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

By Joseph G. Grasso and Charles Platto[1]

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.[2] However, in deciding the *Bi-Economy* and *Panasia cases* on February 19, 2008,[3] 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.

It was in the immediate aftermath of these decisions that we and our colleagues wrote an article commenting on *Bi-Economy* and *Panasia,* in which we concluded that it was now a "whole new ball game and there aren't any rules" for insurance coverage disputes in New York.[4] However, in 2010, when we surveyed the ensuing jurisprudence in New York in a subsequent article, we concluded that little had changed.[5] Now, six years after that review of the legal landscape, we return to this topic and undertake another survey.

The purpose of this article is to review how New York courts have treated the law of bad faith and claims for consequential damages in insurance coverage disputes in the six years since our last article and the eight years since the Court of Appeals' decision in *Bi-Economy* and *Panasia*. Our conclusion remains 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 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 a breach of the implied covenant must be demonstrated. So, we believe it is fair to say that 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.

We will also address the interesting topic of the availability of attorneys' fees, since in this uncertain environment, there has been a growing tendency for

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2. *Pavia v. State Farm Mutual Auto. Ins. Co.,* 626 N.E.2d 24, 26 (N.Y 1993); *See also DiBlasi v. Aetna Life & Cas. Ins. Co.,* 147 A.D.2d 93, 98-99 (N.Y. App. Div. 2d. Dept. 1993) ("the standard is not that of a sinister motive – guilty knowledge – an intent to do harm or deprive another of his just rights and property, but rather, whether the conduct in question constituted a gross disregard of its insured's interests" (internal quotation marks omitted)).

3. *Bi-Economy Market Inc., v. Harleysville Ins. Co. of New York,* 886 N.E.2d 127 (N.Y. 2008); *Panasia Estates, Inc. v. Hudson Ins. Co.,* 886 N.E.2d 135 (N.Y. 2008).

4. Charles Platto, Rachel Lebejko-Preister, and Sujuta Gadkar Wilcox, "New York's 'Good Faith' Standard – What Does it Mean for Bad Faith?," 30-6 Ins. Litigation R. 165, 165 (Apr. 23, 2008).

5. Charles Platto, Joseph Grasso, Rachel Lebejko Priester and Alison Weir, "What is the Law of Bad Faith in New York Two Years Ago after *Bi-Economy* and *Panasia* – Have The Questions Been Answered?," 32-3 Ins. Litigation R. 69 (March 8, 2010).

policyholders to seek attorneys' fees in conjunction with bad faith/consequential damage claims. Recent decisions by the New York courts show that these attempts have been met with limited success.

The Court of Appeals has yet to revisit these issues.

Survey of Decisions Involving Bad Faith/Consequential Damages in Insurance Disputes

The New York Court of Appeals acknowledged in *Bi-Economy* 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."[6] 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.[7] 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. These cases are summarized below.

We begin with federal court decisions which have addressed the issue, applying New York law.

In *Goldmark, Inc. v. Catlin Syndicate Ltd.,* the U.S. District Court for the Eastern District of New York granted the plaintiff leave to amend its complaint, as the plaintiff had failed to plead a claim sufficient to support recovery of consequential damages. In that case, the plaintiff sought recovery for breach of contract arising out of the defendant insurer's failure to pay a claim for theft of nearly $2 million in gold.[8] The plaintiff also brought a claim for consequential damages incurred due to the defendant's allegedly unreasonable delay in investigating that loss.[9] The court unequivocally stated that "New York law limits the availability of consequential damages for breach of an insurance contract to instances where the insurer also breached an implied duty of good faith and fair dealing."[10] The plaintiff argued that in order to recover consequential damages, it need only prove that such damages were reasonably contemplated at the time of execution.[11] The court disagreed, holding that "cases have virtually uniformly held that, after *Panasia Estates* and *Bi-Economy*, a plaintiff cannot sustain a claim for consequential damages without showing that defendants lacked good faith in processing a plaintiff's claim."[12] Therefore, the claim was insufficient as pled to support recovery of consequential damages, and the court, therefore, granted the plaintiff leave to amend its complaint.

The Eastern District reached a similar holding in *Ebrhaimian v. Nationwide Mutual Fire Insurance Company,* this time dismissing the plaintiff's claim for consequential damages against the defendant.[13] The insurance coverage dispute arose after a storm had damaged the plaintiff's home and personal property.[14] The defendant insurer refused to pay for material used in connection with repair work done on the

6. *Orient Overseas Associates v. XL Insurance America Inc.,* 2014 WL 840416, *3 (N.Y. Sup. Ct. N.Y. Co. 2014).
7. *Bi-Economy,* 886 N.E. 2d at 130.
8. *Goldmark, Inc. v. Catlin Syndicate Ltd.,* 2011 WL 743568, *1 (E.D. N.Y. 2011).
9. *Id.*
10. *Id.* at *3.
11. *Id.*
12. *Id.*
13. *Ebrahimian v. Nationwide Mut. Fire Ins. Co.,* 960 F.Supp.2d 405 (E.D. N.Y. 2013).

plaintiff's house, arguing that the work had no demonstrable connection to the storm.[15] The plaintiffs brought suit against the defendant alleging breach of contract and bad faith for failing to indemnify.[16] The court held that "the Plaintiffs do not adequately allege that they suffered any damages as a consequence of the Defendant's alleged bad faith refusal to pay their claims other than the damages associated with the alleged breach of the Policy."[17] The court stated that "at most, the Plaintiffs allege a general disapproval of [the adjuster's] investigation of their claim,"[18] as the plaintiffs admitted that the basis for their claim was that they "just felt that he wasn't doing the right thing with us."[19] The court concluded that this "general disapproval" of an insurer's actions did not support a plaintiff's claim of breach of the implied covenant of good faith and fair dealing necessary to recover consequential damages. Moreover, the plaintiff's general plea for consequential damages in the amount of $1,000,000 lacked the requisite particularity to be considered identifiable.[20] Thus, the court found that "certain issues of fact exist as to the Plaintiff's breach of contract claim," but claims for recovery of consequential damages as a result of that breach failed as a matter of law.[21]

If an insured's claim for consequential damages arising from an insurer's alleged breach of contract rests on an implied breach of the covenant of good faith, courts then apply the *Bi-Economy* tests to determine whether these damages are recoverable. In *Ripka v. Safeco Insurance,* the U.S. District Court for the Northern District of New York dismissed the plaintiff's claims for consequential damages stemming from the defendant insurer's alleged breach of the implied covenant of good faith.[22] In that case, the plumbing leak caused substantial damage to the plaintiff's home and its contents.[23] The plaintiff claimed that the defendant insurer had engaged in a series of delaying tactics "before ultimately failing to pay the claim in full or tender interest for the unsubstantiated delays in payment."[24] The plaintiff sought upwards of $200,000 in consequential damages for the defendant's failure to indemnify. The court dismissed these claims for two reasons under the *Bi-Economy* standard. First, the court held that plaintiff failed to allege that "any such damages were within the parties' contemplation at the time of contracting."[25] The court reasoned that no provision in Homeowner's Policy suggested that special damages would be available in the event of a breach, nor did the plaintiff provide evidence outside of the policy supporting their possible availability.[26] Second, the court held that "even assuming [the plaintiff's] claims for consequential damages were otherwise sufficiently pleaded," the claims lacked "sufficient particularity to identify actual losses."[27] The court reasoned that the plaintiff failed to plead any detail regarding the recovery of consequential damages beyond the dollar amount of $200,000.[28] Thus, the court held that the plaintiff's "general plea for consequential and special damages" must be dismissed as a matter of law.[29]

Courts have generally scrutinized a plaintiff's claim of alleged mutual contemplation of the claimed

14. *Id.* at 407.
15. *Id.* at 411.
16. *Id.* at 412.
17. *Id.* at 416-17.
18. *Id.* at 417.
19. *Ebrahimian,* 960 F.Supp.2d at 417.
20. *Id.* at 418.
21. *Id.*
22. *Ripka v.Safeco Ins.,* 2015 WL 3397961 (N.D. N.Y.).
23. *Id.* at *1.
24. *Id.*
25. *Id.* at *4
26. *Id.*
27. *Id.* at *5
28. *Ripka,* 2015 WL 3397961 at *5.
29. *Id.*

consequential damages through an analysis of the specific facts at play in the case. In *Jane Street Holding, LLC v. Aspen American Insurance Co.*[30], the U.S. District Court for the Southern District of New York dismissed the plaintiff's claim for consequential damages against the defendant insurer, holding that the damages were not contemplated by both parties when the policy was executed. In this case, the defendant denied the plaintiff's insurance claim for flood damage resulting from Superstorm Sandy to a generator located on the basement level of One Manhattan Plaza.[31] The plaintiff claimed consequential damages for the cost of bringing a bad faith action against the defendant.[32] After holding that the conduct of the defendant did not rise to the level of bad faith, the court also dismissed the consequential damages claim.[33] The court stated that the plaintiff's claim was predicated on damages to a generator they bought after entering into the policy with the defendant.[34] Since the plaintiff's claim of consequential damages arose as a result of the loss of the generator, the court reasoned that the parties could not have contemplated damages associated with this loss when they executed the insurance policy.[35] Therefore, the court held that the plaintiff had failed to bring a valid consequential damages claim under *Bi-Economy*, and dismissed the complaint.[36]

The U.S. District Court for the Eastern District of New York used the same analysis to reach a different result in *Sikarevich Family L.P. v. Nationwide Mutual Insurance Co.*[37] In that case, the court held that the allegations of the plaintiff's amended complaint were sufficient to support a claim for consequential damages.[38] The plaintiff alleged that it suffered "loss of business income" as a result of the defendant insurer's bad faith conduct, specifically the insurer's failure to investigate, value, and pay the plaintiff's insurance claim.[39] The plaintiff further alleged that "the damages sustained by the plaintiff as a result of [Nationwide's] wrongful conduct were within the contemplation of the parties herein as the natural and probable result of a breach of [Nationwide's] duties at the time of or prior to the parties renewing the Policy on or about October 12, 2012."[40] The nature of the commercial property insurance policy led the court to conclude that the plaintiff's loss of business income could reasonably have been contemplated by both parties at the time the policy was issued.[41] Therefore, drawing all reasonable inferences in favor of the plaintiff, the court declined to dismiss the plaintiff's request for consequential damages in connection with its breach of contract claim.

The state courts of New York have applied the *Bi-Economy* standard in a similar fashion.

For example, in *Orient Overseas Associates v. XL Insurance America, Inc.,* the Supreme Court in New York County dismissed the plaintiff's claim for consequential damages against the defendant insurer because the plaintiff failed to identify and qualify the alleged harm. The insurance coverage dispute involved the defendant's alleged failure to indemnify after the plaintiff's property was damaged by Superstorm Sandy.[42] The court agreed that *Bi-Economy* and *Panasia* allowed for an insured to pursue a claim for consequential damages based upon an insurer's claimed breach of the implied covenant of good faith inherent in the policy agreement.[43] However, the court stated that "in order to recover

30. *Jane Street Holding, LLC v. Aspen American Ins. Co.,* 2014 WL 28600 (S.D. N.Y. 2014).
31. *Id.* at *3.
32. *Id.* at *11.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Jane Street Holding, LLC,* 2014 WL 28600 at *12.
37. *Sikarevich Family L.P. v. Nationwide Mut. Ins. Co.,* 30 F.Supp.3d 166 (E.D. N.Y. 2014).
38. *Id.* at 173.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Orient Overseas Associates v. XL Ins. America, Inc.,* 2014 WL 840416, *1 (N.Y. Sup. Ct. N.Y. Co. 2014).
43. *Id.* at *2.

consequential damages the harm that occurred beyond the breach of the contract must be proven—thus identifying the consequential damages."[44] Further, "the consequential damages must be quantified in some way."[45] The court held that the plaintiff failed to either identify or quantify the consequential damages sought in their complaint. The court concluded that "had the plaintiff alleged specific loss beyond what is contractually disputed, there may be reasons to allow for consequential damages."[46] However, that was not the case in *Orient*, and the court, therefore, dismissed the claim.

In *Yar-Lo, Inc. v. Travelers Indemnity Co.,* the insured plaintiff brought suit against the defendant insurer, seeking damages related to a sewage flood at its business premises.[47] The plaintiff, a franchise business specializing in the sale of cosmetics, alleged that it suffered $183,435 in lost business income and over $6 million in consequential damages due to the flooding.[48] The plaintiffs appealed the New York Supreme Court's decision to grant the defendant's Motion for Summary Judgment on the ground that the plaintiff's cessation of its business was not directly related to the covered loss as required by its insurance policy.[49] The Appellate Division agreed with the lower court, holding that "no issue of fact exists as to whether the parties contemplated consequential damages in the event that the plaintiff's owner decided to close the business when its operations could have continued."[50] The court reasoned that the plaintiff "failed to adduce any evidence beyond conjecture and speculation that connects its purported loss" to the flooding incident.[51] The court concluded that the plaintiff's claim for consequential damages failed to satisfy the *Bi-Economy* standard, and affirmed the lower court's decision granting the defendant's Motion for Summary Judgment.

In *Mutual Association Administrators, Inc. v. National Union Fire Ins. Co. of Pittsburgh,* the Appellate Division similarly applied the *Bi-Economy* standard to a plaintiff's claim for consequential damages caused by the defendant insurer's breach of its insurance contract.[52] In that case, however, the court found that the plaintiff's complaint satisfied the *Bi-Economy* standard and dismissed the defendant's Motion for Summary Judgment.[53] The plaintiff claimed that the defendant had breached its obligation under the insurance policy to defend and indemnify it in an action commenced in federal court pursuant to the Employee Retirement Income Security Act of 1974 (ERISA).[54] The plaintiff sought consequential damages for "the demise of [the plaintiff] as an operating business]" and "loss of income by [the plaintiff]."[55] The court held that the defendant "failed to establish, prima facie, that it acted in good faith in recommending that the plaintiff accept the settlement offer, and then discontinuing payment of defense costs once the plaintiff rejected the offer."[56] The court reasoned that although the insurance policy contained a provision excluding coverage for 'loss of earnings', "the provision plainly only applies to loss of earnings caused by a covered event under the policy, and does not preclude the recovery of consequential damages caused by [the defendant's] alleged breach of contract."[57] Therefore, the Appellate Division affirmed the lower court's decision to dismiss the defendant's Motion for Summary Judgment.

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44. *Id.* at *4.
45. *Id.*
46. *Id.*
47. *Yar-Lo v. Travelers Indemnity Co.,* 130 A.D.3d 1402 (N.Y. App. Div. 3d. Dept. 2015).
48. *Id.* at 1402.
49. *Id.*
50. *Id.* at 1403.
51. *Id.* at 1404.
52. *Mutual Ass'n Adm'rs, Inc. v. National Union Fire Ins. Co. of Pittsburgh,* 118 A.D.3d 856 (N.Y. App. Div. 2d. Dept. 2014).
53. *Id.* at 858.
54. *Id.* at 857.
55. *Id.*
56. *Id.*
57. *Id.* at 858.

Third Party Claims

Another issue that remains unsettled is how the *Bi-Economy* standard applies to actions involving claims for consequential damages claims brought by third parties. *Bi-Economy* and *Panasia* arose in the context of first party claims. Technically, they did not address the more common bad faith claims that often arise in the context of alleged bad faith refusals to defend or settle.

In *International Rehabilitative Sciences Inc. v. GEICO,* the U.S. District Court for the Western District of New York dismissed a claim by a third party against the defendant insurer, holding that the damages sought by the third party were not in contemplation of the parties at the time the no-fault policy was issued. The plaintiff, a rehabilitation facility, brought suit as the assignee of 154 individuals who had received treatment at the facility.[58] The plaintiff alleged that the defendant failed to pay for durable medical equipment provided to each of the assignors as part of their treatment for injuries sustained in various accidents.[59] Among other claims, the plaintiff sought consequential damages including damages related to loss of revenue and diminution of business value based upon the defendant's alleged failure to make timely payments of the plaintiff's claims.[60] Unlike the insurance contract at issue in *Bi-Economy*, the plaintiff could not point to any provision in GEICO's no-fault insurance policies purporting to cover consequential damages.[61]Moreover, the plaintiff was not a party to the no-fault insurance contracts at issue.[62] Therefore, the court concluded that the plaintiff did not, and could not, allege that consequential damages to third-party payees was contemplated by the parties at the time of the issuance of the policies.[63]

Similarly, in *J. Kokolakis Contracting Corp. v. Evoluation Piping Corp.,* the court dismissed the claims of an additional insured against an insurer for consequential damages, finding it implausible to believe these damages were mutually contemplated by the parties at or prior to the issuance of the policy.[64] The plaintiff, a general contractor, brought suit against a subcontractor's insurer for breach of implied covenant of good faith and fair dealing, based on the insurer's alleged bad faith denial of coverage.[65] The court held that the plaintiff contractor's alleged consequential damages, in excess of two million dollars, could not have been contemplated by the insurer when it issued the policy to the subcontractor.[66] The court reasoned that since the plaintiff did not contract with the insurer, it would be unreasonable to assume that the insurer foresaw the consequential damages allegedly suffered by the plaintiff when the policy was issued.[67]

The Civil Court for the City of New York, Queens County, also rejected the claims of a third-party claimant in *Hunter v. Hereford Insurance Company.*[68] In that case, the plaintiff brought suit against the defendant insurer for insurance bad faith and unfair claim settlement practices following an accident between the plaintiff and the defendant's insured.[69] The plaintiff sought damages for alleged injuries caused by a car accident between the plaintiff and the defendant's insured.[70] When the defendant offered $3,000 to settle the case, the plaintiff deemed the offer insufficient, and filed suit against the defendant, claiming that the insurer was negotiating in bad faith.[71] The court rejected this argument, stating that "in absence of privity, a cause of action may not be

58. *Int'l Rehabilitative Sciences, Inc. v. GEICO,* 2014 WL 6387276, *1 (W.D. N.Y. 2014).
59. *Id.*
60. *Id.* at *2.
61. *Id.* at *3.
62. *Id.* at *4.
63. *Id.*
64. *J. Kokolakis Contracting Corp. v. Evoluation Piping Corp.,* 46 Misc.3d 544 (N.Y. Sup. Ct. Suffolk Co. 2014).
65. *Id.*
66. *Id.* at 551.
67. *Id.*
68. *Hunter v. Hereford Ins. Co.,* 2015 WL 4877682 (N.Y.C. Civ. Ct. Queens Co. 2015).
69. *Id.* at *1.
70. *Id.*

maintained for breach of contract."[72] The court reasoned that "any cause of action against an insurer for 'bad faith' would sound in contract."[73] The court concluded that, as a third party, the plaintiff had no privity with the defendant, and thus would not be able to bring a bad faith claim against the insurer.[74] Therefore, the court dismissed the plaintiff's claims for failure to state a cause of action based on lack of privity.

Attorneys' Fees

Perhaps because it remains difficult for insureds to recover bad faith/ consequential damages, it has been argued that *Bi-Economy* and *Panasia* may also provide for the recovery of attorneys' fees.[75]

Although it has been suggested that *Bi-Economy* and *Panasia* provide a basis for policyholders to recover their attorneys' fees from their insurers in coverage disputes, 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.[76] 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."[77] 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.[78]

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 courts have allowed claims of attorneys' fees to proceed, ostensibly based upon this perceived additional exception.[79] 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. We summarize those cases below.

In *Stein, LLC v. Lawyers Title Insurance Corp.,* the plaintiff had originally brought a claim against the defendant to recover damages for breach of an insurance contract.[80] On appeal, plaintiff challenged the lower court's decision to dismiss the portion of their complaint that sought an award of attorney fees insofar as they were asserted against the defendant.[81] The plaintiff argued that in light of *Bi-Economy* and *Panasia,* an insured may seek consequential damages, including attorney fees, in an affirmative coverage action it brings against its insurer. The Appellate Division disagreed and instead affirmed the lower court's dismissal of the claim, holding that the plaintiff's "contention regarding the award of an attorneys' fee is without merit."[82] The court stated that "nothing in *Bi-Economy* or *Panasia* alters the common-law rule that, absent a contractual or policy

71. *Id.*

72. *Id.* at *2.

73. *Hunter v. Hereford Ins. Co.,* 2015 WL 4877682 at *2.

74. *Id.*

75. Peter A. Halprin and Bruce Strong, "NY's Evolving Acceptance of Policyholder Bad Faith Claims," June 14, 2016, http://www.law360.com/articles/806446/ny-s-evolving-acceptance-of-policyholder-bad-faith-claims.

76. *See Oscar Gruss & Son, Inc. v. Hollander,* 337 F.3d 186, 199 (2d Cir. 2003); *Hooper Assocs., Ltd. V. AGS Computers, Inc.,* 548 N.E.2d 903, 904 (N.Y. 1989).

77. *V.S. Int'l, S.A. v. Boyden World Corp.,* 1993 WL 59399, at *13 (S.D. N.Y. 1993) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 257-59 (1975)).

78. *In re New York Skyline, Inc.,* 471 B.R. 69, 89 (Bankr. S.D. N.Y. 2012).

79. *Richman v. Harleysville Worcester Insurance Co.,* 2010 WL 3783180 (N.Y. Sup. Ct. 2010); *Nisenbuam v. AXA/Equitable Life Insurance Co.,* 2015 WL 10478082 (N.Y. Sup. Ct. 2015); *See also* Peter A. Halprin and Bruce Strong, "NY's Evolving Acceptance of Policyholder Bad Faith Claims," Law360.com, June 14 2016 (available at: http://www.law360.com/articles/806446).

80. *Stein, LLC v. Lawyers Title Insurance,* 100 A.D.3d 622 (N.Y. App. Div. 2d. Dept. 2012).

81. *Id.*

82. *Id.*

provision permitting the recovery of an attorneys' fee, "an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy."[83] Since the documentary evidence proved that no such provision existed in the insurance policy, the court held that the plaintiff's claim was correctly dismissed.[84]

The Appellate Division again rejected the argument that *Bi-Economy* and *Panasia* had altered the traditional common law rule with respect to recovery of attorney fees in *Santoro v. GEICO.*[85] In that case, the defendant appealed from the lower court's decision to deny its motion for summary judgment, which sought to limit the plaintiff's alleged damages to the policy limit of $275,000.[86] The Appellate Division agreed and reversed, thereby granting the defendant's motion.[87] The Court reasoned that:

> "While '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' (*Panasia Estates, Inc. v. Hudson Ins. Co.,* 886 N.E.2d 135 (N.Y. 2008), *the only consequential damages asserted by the plaintiff are an attorneys' fee and costs and disbursements resulting from this affirmative litigation, which are not recoverable.*"

Santoro, 117 A.D.3d at 1028 (emphasis added). Thus, the court emphasized that while *Bi-Economy* and *Panasia* may have changed the rules with respect to consequential damages generally, those two cases have had no effect on the common-law rule concerning attorneys' fees.

Courts in other jurisdictions have similarly held that, under New York law, attorneys' fees generally remain unrecoverable as consequential damages in cases where the insured affirmatively brings an action against its insurer for coverage. For example, in *Wausau Underwriters Insurance Co. v. Danfoss, LLC,* the defendant insured brought counterclaims against the plaintiff insurer, including a claim for attorneys' fees expended in defending against the insurer's breach of contract claims.[88] The defendant premised this counterclaim on three separate legal theories.[89] The U.S. District Court of the Southern District for Florida applied New York state law in this diversity action, and dismissed all three theories in turn.

First, the defendant argued that his claim met one of the exceptions to the general common-law rule with respect to recovery of attorney fees recognized by the U.S. Supreme Court, i.e. that attorneys' fees are only recoverable when the opposing party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[90] The court, however, held that the bad faith exception to the "American Rule" with respect to attorneys' fees did not apply in this case. The court reasoned that in applying the bad faith exception, the "appropriate focus for the court is the conduct of the party in instigating or maintaining the litigation," not the party's business conduct.[91] In *Wassau*, the defendant's counterclaim concerned the plaintiff's alleged breach of contract. Therefore, because the counterclaim was based on the plaintiff's business conduct rather than the plaintiff's conduct in the litigation, the bad faith exception did not apply. Therefore, the defendant "could not recover attorneys' fees under this theory."[92]

Second, the defendant argued that it could

83. *Id.* at 623, quoting *New York Univ. v. Continental Ins. Co.,* 662 N.E.2d 763, 772 (N.Y. 1995).
84. *Id.*
85. *Santoro v. Geico,* 117 A.D.3d 1026 (N.Y. App. Div. 2d. Dept. 2014).
86. *Id.* at 1027.
87. *Id.* at 1028.
88. *Wausau Underwriters Ins. Co. v. Danfoss, LLC,* 2015 WL 9094201 (S.D. Fla. 2015).
89. *Id.* at *13.
90. *Id.* (*quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. at 257-59 (1975)).
91. *Id.*
92. *Id.*

recover attorneys' fees as consequential damages in the context of a first-party insurance coverage dispute. In making that argument, the defendant cited *Bi-Economy* and *Panasia* in support of his theory, claiming that the opinions had expanded the damages recoverable in first-party bad faith insurance claims under New York law.[93] The court disagreed, holding that New York courts "largely have not interpreted *Bi-Economy* and *Panasia* as allowing the recovery of attorneys' fees as consequential damages."[94] In support of this holding, the court cited a number of recent New York cases, including: *Goodfellow v. Allstate Indem. Co.* (finding plaintiff could not recover attorneys' fees, costs, and litigation expenses as a form of consequential damages),[95] *Quick Response Comm. Div. v. Aon Risk Services of Illinois, Inc.,* ("there is abundant authority from New York courts that the general rule is that 'an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy' . . . the Court agrees that this is the current state of the law),[96] *Woodworth v. Erie Ins. Co.* ("nothing in *Bi-Economy* or any post-*Bi-Economy* authority cited by the parties suggests that the New York Court of Appeals intended through its *Bi-Economy* decision to alter in the insurance context the traditional American rule that each party should bear its own attorneys' fees"),[97] and *Santoro v. GEICO* (discussed above). By invoking this line of authority, the *Wassau* court confirmed that in its view, *Bi-Economy* and *Panasia* have not changed the general rule with respect to attorneys' fees in New York.

The third theory put forth by the defendant was that, under *Sukup v. State,*[98] *it could recover attorneys' fees because the dispute involved "more than an arguable difference of opinion between carrier and insured over coverage."*[99] *In Sukup,* the New York Court of Appeals articulated a possible exception to the American Rule with respect to attorneys' fees in cases where an insured makes "a showing of such bad faith in denying coverage that no reasonable carrier would, under the given facts, be expected to assert it."[100] Although *Bi-Economy* and *Panasia* implicitly overruled *Sukup,* an insured may still allege a separate independent tort claim against an insurer, provided that the insurer's conduct rises to the level of egregious bad faith. Here, the court held that the defendant's complaint had inadequately plead the necessary elements of the *Sukup* standard, and therefore dismissed the claim under this theory as well.[101]

It was also the *Sukup* standard, rather than some new exception articulated in *Bi-Economy* or *Panasia,* that drove the court's holding on the issue of recover of attorneys' fees in *Nat'l R.R. Passenger Corp. v. Arch Specialty Ins. Co.*[102] *T*hat case concerned an insurance coverage dispute between Amtrak ("plaintiff") and various insurance companies ("defendants") that arose in the aftermath of Superstorm Sandy.[103] The plaintiff had purchased a number of all-risk property insurance policies from the defendants with a policy period spanning December 2011 to December 2012.[104] While the policies were in effect, Superstorm Sandy made landfall near New York City on October 29, 2012.[105] The storm caused waters of the East and Hudson Rivers to rise and "inundate" the plaintiff's tunnels, damaging various types of equipment.[106] *T*he coverage dispute centered on

93. *Id.*
94. *Wausau Underwriters Ins. Co*., 2015 WL 9094201 at *14.
95. *Goodfellow v. Allstate Indem. Co.,* 2014 WL 7384239, *4 (W.D. N.Y. 2014).
96. *Quick Response Comm. Div. v. Aon Risk Services of Illinois, Inc.,* 2012 WL 6021438, *2 (N.D. N.Y. 2012).
97. *Woodworth v. Erie Ins. Co.,* 2009 WL 1652258, *5 (W.D. N.Y. 2012).
98. *Sukup v. State,* 227 N.E.2d 842 (N.Y. 1967).
99. *Wassau,* 2015 WL 9094201 at *14.
100. *Sukup,* 227 N.E.2d at 844.
101. *Wassau,* 2015 WL 9094201 at *14.
102. *Nat'l R.R. Passenger Corp. v. Arch Specialty Ins. Co.,* 124 F.Supp.3d 264 (S.D. N.Y. 2015).
103. *Id.* at 266.
104. *Id.*
105. *Id.* at 267.
106. *Id.*

"whether the definitions of "flood" in the policies here at issue encompass inundation caused by storm surge."[107] However, the court also took up the defendants' motion to dismiss the plaintiff's demand for consequential damages, which included attorneys' fees.[108]

The court stated that "New York courts have since rejected the argument" that *Bi-Economy* and *Panasia* created a new exception to the common-law rule with respect to attorneys' fees.[109] Nevertheless, the *Amtrak* court allowed the plaintiff's claim for attorneys' fees to go forward, "albeit in a more limited manner," under the exception articulated in *Sukup*.[110] The court reasoned that the plaintiff had alleged that the defendants declined to make interim payments required under the policies for amounts that are "not the subject of reasonable dispute."[111] Therefore, the court allowed the plaintiff's claims for attorneys' fees to go forward, concluding that the insurer's conduct in that case did indeed rise to the level of egregious bad faith. Thus, the case does not signal a shift in New York law, nor does it showcase a new exception to the general rule as to recovery of attorneys' fees. Instead, the decision is based on entirely separate factual grounds, and New York law remains settled in this area.

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,[112] 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.

107. *Id.* at 269.

108. *Nat'l R.R. Passenger Corp.,* 124 F.Supp.3d at 280.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See* William T. Barker and Paul E.B. Glad, "Use of Summary Judgment in Defense of Bad Faith Actions Involving First-Party Insurance," 30 Tort & Ins. L.J. 49-102 (1994).