled to retain counsel to protect its significant, immediate interests, until such time as the insurer offered counsel.

The Second Circuit rejected Lafarge's argument that its P&I club was required to cover the actions, construing the language in the Certificate of Entry not to cover temporary vessels such as the subject barge for which Lafarge only used pursuant to a Transportation Agreement (as opposed to enumerated vessels Lafarge "acquires an insurable interest in . . . through purchase, charter, lease or otherwise"). The Second Circuit held that not only did the structure and language of the P&I club's policy preclude such open-ended coverage, but the undisputed evidence did not support Lafarge's contract interpretation and, indeed, "Lafarge never declared or tendered any premiums for the over 3,000 third-party owned barges that had passed through its terminals for nearly seven years since Lafarge had become a member" of the P&I club. It was only after the commencement of the barge litigation that Lafarge attempted to satisfy at once its declarations and premiums for the thousands of third-party barges that passed through its terminals for the past seven years," a sequence of events that the Second Circuit agreed was "transparently tactical." On this record, even though the particular contractual provision at issue was ambiguous, the Second Circuit affirmed the trial court's grant of summary judgment against Lafarge.

Allegation of intentionally delaying coverage decision, prompting insureds to file suit at their own expense, could state a claim for violation of N.Y. Gen. Bus. Law § 349. In *Wilner v. Allstate Insurance Company,* 893 N.Y.S.2d 208, 2010 N.Y. App. Div. LEXIS 257 (2d Dep't Jan. 12, 2010), the New York Appellate Division considered whether policyholders were compelled to file a suit to protect their interest and the insurer's interest under a subrogation clause of a homeowner's policy. The homeowners allegedly suffered damage to their property due to a storm, and the damage - including felled trees - allegedly spread beyond the homeowners' own property to property owned by the Village of Roslyn (in Long Island). The Village began proceedings against the homeowners for that damage. The homeowners alleged in the coverage action that the insurer refused to make a decision about coverage in a timely manner, so the insureds were forced to bring suit against the Village before the limitations period expired in order to comply with the policy's subrogation provision: "When we pay for any loss, an insured's person's right to recover from anyone else becomes ours up to the amount we have paid. *An insured person must protect these rights and help us enforce them.* You may waive your rights to recover against another person for loss involving the property covered by this policy. This waiver must be in writing prior to the date of loss." (Emphasis added.) The insureds alleged that the insurer's failure to timely notify them of its coverage position was purposeful, thereby forcing the insureds to use their own money to start a lawsuit to protect the insurer's interests, which constituted deceptive consumer-oriented conduct, exposing the insurer to liability under N.Y. Gen. Business Law § 349. The insurer countered that "the insurance policy did not require an insured to file a lawsuit against anyone, and no reasonable policy holder would conclude that it did." In evaluating the pleadings on the insurer's motion to dismiss, the Appellate Division stated that the homeowners had successfully pleaded misleading conduct, could potentially show the conduct was consumer oriented given that the provision was in all of the insurer's policies, and whether the insureds "reasonably" instituted the lawsuit is a question of fact. The court also permitted the plaintiffs' claims

for treble and punitive damages to go forward, granted plaintiffs' motion to compel some discovery related to other claims in connection with the storm that had allegedly caused the plaintiffs' damage, and remanded the case for further proceedings.

Court orders equitable contribution for silicosis litigation defense costs. *Stonewall Ins. Co. v. Travelers Cas. & Sur. Co.,* 2010 U.S. Dist. LEXIS 3 (D. Mass. Jan. 4, 2010). A number of insurer provided liability coverage for Jacksonville Shipyards, Inc., a defendant in silicosis litigation. Plaintiffs-insurers, Stonewall Insurance Company and the Seaton Insurance Company (collectively "S&S"), after an "impasse" in which insurers who agreed to coordinate a strategy for dividing costs could not agree on a method, eventually took control of the entire defense of the litigation on Jacksonville's behalf for all insurers, paying all defense costs. S&S settled with several other insurers as to contribution for defense costs, with certain London insurers objecting to S&S's "leadership" and declining to cooperate. As the court described the underlying silicosis litigation, "The great majority of the complaints for which S&S paid defense costs were sham and fraudulent claims. Before S&S assumed supervision of the defense, the defense costs were grossly excessive and unreasonable. The [defendant] London Insurers do not contest these two facts . . ." The court found that "S&S have conducted their supervision of the silicosis defense in a highly professional manner and they have achieved exceptional results. . . . S&S dramatically reduced the defense costs and the London Insurers do not dispute this favorable outcome . . . [and] benefit[ted] substantially from S&S's successful management of the defense costs." Accordingly, the court ordered the London insurers to pay 30% of the defense costs as their "proper" and equitable share.

Is defective workmanship "property damage" under marine insurance policy? *St. Paul Fire & Marine Ins. Co. v. Sea Quest Int'l, Inc.,* 2009 U.S. Dist. LEXIS 117631 (M.D. Fla. Dec. 17, 2009). Sea Quest engaged Trident Shipworks, Inc., to build a 117-foot luxury yacht. The project did not go smoothly, and Sea Quest ultimately sued Trident for negligence and breach of contract. St. Paul provided a defense to Trident under a Marine General Liability policy, under a reservation of rights. Sea Quest won a judgment against Trident, though recovery was limited to the amount of insurance proceeds, given Trident's declaration of bankruptcy. St. Paul then filed this action, asserting that there was no coverage "under the MGL Policy for the costs of repairing Trident's defective workmanship as the damages awarded to Sea Quest in the Underlying Action are not 'property damage' as such is defined in the policies." Sea Quest asserted that negligent construction is "property damage" under the policies and Florida law, and construction errors such as the ones on this yacht were "neither expected nor intended [and] are an 'occurrence' as that term is defined in the policies as well." Construing Florida law, the court held that "the losses sustained as a consequence of Trident's negligent and faulty workmanship and intentional acts were not covered property damage in contemplation of the MGL policy. Here, Sea Quest succeeded on its claims based on the faulty and incomplete construction of the yacht, but the award made by the court was for the cost of removing and replacing the faulty work and completing the balance of the project, not for damage beyond the faulty workmanship or defective work. In the context of CGL policies employed in the State of Florida, such losses are not 'property damage.'" The court compared the defective workmanship on the yacht to economic losses, where a party to a contract did not get what he bargained for. The court also held that in the event coverage did exist, the operations exclusion would have excluded all loss because it occurred while the yacht was in Trident's "care, custody, or control."

Second Circuit holds Holocaust insurance claims against Italian company preempted by U.S. foreign policy. In the case of *In re Assicurazioni Generali,* 592 F.3d 113 (2d Cir. 2010), the U.S. Second Circuit Court of Appeals affirmed the trial court's judgment that the U.S. Supreme Court decision in *American Insurance Association v. Garamendi,* 539 U.S. 396 (2003), controls and plaintiffs' state law claims were preempted by U.S. foreign policy. The

plaintiffs in *Generali* are "beneficiaries of insurance policies purchased by their ancestors in the years leading up to the Holocaust" from the defendant, an Italian insurance company. According to the complaints, the insurer "betrayed the policyholders by cooperating with the Nazi regime and refusing to pay the beneficiaries of the insurance policies purchased by Jews and other persecuted minorities." In 2000, the German government agreed to set up a fund to compensate Holocaust victims; similar agreements were reached with Austria and France. As part of the agreement, the United States would "submit a statement of interest to the court explaining that 'it would be in the foreign policy interests of the United States for the [German] Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II.'" The United States had similar agreements with France and Austria, but there was no such agreement with Italy. The agreement with Germany also "specified that German Foundation would work with the ICHEIC to handle insurance claims."

The *Generali* plaintiffs argued, *inter alia,* that because there was no similar agreement between the United States and Italy, their state law claims were not preempted. The Second Circuit disagreed, referring to the Supreme Court's decision in *Garamendi* and, in particular, its construction of U.S. foreign policy as intending to have the ICHEIC work to resolve European insurance claims. The Second Circuit also noted that in the *Generali* case itself, the State Department, in 2008 (through the offices of Secretary of State Condoleezza Rice in the Bush administration) and in 2009 (through the offices of Secretary of State Hillary Rodham Clinton in the Obama administration) expressed the government's desire to have the *Generali* claims referred to the ICHEIC. The Second Circuit stated that given the government's expression that the ICHEIC was the exclusive forum for resolving such claims, these plaintiffs could not bring state law claims. Furthermore, the Second Circuit was not moved that the ICHEIC has concluded its work and plaintiffs therefore may have missed their deadlines; "[i]f the ICHEIC door has closed on plaintiffs, it is because they chose to allow it to close."

One plaintiff claimed that his ancestor's policy was cancelled "prior to the Holocaust era." The Second Circuit acknowledged that, if that policy were cancelled during that time frame, the claim would be outside the ICHEIC process. That plaintiff would therefore be allowed to amend, if he could, his complaint to state allegations not subject to the ICHEIC process.

CUIPA and a "general business practice." A Connecticut trial court recently held that the "general business practice" element of an unfair settlement practice claim under the Connecticut Unfair Insurance Practices Act, Conn. Gen. Stat. §38a-816(6) ("CUIPA") requires that a plaintiff prove multiple unfair practices by an insurer against more than one insured. *Dynamic Elec. Contractors, Inc. v. Southport Contracting, Inc.* et al., No. CV-07-5006557, 48 Conn. L. Rptr. No. 17, 600 (Sept. 22, 2009). The court granted the insurer's motion to strike the plaintiff's CUIPA count. The court reasoned that, "[i]n requiring proof that the insurer has engaged in unfair claim settlement practices 'with such frequency as to indicate a general business practice,' the legislature has manifested a clear intent to exempt from coverage under CUIPA isolated instances of insurer misconduct." The court continued that the plaintiff's allegations were limited to how the insurer treated the plaintiff's claims. Despite the fact that the plaintiff alleged claims under four insurance policies, which factual scenario the court noted was different from cases where a plaintiff alleges that an insurer committed several unfair settlement practices against a plaintiff under only one policy of insurance, the court nevertheless held that "the very notion of a 'general business practice' would seem to imply that wrongs against more insureds than a particular plaintiff need be proven." Accordingly, the court struck the CUIPA count because "appropriate factual allegations have not been alleged as to claims involving insureds other than the plaintiff."