To Be Argued By:
MICHAEL S. ZICHERMAN

New York County Clerk's Index No. 602472/05

New York Supreme Court

Appellate Division - First Department

PANASIA ESTATES, INC.,

Plaintiff-Respondent,

—against—

HUDSON INSURANCE COMPANY,

Defendant-Appellant.

BRIEF FOR PLAINTIFF -RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court properly held that, under New York law, an insured may recover consequential damages for its insurer's breach of the parties' insurance contract.

2. Whether the trial court properly concluded that the insurance policy issued by Defendant-Appellant did not contain an exclusion of consequential damages arising out of a breach of the insurance contract.

PRELIMINARY STATEMENT

The issues before the Court on this appeal are far simpler than one would be led to believe from the appellate brief by Defendant-Appellant, Hudson Insurance Company ("Hudson"). Contrary to the lengthy arguments asserted by Hudson and the litany of inapposite cases it cited, Plaintiff-Respondent, Panasia Estates, Inc. ("Panasia") has not asserted a cause of action for deceptive trade practices, pursuant to General Business Law § 349, or asserted a private cause of action for unfair claim settlement practices under New York Insurance Law § 2601. Panasia concedes that, to date, the Court of Appeals has not recognized such causes of action. Likewise, Panasia has not sought punitive damages to redress Hudson's wrongful conduct. Instead, Panasia merely has asserted a simple cause of action for breach of contract for which it seeks an award of consequential damages, in

addition to its general damages. Claims for consequential damages arising out of an insurer's breach of its insurance contract specifically have been allowed by the decisions of the courts in this Department, as well as the Second Department, and have not been proscribed by any decision of the Court of Appeals.

The trial court properly denied Hudson's motion for partial summary judgment and the court's decision allowing Panasia to seek an award of consequential damages should be affirmed.

COUNTERSTATEMENT OF FACTS

Panasia commenced this action to recover damages it incurred as a direct result of Hudson's wrongful bad faith denial of an insurance claim that Panasia made under the commercial property and builder's risk insurance policy that Hudson issued to it (the "Policy"). (R100).

Panasia procured the insurance from Hudson to cover damage that might occur to certain occupied commercial rental property that it owned, which was in the process of undergoing various renovations and construction. (R21-R22)[1]. During the Policy period, in the summer of 2003, part of the roof of the Property was opened in order to perform some of the construction work. (R22). The

[1] All of the allegations of Plaintiff's complaint were sworn to be true and incorporated into the Affidavit of Heman Mehta, the Managing Agent of Plaintiff, which was submitted in opposition to Hudson's Motion for Partial Summary Judgment. (R100).

contractor performing the renovations and construction temporarily protected the roof opening during the time that work was not being performed. (R22).

During July 9-11, 2003, there was severe inclement weather with high winds and significant rainfall. (R22). Despite the temporary protection of the roof, the inclement weather caused rain to enter the building through the roof opening (R22), resulting in nearly $1.5 million in damage to the property (R101). Upon discovery of the water damage, Panasia promptly notified Hudson of the loss and its claim. (R22). However, Hudson did not send anyone to investigate or adjust the claim until several weeks later. (R22).

Hudson's agent, UTC Risk Management Services ("UTC"), investigated Panasia's claim on or about July 31, 2003. (R22). As alleged by Panaisa in its Complaint, UTC's investigation of the loss and cause of loss at the Property lasted no more than 30 minutes with most of that time being spent on the roof where the water had infiltrated the building and conducted little to no investigation of the interior of the building and the resulting damage caused by the water. (R24-R25, R101). At no time before, during or after UTC's investigation did Hudson or UTC ever ask Panasia to provide any documentation in connection with their determination of the existence of coverage or any documentation to estimate the value of the loss sustained. (R101).

It was clear from the superficial nature of the investigation, the complete lack of time spent determining the cause and extent of the damage and the failure to develop an estimate of the cost to repair/replace the damage, that Hudson never had any intention of paying Panasia's claim under the Policy, but was instead working to develop a basis to deny the claim. (R24-R25, R101). Eventually, three months after UTC investigated the claim, it sent a letter to Panasia, on behalf of Hudson, summarily denying the claim on several baseless pro-forma Policy exclusions, including, (1) wear and tear; (2) Continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of fourteen days or more; (3) the insured's failure to use all reasonable means to save and preserve property from further damage at and after the time of loss; and (4) faulty, inadequate or defective workmanship, repair, construction, renovation, materials, and maintenance, unless they result in a covered cause of loss. (R18-R20, R23). Here, the cause of loss was from water infiltration through the opening in the roof, which is a covered cause of loss under the policy. (R24, R25).

Apparently, Hudson/UTC routinely sends out many denial letters for water infiltration with these very same policy exclusions cited as the bases for the denial because the letter of denial that Hudson/UTC sent to Panasia referred to a policy section/endorsement that was not part of Panasia's Policy, making it reasonably

evident that the denial letter was merely a standard form letter that Hudson/UTC sends out without regard to the factual applicability of the exclusions. (R25). Further, there was absolutely no factual substantiation or findings reported to Panasia to support the bases for denial asserted by Hudson. (R25). Due to Hudson's inexcusable and extensive delay in processing the claim and then its baseless denial of the claim, Panasia was caused to incur damages beyond the direct loss sustained from the inclement weather, including the payment of significant interest on several loans taken out to pay for the repair and replacement costs for the property damage that Hudson refused to cover, as well as payment of higher interest rates and closing costs on the conversion of Panasia's construction financing into permanent financing. (R101-R102). In addition, Panasia lost rents due to its inability to more expeditiously complete the repair work, which too resulted from Hudson's delay in processing the claim and ultimate wrongful disclaimer of coverage. (R101-R102).

Thereafter, Panasia commenced this action against Hudson, wherein it asserted a single cause of action for breach of contract for wrongful bad faith disclaimer of coverage under the Policy. (R21-R26). In order to make itself whole, Panasia sought both general damages and consequential damages. (R26). Hudson filed a motion for partial summary judgment to dismiss the allegations of bad faith and the claim for consequential damages, among other things. Relying

on his Court's binding precedent in Acquista v. New York Life Ins. Co., 285 A.D.2d 73, 730 N.Y.S.2d 272 (1st Dept. 2001), the trial court entered an Order and Decision on July 24, 2006, denying the motion, except to the extent that Panasia sought attorney's fees in connection with the pending action. (R8-R12).

This appeal ensued.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY HELD THAT PANASIA IS ENTITLED TO ASSERT A CLAIM FOR CONSEQUENTIAL DAMAGES ARISING OUT OF HUDSON'S BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING IN ITS INSURANCE CONTRACT.

The primary issue before this Court is whether, under New York law, an insured has the right to obtain consequential damages for an insurer's alleged bad faith denial of the insured's first-party claim. Despite Hudson's assertions to the contrary, it is respectfully submitted that the answer is YES.

Pursuant to the law of this state, all contracts contain an implied covenant of good faith and fair dealing in the course of their performance. See 511 West 232nd Owens Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 746 N.Y.S.2d 131 (2002). This covenant to act in good faith even extends to insurance contracts. See Smith v. General Acc. Ins. Co., 91 N.Y.2d 648, 674 N.Y.S.2d 267 (1998). When an

insurance carrier has breached its duty to act in good faith, the courts of this state have ruled that the insurer may be liable for damages beyond the policy limits (see, e.g., Pavia v. State Farm Ins. Co., 82 N.Y.2d 445, 453, 605 N.Y.S.2d 208 (1993)) and where the insurer's bad faith rises to the level of egregious patterns of tortious conduct directed at the public at large, as well as the individual claimant, the insured even may be entitled to recover punitive damages as well (see Rocanova v. Equitable Life Ass. Soc., 83 N.Y.2d 603, 615, 612 N.Y.S.2d 339 (1994)).

In denying Hudson's motion for partial summary judgment, the trial court correctly relied upon this Court's decision in Acquista v. New York Life Ins. Co., supra, holding that in the context of a first-party insurance claim, an insurer's breach of its insurance contract gives rise to a right of action for consequential damages. In Acquista, this Court reversed the dismissal of the plaintiff's bad faith claim and held that while New York law does not recognize an independent tort cause of action for an insurer's alleged failure to perform its contractual obligations under an insurance policy, the insurer's failure to make payment of benefits under the policy is a breach of contract for which contract damages (including consequential damages) should be awarded. Id. at 78, 730 N.Y.S.2d at 275-276.

The Court recognized that commentators around the country have begun to acknowledge that a fundamental injustice may result if an insured's damages are limited solely to an amount equal to what the insurer was otherwise obligated to pay under the policy plus interest, since it presumes, for example, that the plaintiff has access to an alternative source from which to pay the moneys that the insurer refused to pay and ignores further damages that the insured might incur from being denied the money to which it was entitled. Id. 78-79, 730 N.Y.S.2d at 276. The difficulty with such an approach, as explained by the Court, is that it does not necessarily achieve the goal of contract damages, which are to place the plaintiff in the position he would have been in had the contract been performed. Id. at 79, 730 N.Y.S.2d at 276.

In redressing this problem, the court noted that many courts throughout the country have adopted a tort cause of action for the insurer's bad faith in handling a policyholder's claim and that other courts have merely expanded the scope of contract remedies to encompass more than just the policy limits, so as to include foreseeable money damages beyond the policy limits, consequential damages (even for mental distress or inconvenience), as well as other economic losses. Id. at 79-81, 730 N.Y.S.2d at 276-278.

Declining to adopt a tort-based cause of action, as has been done by numerous other states, this Court instead employed a contract-based approach,

adopting the reasoning and rationale of the Utah Supreme Court in Beck v. Farmers Ins. Exchange, 701 P.2d 795 (1985), which held that:

> [T]here is no reason to limit damages recoverable for breach of a duty to investigate, bargain, and settle claims in good faith to the amount specified in the insurance policy. Nothing inherent in the contract law approach mandates this narrow definition of recoverable damages. Although the policy limits define the amount for which the insurer may be held responsible in performing the contract, they do not define the amount for which it may be liable upon a breach.

Id. at 81, 730 N.Y.S.2d at 278.

Since Acquista, the courts in this Department have consistently cited to the holding in that case with approval and followed it as binding precedent to permit a claim of consequential damages. See Koloski v. Metropolitan Life Ins. Co., 5 Misc.3d 1028(A), 799 N.Y.S.2d 161, 2004 WL 2903626 at *8 (Sup. Ct. 2004) (unpublished disposition) (Citing Acquista with approval for the proposition that where a showing of bad faith is made, a plaintiff can recover "consequential damages beyond the limits of the policy for the claimed breach of contract"); Weisel v. Provident Life and Cas. Ins. Co., 11 Misc.3d 1062(A), 2006 WL 624900 at *4 (Sup. Ct. 2006) (unpublished disposition) (Denying the defendant-insurer's motion to dismiss the insured's claim for consequential damages for the bad faith denial of his disability insurance claim).

The decision in Acquista is consistent with the case law from the other departments, such as the Second Department, which has long held that claims for consequential damages are permissible. See Fleming v. Allstate Ins. Co., 106 A.D.2d 426, 426, 482 N.Y.S.2d 519, 519 (2d Dept. 1984), aff'd 66 N.Y.2d 838, 498 N.Y.S.2d 365 (1985), cert. denied 475 U.S. 1096, 106 S.Ct. 1493, 89 L.Ed.2d 894 (1986) (Affirming the denial of the insurer's motion to dismiss the complaint, the court held that the "complaint alleges a cause of action for breach of contract and, if plaintiffs ultimately prevail, they may recover consequential damages resulting from said breach"); Korona v. State Wide Ins. Co., 122 A.D.2d 120, 121, 504 N.Y.S.2d 514, 514 (2d Dept. 1986) (Holding that the plaintiff pled a cause of action for breach of contract for which "he may recover consequential damages as resulted from the breach of the insurance contract"); Porter v. Allstate Ins. Co., 184 A.D.2d 685, 686, 585, N.Y.S.2d 465 466 (2d Dept. 1992) (Holding that the factual allegations in the complaint set out a cause of action for breach of contract and consequential damages arising from a breach).

Hudson has gone to great lengths to argue that Acquista was wrongly decided by this Court, relying upon the Court of Appeals' decisions in Rocanova v. Equitable Life Ass. Soc., 83 N.Y.2d 603, 612 N.Y.S.2d 339 (1994) and New York University v. Continental Ins. Co., 87 N.Y.2d 308, 639 N.Y.S.2d 283 (1995), as well as a line of non-binding, non-precedential federal district court decisions

(mostly unpublished) that have criticized Acquista as being contrary to New York law as set out in Rocanova and New York University. However, their reliance on Rocanova and New York University for the proposition that an insured cannot obtain consequential damages for the insured's breach of an insurance contract is gravely misplaced. The Court of Appeals in those cases solely ruled that an insured may not assert: (1) an independent tort cause of action for bad faith claim settlement practices; (2) a cause of action for deceptive trade practices, pursuant to General Business Law § 349; (3) a private cause of action for unfair claim settlement practices under New York Insurance Law § 2601; or (4) a claim for punitive damages (absent exceptional circumstances).

Nowhere in either Rocanova or New York University did the Court of Appeals address the issue of consequential damages or breach of contract claims. It does not even appear that the plaintiffs in those cases asserted claims for consequential damages, which would explain why the issue was never raised. However, while the Court of Appeals did not expressly address this issue in Rocanova and New York University, or any other published decision, it did do so inferentially via its affirmance of the Second Department's decision in Fleming v. Allstate Ins. Co., supra, which allowed claims for consequential damages arising out of an insurance carrier's breach of its insurance contract.

Panasia's bad faith allegations are merely supportive of its breach of contract claim and are consonant with the holding in Acquista. If Panasia establishes Hudson's bad faith at trial, Panasia will be entitled to recover consequential damages. Panasia merely seeks to be put in the same position it would have been in had Hudson properly and timely performed under the contract. Accordingly, Panasia's bad faith claim and prayer for consequential damages states a viable cause of action in New York and should not be dismissed.

POINT II

THERE ARE NO SPECIAL PLEADING REQUIREMENTS THAT PANASIA HAS TO SATISFY TO ASSERT A CLAIM FOR CONSEQUENTIAL DAMAGES.

Panasia has set forth sufficient allegations in its complaint to assert a claim for consequential damages due to Hudson's breach of its good faith performance obligations by having unreasonably delayed the adjustment and settlement of Panasia's claim, conducting a grossly superficial investigation of the cause of loss and the extent of the loss, which were geared solely towards establishing a basis for denial of coverage, and then, after further delay, summarily denying the claims without any factual substantiation for the basis of denial. Panasia has sustained substantial damages, beyond just reimbursement for the insurance proceeds that

were not paid. Panasia has incurred additional costs for, among other things, interest, attorney's fees and other costs on the moneys it borrowed to pay for the water damage repairs, extended higher interest rates on its original construction loan and lost rent on its property.[2] (R101-R102).

Hudson, however, speciously argues that despite the liberality with which complaints are to be construed, Panasia has somehow failed to satisfy a necessary pleading standard. Contrary to its assertions, though, consequential damages have no special pleading requirements. Sections 3015 and 3016 of the CPLR set forth those subjects that have special pleading requirements, which include: conditions precedent; corporate status; judgment, decision or determination; signatures on negotiable instruments, licenses to do business; Libel or slander; Fraud or mistake; Separation or divorce; Judgment; Law of foreign country; Sale and delivery of goods or performing of labor or services; Personal injury; Gross negligence or intentional infliction of harm by certain directors, officers or trustees of certain corporations, associations, organizations or trusts. Consequential damages are not among these special pleading subjects.

[2] Whether these or any other damages incurred by Panasia are direct or consequential damages were not argued before the lower court, were not raised on appeal and thus, is not an issue that presently is before this Court.

While Panasia may have to prove at trial that any consequential damages it sustained were either foreseeable or were within the contemplation of the parties at the time that the contract was made, this does not equate to a specific pleading requirement that a plaintiff must factually allege such foreseeability or contemplation in order to first seek consequential damages as part of a breach of contract claim, and none of the cases cited by Hudson alters this reality. The cases cited by Hudson merely hold that a plaintiff must allege sufficient facts to raise a material issue of fact so as to be able to withstand a motion for summary judgment. See Brody Truck Rental, Inc. v. Country Wide Ins. Co., 277 A.D.2d 125, 126, 717 N.Y.S.2d 43, 44 (1st Dept. 2000) (Holding that "no factual issue has been otherwise raised as to whether the parties intended that Truck Rite would be able to recover damages due to lost business and/or profits.");[3] Martin v. Metropolitan Property and Cas. Ins. Co., 238 A.D.2d 389, 390, 656 N.Y.S.2d 318, 319 (2nd Dept. 1997) (Holding that it was disingenuous for the plaintiffs to claim that they were forced into foreclosure by the defendant's alleged failure to pay one month's loss of use benefits). As such, factual assertions of foreseeability or what was contemplated by the parties do not have to be made in the complaint, but may

[3] While the opinion in Brody is far from factually detailed, it appears that the issue before the Court in that case was whether the defendant's policy entitled it to claim consequential losses arising out of the incident, as opposed to a claim for consequential damages arising out of the insurer's breach of the insurance contract, which is a significant distinction.

be adduced or substantiated at anytime during the course of discovery. With respect to the case at bar, the parties are still in the process of completing discovery and thus, a motion for summary judgment on this basis would be premature.

POINT III

THE INSURANCE POLICY ISSUED TO PANASIA BY HUDSON DOES NOT CONTAIN AN EXCLUSION FOR CONSEQUENTIAL DAMAGES.

Hudson's final argument that Panasia is not entitled to consequential damages due to an "explicit" exclusion in the Policy is flawed on several different levels. First, there is no exclusion in Panasia's policy that excludes consequential damages. According to the Reply Affirmation of Frederic Mindlin, the purported "any other consequential loss" exclusion upon which Hudson relies, is contained at section B.4.a.(6) of the Causes of Loss – Special form. (R106). This section is located at page 54 of the Record, and states in pertinent part as follows:

> 4. Special Exclusions
>
> The following provisions apply only to the specified Coverage Forms.
>
> a. **Business Income (And Extra Expenses) Coverage Forms, Business Income (Without Extra Expense) Coverage Form, Or Extra Expense Coverage Form**

We will not pay for:

* * *

(6) Any other consequential loss.

(R54) (Emphasis in original).

It is clear from the above that the exclusion upon which Hudson relies is taken out of context and does not apply to Panasia, since the specific exclusion pertains **solely** to claims made under the specified forms; none of which are part of Panasia's Policy as evidenced from the Policy's Forms and Endorsement List (R29). Further, there is no other provision in the policy that deals with consequential losses. Thus, the purported exclusion for "any other consequential loss" cannot serve as a basis to dismiss Panasia's claim of consequential damages.

More significantly though, even assuming arguendo that the exclusion was part of Panasia's Policy, the exclusion does not bar Panasia's consequential damage claim for a more fundamental reason. The exclusion only applies to claims for "consequential losses" and Panasia is asserting a claim for "consequential damages," not consequential losses. The two concepts on very different and according to Black's Law Dictionary are not synonymous. Black's defines "consequential loss" as "Losses not directly caused by damage, but rather arising from results of such damage." Black's Law Dictionary 306 (6th ed. 1990). "Consequential Damage," on the other hand, is defined as "Such damage, loss or

injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act." Black's Law Dictionary 390 (6th ed. 1990).

As is evident from the above definitions, the significant distinction between the two concepts is that the former is a consequence of damages that were sustained and the other is the consequence of a party's actions. For example, if a historic home burns down, a claim by the insured for the lost business opportunity to use the home as an income producing property by giving tours would be a consequential loss since the lost business opportunity resulted from the fire damage. However, if the lost business opportunity was caused by the insurer's failure to adjust and pay for the fire damage that was covered under the policy (i.e., if the claim was timely and fully paid the business opportunity would not have been lost), this would be a consequential damage, since the lost business opportunity was not caused by the fire, but was a consequence of the insurer's actions or inactions.

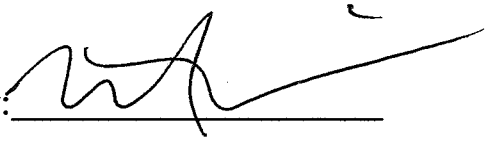
Panasia's claim to Hudson for the water infiltration was merely for the direct costs to repair the water damage to the property and did not seek any consequential losses arising out of the water damage. That direct loss either is payable as a covered loss or not payable if it falls under one of the Policy's exclusions. Conversely, the consequential damages set out in Panasia's complaint

arise out of Hudson's breach of the insurance contract and therefore, are not consequential losses. It is significant to note that despite the numerous provisions setting out the rights and obligations of the parties in connection with asserting a claim and paying claims under the Policy (see, e.g., R71-R73), the Policy is completely devoid of any provision that specifically excludes claims of consequential damages arising out of a breach of the contract, as is often found in many commercial contracts. Despite, Hudson's desire to carve out a special exception in the law of contracts just for insurance companies, an insurance policy is simply a contract, just like any other commercial agreement. Hence, if Hudson wanted to avoid liability for consequential damages arising out of its breach of its insurance contract, all it had to do was to add a simple clause in the Policy specifically stating that it shall not be liable for any consequential damages arising out of or related to its breach of the terms of the policy. Certainly, the inclusion of such a clause would not be an onerous task and the glaring lack of such a provision can only signify that Hudson agreed to be liable for all foreseeable damages arising out its breach of the contract.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the July 24, 2006 Decision and Order of the Supreme Court, New York County, should be affirmed.

Respectfully submitted,

By: 

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NEW YORK SUPREME COURT
APPELLATE DIVISON – FIRST DEPARTMENT

Panasia Estates, Inc vs. Hudson Insurance Company	Index Number: 602472/2005 **AFFIDAVIT OF SERVICE**

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Lyndsay Krenn, being duly sworn, deposes and says: I am not a party to the within action, am over the age of 18 years, and reside in Bergen County, New Jersey.

On February 27, 2007, I served two true copies of the within Opposition Brief on Appeal of Panasia Estates, Inc. upon the following person listed below by enclosing the same in a sealed envelope, via FedEx for overnight delivery and depositing the sealed envelope into the custody of FedEx prior to the latest time designated by Federal Express for overnight delivery:

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Sworn to before me this
27 day of February, 2007

Notary Public

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Notary Public, State of New York
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Qualified in New York County
Commission Expires July 18, 2010

229622

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