

[Guest Blog: Will New York Ever Become a Bad Faith State?](#)

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As it stands now, New York insureds have few options when they are wrongfully denied coverage or face unjustified delays from their insurers. While New York does regulate the conduct of its insurers through legislation prohibiting “unfair claim settlement practices,”^[1] the applicable statute—Insurance Law § 2601—is without teeth. That is because New York fails to create a cause of action for the victims of those unfair practices.^[2] As a result, insureds are left with little more than a breach of contract action that greatly limits their recoverable damages. For nearly three decades, some New York legislators have been trying to level the playing field. The current proposed bill, S3673/A7102, would amend § 2601 to create a private civil remedy that empowers insureds to recover compensatory and punitive damages, as well as attorney’s fees. This would be a marked improvement for plaintiffs. But as this bill languishes in committee, as all its prior iterations did, New York insureds remain vulnerable to recurrent and calculated refusals to extend coverage.

1. The Current State of the Law

When a New York insured is wrongly denied coverage, she can generally only bring a breach of contract action. Unlike the vast majority of states,^[3] “[t]here is no separate tort for bad faith refusal to comply with an insurance contract.”^[4] And even if the plaintiff attempts to bring a contract and a bad faith claim together, the latter will be dismissed as duplicative.^[5] This limitation on the remedies available to

insureds greatly cabins their recoverable damages. For example, in *Koffler v. Cincinnati Insurance Co.*, the plaintiff sued his insurer for failing to pay benefits and “deliberately undervalue[ing] the amount of the damage” after a fire destroyed his covered building.^[6] Despite that allegation of bad faith, the plaintiff was not entitled to seek attorney’s fees or punitive damages. The Second Department held that these sums are not typically available for breach of contract, which was, of course, the only cause of action available to him.^[7]

The result is that New York insureds can only recover within their policy limits, even after bad faith delays. But in some cases, consequential damages are available after the Court of Appeals’ decision in *Bi-Economy Market v. Harleystown Insurance Co.*^[8] In that case, Bi-Economy sued Harleystown in breach of contract for failure to timely and fully pay its obligations under a property insurance policy.^[9] What the Court of Appeals had to decide was whether Bi-Economy could assert a claim for *consequential* damages even though the policy itself disclaimed liability for “consequential losses.”^[10] A divided court said yes. Specifically, the Court of Appeals held that Bi-Economy could recover its “additional damages as a result of [its] insurer’s excessive delay,” even though that amount could exceed the policy limits.^[11] The provision that excluded “consequential losses” did not bar consequential *damages*, the court reasoned, because it only referred to harm caused by third-party actors.^[12] Harleystown was a party to the contract, and its wrongful withholding of benefits caused Bi-Economy’s extra-contractual damages. While important, the holding in *Bi-Economy* is far from revolutionary. Allowing a plaintiff to recover reasonably foreseeable consequential damages that are not addressed in the contract is hornbook law.

But *Bi-Economy* is still woefully inadequate in practice. Attorney’s fees,^[13] emotional distress damages,^[14] and punitive damages^[15] are generally not recoverable. Attorney’s fees are mere “expenses” in bringing the action, which cannot be recovered without legislative action.^[16] Emotional distress damages are only available in tort. And punitive damages were expressly disallowed in *Bi-Economy*.^[17] So, many insureds are still left without a chance for full recovery. And it is unclear how often consequential damages would be available in the absence of the business interruption coverage seen in *Bi-Economy*.

In some circumstances, New York consumer protection law provides a workaround for insureds. General Business Law § 349 prohibits “deceptive acts or practices in the conduct of any business.”^[18] It also provides plaintiffs with a cause of action if three conditions are met: “(1) the defendant’s conduct was consumer-oriented; (2) the defendant’s act or practice was deceptive or misleading in a material way; and (3) the plaintiff suffered an injury as a result of the deception.”^[19] If a § 349 violation is alleged in conjunction with the underlying breach of contract claim, then the plaintiff can recover attorney’s fees and punitive damages.^[20]

One of the first insurance cases to use § 349 in conjunction with the standards set out in § 2601 was *Riordan v. Nationwide Mut. Fire Ins. Co.*^[21] There, the plaintiffs were suing Nationwide for wrongfully delaying the claims process after a fire destroyed their covered building.^[22] Along with that, they alleged that Nationwide had adopted a policy to frustrate efficient claims handling in cases like their own.^[23] In an order following motions to dismiss, the court held that § 2601, while not a cause of action for any plaintiff, sets the standard for “deceptive business practice[s]” in the insurance industry.^[24] The key strategic choice of the plaintiff was to plausibly allege a “claim settlement policy designed to deceive certain categories of policyholders.”^[25] That allegation served as the basis for a “public injury” worthy of the § 349 remedy.^[26] Beyond this, the Southern District did not discuss the last two prongs of § 349, but the plaintiffs in *Riordan* successfully preserved their § 349 claim.

An insured more recently used this workaround in *PAR Technology Corp. v. Travelers Property Casualty Co. of America*.^[27] In that case, PAR Technology had purchased a CGL policy from Travelers but was wrongly denied coverage and defense from that insurer.^[28] In addition to its breach of contract and bad-faith claims, PAR Technology also alleged a § 349 violation, which the Northern District of New York refused to dismiss.^[29] Travelers’ conduct was “consumer-oriented” because it issued a standard CGL policy throughout the state and the plaintiff alleged recurrent, similar denials of coverage.^[30] This pattern of claim denials meant that the dispute had “the potential to . . . broadly impact[] other consumers.”^[31] And the two other elements of a § 349 claim were easily met in this case. So, where there are at least standard policy terms and a pattern of insurer misconduct, § 349 can offer one avenue

towards full recovery.[\[32\]](#) However, this case should be cited to with some hesitation. It is only the Northern District's interpretation of New York state law and, as the cases in footnote 33 show, is not the norm when a § 349 claim appears in an insurance dispute.

The problem with relying on § 349, however, is that insureds often struggle to show the “consumer-oriented” element. Courts tend to categorize these cases as “private contract dispute[s]” that do not affect any larger marketplace.[\[33\]](#) To understand this, *Riordan* and *PAR Technology* are instructive. In both those cases, the plaintiffs were able to allege *patterns* of wrongful conduct that could affect the broader marketplace. Without those hooks, insurance disputes alleging § 349 violations will fail the “consumer-oriented” prong and be dismissed. As a result, the bulk of New York insureds are left with few options.

1. Proposed Legislation

Under § 2601, as written now, there is no private cause of action for bad faith in insurance contracts. Subsection (c) leaves enforcement with the Superintendent for the Department of Financial Services. That is an unfortunate state of affairs, however, since the department's insurance division consistently receives poor ratings.[\[34\]](#)

S3673/A7102 would remove this trap for insureds. The bill would create a cause of action for plaintiffs when an insurer “was not substantially justified” in refusing or delaying payment under the terms of the policy.[\[35\]](#) And it also explicitly permits recovery for attorney's fees and damages in excess of the policy limits, including compensatory, consequential, and punitive damages.[\[36\]](#) While there is a cap on the amount of punitive damages set to two times the covered loss,[\[37\]](#) this legislation would be a marked boon to insureds.

Both versions of the bill have been referred to the insurance committees in the Senate and Assembly, respectively. Since those referrals occurred in early 2025, there has been no action on either version. The Senate bill is sponsored only by Senator Leroy Comrie. The Assembly bill is sponsored by Assemblymembers Rodneyse Bichotte Hermelyn, Vivian Cook, William Colton, Rebecca Seawright, Linda Rosenthal, and Phil Ramos.

1. Conclusion

With no bad faith tort and no statutory cause of action, insured plaintiffs in New York face an uphill battle. The best plaintiffs can hope for is a recovery of consequential damages in line with *Bi-Economy*. In some circumstances, plaintiffs can also supplement their breach of contract actions with § 349 claims. But without evidence that suggests a pattern of unfair claims practices that affect the broader market, these will fail. As a result, New York insureds will be at a clear disadvantage unless the legislature creates a private cause of action with meaningful remedies.

S3673/A7102 would fix these problems, but many similar bills have failed before. Senators and assemblymembers have not responded to requests for comment on the bill. And nothing is likely to move forward until at least January 2026. So, while legislative reform remains difficult, the next few months are an excellent lobbying opportunity.

[1] N.Y. Ins. Law § 2601 (McKinney).

[2] *Violet Realty, Inc. v. Affiliated FM Ins. Co.*, 267 F. Supp. 3d 384, 390 (W.D.N.Y. 2017) (“It is well settled that there is no private right of action under § 2601.”).

[3] See Susan Sullivan & Brett Safford, *Claims Handling Guidelines and Bad-Faith Considerations in the*

Handling of Fidelity Claims, 28 Fidelity L. J. 181, 202-03 (2022).

[4] *Id.*

[5] See *Parisi v. Kingstone Ins. Co.*, 227 A.D.3d 1094, 1096 (N.Y. App. Div. 2024) (“[T]he cause of action alleging bad faith is duplicative of the cause of action alleging breach of contract.”) (quoting *Multani v. Castlepoint Ins. Co.*, 221 A.D.3d 722, 725 (N.Y. App. Div. 2023)).

[6] *Id.* at 841.

[7] *Id.*

[8] 886 N.E.2d 127 (N.Y. 2008).

[9] *Id.* at 129.

[10] *Id.*

[11] *Id.* at 132.

[12] *Id.*

[13] *Santoro v. GEICO*, 117 A.D.3d 1026, 1028 (N.Y. App. Div. 2014) ; *Zelasko Constr. Inc. v. Merchs. Mut. Ins. Co.*, 142 A.D.3d 1328, 1329 (N.Y. App. Div. 2016).

[14] *Brown v. Gov’t Emps. Ins. Co.*, 156 A.D.3d 1087, 1090 (N.Y. App. Div. 2017) (holding that the *Bi-Economy* court “did not implicitly abandon the long-standing rule that damages for emotional distress for breach of contract are available only in certain limited circumstances, such as willful breach accompanied by egregious and abusive behavior”).

[15] *Koffler v. Cincinnati Ins. Co.*, 239 A.D.3d 840, 842 (N.Y. App. Div. 2025).

[16] See *Mighty Midgets v. Centennial Ins. Co.*, 389 N.E.2d 1080, 1085 (N.Y. 1979).

[17] See *Bi-Economy Market*, 886 N.E.2d at 193-94 (explaining why its ruling on consequential damages

was not a departure from precedent disallowing punitive damages).

[18] N.Y. Gen. Bus. Law § 349 (McKinney 2025).

[19] *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 171 N.E.3d 1192, 1197 (N.Y. 2021).

[20] N.Y. Gen. Bus. Law § 349 (McKinney 2025).

[21] 756 F. Supp. 732 (S.D.N.Y. 1990).

[22] *Id.* at 734–36.

[23] *Id.* at 736.

[24] *Id.* at 739.

[25] *Id.*

[26] *Id.*

[27] No. 6:22-cv-1121, 2024 WL 2747823 (N.D.N.Y. May 29, 2024).

[28] *Id.* at *1.

[29] *Id.* at *3.

[30] *Id.* at *4.

[31] *Id.*

[32] See also *Rockefeller Univ. v. Aetna Cas. & Sur. Co.*, 231 A.D.3d 457, 458 (N.Y. App. Ct. 2024) (finding that the defendant’s conduct was “consumer-oriented” because the dispute involved a “standard form policy provided to multiple consumers”).

[33] *Davin v. Plymouth Rock Assurance Co. of New York*, 227 A.D.3d 862, 864 (N.Y. App. Div. 2024) (dismissing a § 349 claim in an automobile insurance dispute); see also *Sakandar v. Am. Trans. Ins. Co.*, 231 A.D.3d 759, 759 (N.Y. App. Div. 2024) (dismissing a § 349 claim in an automobile insurance dispute); see also *Korn v. UNUM Life Ins. Co.*, 277 A.D.2d 355, 356 (N.Y. App. Div. 2000) (dismissing a § 349 claim in a life insurance dispute); see also *New York University v. Continental Ins. Co.*, 662 N.E.2d 763, 766, 770 (N.Y. 1995) (dismissing a § 349 claim in a commercial liability insurance dispute) see also *Zawahir v. Berkshire Life Ins. Co.*, 22 A.D.3d 841, 842 (N.Y. App. Div. 2005) (dismissing a § 349 claim in a disability insurance dispute).

[34] Jerry Theodoru, *2024 Insurance Regulation Report Card*, R Street Inst. (Dec. 12, 2024), <https://www.rstreet.org/research/2024-insurance-regulation-report-card/>.

[35] S.B. 3673, 2025 Leg., 248th Sess. (N.Y. 2025).

[36] *Id.*

[37] *Id.*