

ANDERSON KILL POLICYHOLDER ADVISOR

The Policyholder Law Firm



Two NY Courts Rule That Insurance Companies May Have to Pay Attorneys' Fees

By Rhonda D. Orin and Daniel J. Healy

When is a wrongful coverage denial just a breach of contract — and when is it an act of bad faith? This question is asked by almost every policyholder whose claim is denied.

The next question, typically, is whether insurance companies that acted in bad faith can be required to pay for the attorneys' fees and costs that policyholders are forced to incur in order to redress the wrong.

The good news for policyholders is that courts in New York are increasingly willing to hold insurance companies financially accountable for violations of their obligations of good faith and fair dealing. Under New York law, those obligations are implied in every insurance contract.

In two recent decisions — one federal and one state — courts made clear that attorneys' fees and costs can constitute consequential damages that insurance companies may be obligated to pay.

One particularly important decision on this issue was handed down on July 31 in *National Railroad Passenger Corp. v. Arch Specialty, et al.*, Case No. 14-cv-7510 (S.D.N.Y.) (Rakoff, J.). There, the Southern District of New York

denied, in part, a motion of the insurance companies to dismiss plaintiff's demand for consequential damages. The part of the motion that was denied was the policyholder's demand for attorneys' fees and costs.

The insurance companies had argued — as they usually do and as some New York courts have held — that consequential damages can never encompass attorneys' fees and costs under the American rule.

By denying that part of the motion, therefore, the Southern District made clear that attorneys' fees and costs can in fact constitute consequential damages in New York, pursuant to *Panasia Estates, Inc. v. Hudson Ins. Co.*, 10 N.Y. 3d 200 (2008) and *Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York*, 10 N.Y. 3d 187 (2008).

The Southern District expressly recognized that, in decisions that post-dated *Panasia* and *Bi-Economy*, some "New York courts have since rejected the argument that [Plaintiff] makes here" — that attorneys' fees and costs can constitute consequential damages.

But the Southern District declined to follow those decisions. Instead, it found precedential

Rhonda D. Orin is the managing partner in Anderson Kill's Washington, DC, office. Ms. Orin has recovered millions of dollars for self-funded plans from third-party administrators, stop-loss insurers and others, and also has extensive experience in representing policyholders against insurance companies in traditional coverage disputes.

(202) 416-6549 | rorin@andersonkill.com

Daniel J. Healy is counsel in Anderson Kill's Washington, DC, office and represents policyholders seeking insurance coverage. He has experience obtaining coverage relating to health and welfare benefits, D&O liabilities, business interruptions, property damage, asbestos products and intellectual property disputes.

(202) 416-6547 | dhealy@andersonkill.com

support for awarding attorneys' fees and costs as consequential damages in a 1967 decision of the New York Court of Appeals, captioned *Sukup v. State*, 19 N.Y.2d 519:

"The New York Court of Appeals has suggested that an exception to the general rule prohibiting claims for attorneys' fees may exist when the insured can make 'a showing of such bad faith [on the part of the insurer] in denying coverage that no reasonable carrier would, under the given facts, be expected to assert it."

On this basis, the Southern District held that the policyholder's demand for an award of attorneys' fees and costs as consequential damages was not subject to dismissal.

A state court in New York reached a similar decision on March 10, just a few months earlier. In *Niesenbaum v. AXA/Equitable Life Ins. Co.*, Case No. 2013/600412 (N.Y. Sup. Ct., Nassau Cty), the Supreme Court in Nassau County denied a motion for summary judgment dismissal of a claim for consequential damages. The denial was significant because the only consequential damages at issue were for attorneys' fees and costs.

In refusing to dismiss the demand for consequential damages, the Supreme Court relied on *Panasia* and *Bi-Economy*. The court held that consequential damages may be appropriate because "the defendant failed to establish, *prima facie* that it acted in good faith in finding that the plaintiff was at first disabled, then reversing its finding and disclaiming coverage."

The determination of whether an insurance company has breached its implied obligation of good faith and fair dealing is always fact-specific. The key questions vary, depending on the facts of the case. But the ultimate consideration is whether the insurance company fully and fairly considered the underlying facts before issuing the denial.

Depending on the facts, any number of other questions may arise. Examples include whether it initially approved the claim, then reversed its position without justification; whether it delayed making a decision for an inordinate length of time, waiting for a change of circumstances that would justify a denial.

But the bottom line is that, in New York at least, there is an increased trend in favor of holding insurance companies accountable and giving policyholders a fair shake when they encounter bad faith practices.

A real potential for recovering consequential damages, beyond policy limits, and of recovering attorneys' fees can significantly impact the course of a claim or coverage litigation. It also can increase the chance of avoiding litigation entirely, or of reaching an settlement that ends the litigation once the insurance companies realize that they are on the risk for paying the policyholder's fees. ▲

The authors were counsel to the policyholders in the two cases featured in this alert: National Railroad Passenger Corporation and Niesenbaum.

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estate, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Ventura, CA, Philadelphia, PA, Stamford, CT, Washington, DC, and Newark, NJ.

The information appearing in this article does not constitute legal advice or opinion. Such advice and opinion are provided by the firm only upon engagement with respect to specific factual situations.

©2015 Anderson Kill P.C.