COURT OF APPEALS
STATE OF NEW YORK

MONROE COUNTY INDEX NO. 2004-11840
APPELLATE DIVISION INDEX NO. CA 06-00847

Bi-Economy Market, Inc.,

PLAINTIFF-APPELLANT,

-AGAINST-

Harleysville Insurance Co. of New York; Harleysville Group, Inc.; and Harleysville Mutual Insurance Co.,

DEFENDANTS-RESPONDENTS.

BRIEF OF AMICUS CURIAE, UNITED POLICYHOLDERS, IN SUPPORT OF APPELLANT, BI-ECONOMY MARKET, INC.

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STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders is a non-profit corporation founded in 1991 to educate the public, the judiciary, and elected officials on insurance issues and the rights of policyholders. The organization is tax-exempt under §501(c)(3) of the Internal Revenue Code. United Policyholders is funded by donations and grants from individuals, businesses, and foundations and governed by an eight member Board of Directors. United Policyholders operates in New York and nationwide.

While much of its work is aimed at individuals and businesses affected by disasters, United Policyholders actively monitors legal and marketplace developments affecting the interests of all policyholders. United Policyholders publishes free-of-charge materials that give practical guidance on buying coverage and claim issues to property and business owners and advocates, disaster relief personnel, attorneys and adjusters at www.unitedpolicyholders.org. The organization also receives frequent invitations to testify at legislative and other public hearings and to participate in regulatory proceedings on rate and policy issues.

A diverse range of personal and commercial line policyholders throughout the United States regularly communicate their insurance concerns to United Policyholders. In turn, the organization advances policyholders' interests in courts nationwide by filing amicus curiae briefs in cases involving important insurance

principles. United Policyholders advances the shared interest that commercial and personal lines policyholders have in equitable insurance practices. The organization's activities are supported by donated labor and contributions of services and funds.

United Policyholders has filed amicus curiae briefs on behalf of policyholders in more than 225 cases throughout the United States in the past six years. A significant number of those cases have been adjudicated in New York State courts.[1] United Policyholders has filed amicus curiae briefs in numerous cases before the United States Supreme Court.[2] The U.S. Supreme Court cited United Policyholders' amicus curiae brief in Humana, Inc. v. Forsyth, 525 U.S.

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[1] See, e.g., Allstate Ins. Co. v. Gregory Serio, No. 97 CIV-0670 (RCC), United States District Court, Southern New York District; Belt Painting v. TIG, No. 18328100, New York Court of Appeals (reported at 100 N.Y.2d 377, 795 N.E.2d 15, 763 N.Y.S.2d 790 (2003)); A-One Oil Inc. v. The Massachusetts Bay Ins. Co., No. 95-4397, New York Court of Appeals (reported at 92 N.Y.2d 814, 705 N.E.2d 1215, 683 N.Y.S.2d 174 (1998)); American Home Assurance Co. v. Int'l Ins. Co. & Nat'l Cas. Co., No. 12679/91, 20741/90, New York Court of Appeals; Town of Harrison v. Nat'l Union Fire Ins. Co., No. 13167/92, New York Court of Appeals; Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, No. 2000-2300, New York Supreme Court, Appellate Division, 1st Department (reported at 277 A.D.2d 100, 716 N.Y.S.2d 297 (1st Dep't 2000)); A-One Oil Inc. v. The Massachusetts Bay Ins. Co., No. 97-05050, New York Supreme Court, Appellate Division, 2nd Department, (reported at 250 A.D.2d 633, 672 N.Y.S.2d 423 (2nd Dep't 1998)); Stone v. Cont'l Ins. Co., No. 95-11376, New York Supreme Court, Appellate Division, 2nd Department (reported at 234 A.D.2d 282, 650 N.Y.S.2d 772 (2nd Dep't 1996)); Sec. Mut. Life Ins. v. Christopher Dipasquale, No. 601780/98, New York State Appellate Division; American Names Ass'n Inc. v. N.Y. State Dept. of Ins., No. 107185/20, New York Supreme Court, July 2002; Anthoine v. Lord, Bissell & Brook, No. 102420/99, New York Supreme Court; Med. Soc'y of the State of N.Y. v. Gregory Serio, No.11651/01, New York Supreme Court, August 2002; Payton, Dolores v. Aetna/US Healthcare, No. 99/100440, New York Supreme Court.

[2] See, e.g., Philip Morris USA v. Mayola Williams, No. 05-1256, United States Supreme Court (2006); Aetna Health, Inc. v. Juan Davila, Nos. 02-1845 & 03-83, United States Supreme Court (2004); Cont'l Cas. Co. v. Superior Court (Paragon), No. 5101679, United States Supreme Court, Appellate Case #B147084 (2001); FL Aerospace v. Aetna Cas. & Sur. Co., No. 90-289, United States Supreme Court (Sept. 13, 1990); Fuller-Austin Insulation Co., f/b/o Fuller-Austin Asbestos Settlement Trust v. Highlands Insurance Company, No. 06-94, United States Supreme Court (2005).

299 (1999). United Policyholders was the only national consumer organization to submit an amicus curiae brief in the landmark case of State Farm v. Campbell, 538 U.S. 408 (2003).

United Policyholders has a vital interest in ensuring that insurance companies fulfill the promises they make to their policyholders. While insurance companies are in business to earn profit through risk assumption, businesses and individuals rely on insurance to protect property and livelihoods. United Policyholders seeks to prevent insurance companies from shifting risk back to policyholders through schemes that are not authorized by insurance contracts or public policy. The organization works to counterbalance the widely-represented interests of insurance companies by serving as an advocate for large and small policyholders in forums throughout the country.

In the case at bar, United Policyholders seeks to appear as amicus curiae to address certain questions before the Court that are of significance well beyond the application of law to the specific facts of this litigation. These important issues will affect policyholders nationwide. It should be noted that no party to this case has contributed directly or indirectly to the preparation of this brief.[3]

[3] Anderson Kill's subsidiary, Anderson Kill Loss Advisors, has a relationship with several public loss adjusters. None of those adjusters are involved in this case.

NATURE OF THE CASE AND STATEMENT OF THE FACTS

A. United Policyholders Adopts the Statement of Facts as Set Forth by the Policyholder, Bi-Economy.

As to the operative facts, United Policyholders adopts the Statement of Facts of the policyholder, Bi-Economy Market Inc. ("Bi-Economy").

ARGUMENT

I. WHETHER THE INSURANCE COMPANIES ACTED IN BAD FAITH IS IRRELEVANT TO BI-ECONOMY'S RECOVERY OF CONSEQUENTIAL DAMAGES

A. A Party Who Has Suffered Loss as a Result of Contractual Breach Is Entitled to the Full Panoply of Contract Damages, Including Consequential Damages under New York Law

For over a century, New York law has followed the bedrock contract rule that a party to a contract damaged by another party's breach is entitled to be made entirely whole. United States Trust Co. v. O'Brien, 38 N.E. 266, 267 (N.Y. 1894). More specifically, New York adheres to the landmark decision of Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854), which dictates that an aggrieved party can recover the following "consequential" damages for breach of contract: (1) damages that "arise naturally, i.e., according to the usual course of things from such breach itself"; and (2) damages that were reasonably foreseeable at the time the contract was made. See Ashland Mgt. v. Janien, 624 N.E. 2d 1007, 1010 (N.Y. 1993).

B. Consequential Damages Are Recoverable for the Breach of an Insurance Contract Under New York Law

There is no legal or policy reason for New York courts to depart from the Hadley rule when the contract at issue is an insurance policy. New York courts have applied Hadley, and awarded consequential damages, in the specific context before this Court: the breach of an insurance contract. Sabbeth Indus. Ltd. v. Pennsylvania Lumbermens Mut. Ins. Co., 238 A.D.2d 767, 769, 656 N.Y.S.2d 475, 477 (3rd Dep't 1997).

New York courts permit recovery of consequential damages in insurance contract cases under the same circumstances that they permit recovery of consequential damages in any other type of contract case. "To determine those damages which are reasonably contemplated by the parties, 'the nature, recovery purpose and particular circumstances of the contract known by the parties should be considered . . . as well as what liability the [insurance company] fairly may be supposed to have assumed consciously, or to have warranted the [policyholder] reasonably to suppose that it assumed, when the contract was made.'" Sabbeth, 238 A.D.2d at 769, 656 N.Y.S.2d at 477 (quoting Kenford Co. v. County of Erie, 73 N.Y.2d 312, 319, 537 N.E.2d 176, 179, 540 N.Y.S.2d 1, 4 (N.Y. 1989)) (emphasis added) (citations omitted). Bi-Economy, therefore, like any other non-breaching party, need not prove that the insurance companies actually assumed liability for the damages it seeks by stating so in their policy any more than any

other non-breaching party, going back to Hadley, had to show such a "consequential damages" provision in their contract. Such a modification to the rule in Hadley – limiting a policyholder's recovery for breach of an insurance policy to damages expressly assumed in that policy – would entirely eliminate the doctrine of consequential damages, as no insurance company would include such a provision in the policies they draft.

C. The Very Nature of the Business Interruption Insurance Policy at Issue Here Establishes Foreseeability of the Types of Consequential Damages Sought by Bi-Economy

Insurance contracts are fundamentally different from other contracts in that the non-breaching party has no ability to "cover." In other words, there is no possibility that a policyholder, who has suffered a loss, and is wrongfully denied coverage, can purchase substitute coverage for a loss which has already occurred. The insurance company knows that if it breaches the policy, the policyholder will suffer additional damages, such as being out of business for a longer period. Accordingly, as a general matter, consequential damages from a breach of an insurance policy are generally forseeable and arise naturally from the breach. This has been recognized by New York courts.

In Sabbeth, the court concluded that the very purpose and nature of business interruption insurance coverage made the insurance companies aware that a breach of such a policy would cause the consequential damages sought by its

policyholders, or that it was reasonable for the policyholders to suppose that the insurance company assumed that liability because of the type of coverage the policyholder purchased:

> In view of the fact that [the policyholders] maintained business interruption coverage and in view of the specific protection that such coverage provides, we conclude that consequential damages were reasonably foreseeable and within the contemplation of these parties. The very purpose of business interruption coverage would make [the insurance company] aware that if it breached the policy it would be liable to [the policyholders] for damages for the loss of their business as a consequence of its breach or made it possible for [the policyholders] reasonably to suppose that [the insurance company] assume such damages when the contract was made.

Sabbeth, 238 A.D.2d at 769, 656 N.Y.S.2d at 477 (emphasis added); see also Hold Bros, Inc. v. Hartford Fire Ins. Co., 357 F. Supp. 2d 651, 657 (2005); Lava Trading Inc. v. Hartford Fire Ins. Co., 326 F. Supp. 2d 433, 441-42 (2004).

In order to determine which damages were foreseeable, the Sabbeth court relied on long-held principles of New York law and the New York Court of Appeals' decision in Kenford. In Kenford, this Court stated that a court should look to the nature and purpose of a contract, as well as what the policyholder reasonably could have assumed, to determine foreseeability:

> In determining the reasonable contemplation of the parties, the nature, purpose and particular circumstances of the contract known by the parties should be considered, as well as 'what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made.'

Id. at 319, 537 N.E.2d at 179, 540 N.Y.S.2d at 4 (citations omitted). In other words, one looks to the type of insurance to determine whether the parties reasonably foresaw that the policyholder would be put in dire financial straights if the insurance company breached. This Court should also adhere to the holding of Sabbeth by ruling that Bi-Economy can recover consequential damages for the loss of its business for the insurance companies' breach of its Business Interruption insurance contract.

We respectfully ask this Court to examine the nature and purpose of the coverage that was sold to the policyholder in the underlying case. Business Income insurance is designed to do for the policyholder what it would have done had there been no catastrophe, by paying continuing expenses and the profit that would have been earned. See Cytopath Biopsy Lab., Inc. v. United States Fidelity & Guar. Co., 774 N.Y.S.2d 710, 711 (N.Y. Sup. 2004) ("The purpose of business interruption insurance is to indemnify the insured against losses arising from inability to continue normal business operation and function due to the damage sustained as a result of the hazard insured against."); Anchor Toy Corp. v. American Eagle Fire Ins. Co., 155 N.Y.S.2d 600, 602 (N.Y. Sup. 1956) ("[I]t is obvious that the items of recovery would consist of the profits that would have been earned if the business had not been interrupted and the expense of maintaining an organization during the interruption."). Any insurance company

knows, at the time of sale, that if it refuses to pay Business Interruption coverage after a catastrophe, the policyholder, with continuing expenses and no income, will continue to suffer losses and eventually go bankrupt. Policyholders buy Business Income insurance to protect their profits. See Zurich Am. Ins. Co. v. ABM Indus., Inc., No. 01 Civ. 11200, 2006 WL 1293360, at *3 (S.D.N.Y. May 11, 2006) ("Moreover, under [the insurance company's] theory, if all of the WTC tenants immediately relocated to other buildings that [the policyholder] did not service, [the policyholder's] business would remain interrupted, but it would be unable to recover damages under the Business Interruption provision of the Policy, a result the parties could hardly have intended."). Indeed, insurance companies trumpet the purpose of Business Interruption policies in advertising their policies:

> What it pays – In the event of a disaster, a company's business interruption insurance will provide money to continue to meet the payroll, pay rent and utilities and/or finance the move to a new temporary or permanent location. This insurance will also replace lost inventory, wrecked machinery and help with additional expenses such as advertising and letting the world know the company is still in business.

"Business Interruption Insures the Bottom Line," Advertisement of Zurich American Insurance Co., N.Y. Times, Sept. 25, 2006 at ZW6 (emphasis added), attached hereto as Appendix A.

D. Regardless of the Circumstances under Which a Policyholder Can Recover for Bad Faith in New York, Consequential Damages Are Neither Punitive Nor Limited to Cases of Bad Faith

Under New York law, punitive damages are generally not recoverable in claims for breach of contract. Carney v. Memorial Hosp. & Nursing Home of Greene County, 101 A.D.2d 990, 477 N.Y.S.2d 735 (3rd Dep't 1984). Punitive damages may be awarded if "it is necessary to deter the defendant and others like it from engaging in conduct that may be characterized as 'gross' and 'morally reprehensible,' and of 'such wanton dishonesty as to imply a criminal indifference to civil obligation.'" New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 315-16, 639 N.Y.S.2d 283, 287, 662 N.E.2d 763, 767 (1995). This Court stated in New York University, 87 N.Y.2d at 315, 639 N.Y.S.2d at 287, 662 N.E.2d at 767, that "damages arising from the breach of a contract will ordinarily be limited to the contract damages necessary to redress the private wrong, but that punitive damages may be recoverable if necessary to vindicate a public right."

In this case, the insurance companies seek to equate the contract remedy of consequential damages with the punitive damages for bad faith, so as to argue that consequential damages are available only if the policyholder establishes a right to punitive damages. This argument improperly attempts to confuse distinct remedies. Consequential damages are part of the parcel of contract damages available to ensure the non-breaching party is made whole upon a breach of

contract. In contrast, punitive damages are not designed to make the non-breaching party whole, but to deter dishonest conduct. Here, Bi-Economy seeks consequential damages to make it whole. Bi-Economy does not seek punitive damages to punish the insurance companies for acting in bad faith. The insurance companies have highlighted the matter of bad faith as a means of evading the core issue in this case which is their liability for consequential damages due to breach of contract, a remedy that is readily available to Bi-Economy in New York courts.

II. EXCLUSION OF CONSEQUENTIAL LOSS UNDER AN INSURANCE POLICY DOES NOT BAR RECOVERY OF CONSEQUENTIAL DAMAGES

Consequential damages – a remedy for breach of contract – and consequential loss – an element of policy coverage – are wholly separate legal concepts. Although courts may at times use the terms "loss" and "damage" interchangeably in their opinions, see Lava Trading, 326 F. Supp. 2d at 441, these terms embody two separate legal concepts in the context of claims for breach of an insurance contract. See id. at 442 (stating that "[t]he scope of policy coverage and the damages that are recoverable if the insurer breaches the policy are, of course, distinct concepts"); see also Panasia Estates Inc. v. Hudson Ins. Co., 39 A.D.2d 343, 343, 835 N.Y.S.2d 49, 49 (1st Dep't 2007) (holding that "'[c]onsequential loss' and 'consequential damages' are not synonymous"). The Lava Trading court further distinguished consequential damages and consequential loss by noting that

"[p]ayment to an insured for a covered and non-excluded loss is performance under the contract of insurance. Breach of the contract of insurance is an entirely different matter governed by the present day successors to Hadley v. Baxendale . . . ." Lava Trading, 326 F. Supp. 2d at 442.

The insurance companies have taken the position that exclusions in their policies for "consequential loss" bar recovery for consequential damages. Such exclusions limit coverage under a property insurance policy, not liability for breach of the policy. See generally Lava Trading, 326 F. Supp. 2d 434; Hold Bros. Inc., 357 F. Supp. 2d 651. In the insurance market today, there is no specific exclusion for the consequences flowing from an insurance company's deliberate and intentional breach of a policy. Nor could there be. Insurance companies do not have legislative or judicial power to insulate themselves from remedies for their breaches of contract. They can no more bar a policyholder from seeking consequential damages than they can include an exclusion barring a policyholder from seeking a declaratory judgment or a temporary restraining order.

States throughout the Union universally allow claims against insurance companies for consequential damages that result from breach of contract. See Appendix B hereto. Indeed, courts specifically permit policyholders like Bi-Economy to recover the value of their business as a going concern – "death of a company" damages – if it is destroyed by an insurance company's breach. See

Royal College Shop, Inc. v. Northern Ins. Co., 895 F.2d 670, 679 (10th Cir. 1990) ("It is elementary that a business obtains insurance against fire loss for protection and to restore itself to the status quo, i.e., the status before the fire. If a fire should occur, and the insurance company should refuse to pay under the policy, a business could be forced to close down for lack of finances. Furthermore, as the district court stated, it was reasonable for the jury in this case to conclude that the parties to the insurance contract reasonably anticipated that the failure to pay upon the contract following a fire would prevent plaintiffs from restarting their business."); Reichert v. Gen. Ins. Co., 428 P.2d 860, 864 (Cal. App. 1967), vacated on other grounds, 442 P.2d 377 (Cal. 1968) ("Where the owner of a heavily mortgaged motel or other business property suffers a substantial fire loss, the owner may be placed in financial distress, may be unable to meet his mortgage payments, and may be in jeopardy of losing his property and becoming a bankrupt. A major, if not the main, reason why a businessman purchases fire insurance is to guard against such eventualities if his property is damaged by a fire. Certainly, the property owner who purchases fire insurance may reasonably expect that if a fire occurs, the insurance proceeds will be promptly available to protect him from those eventualities. The business of the fire insurer is to provide such protection. Insurers are, of course, chargeable with knowledge of the basic reasons why fire insurance is purchased, and of the likelihood that an improper delay in payment

may result in the very injuries for which the insured sought protection by purchasing the policies.").

As a matter of public policy, interpreting a consequential loss exclusion to bar coverage for the consequences flowing from an insurance company's deliberate and intentional breach of a policy, leading to the death of a company, would deprive New York policyholders of a contract remedy that is universally recognized. It would also ensure that insurance companies dramatically expand their exclusions from coverage to attempt to bar policyholders from seeking and courts from granting the full contractual remedies for breach of contract.

CONCLUSION

For the foregoing reasons, amicus curiae United Policyholders respectfully requests this Court to reverse the decision of the Appellate Division.

Dated: New York, New York
June 19, 2007

Respectfully submitted,

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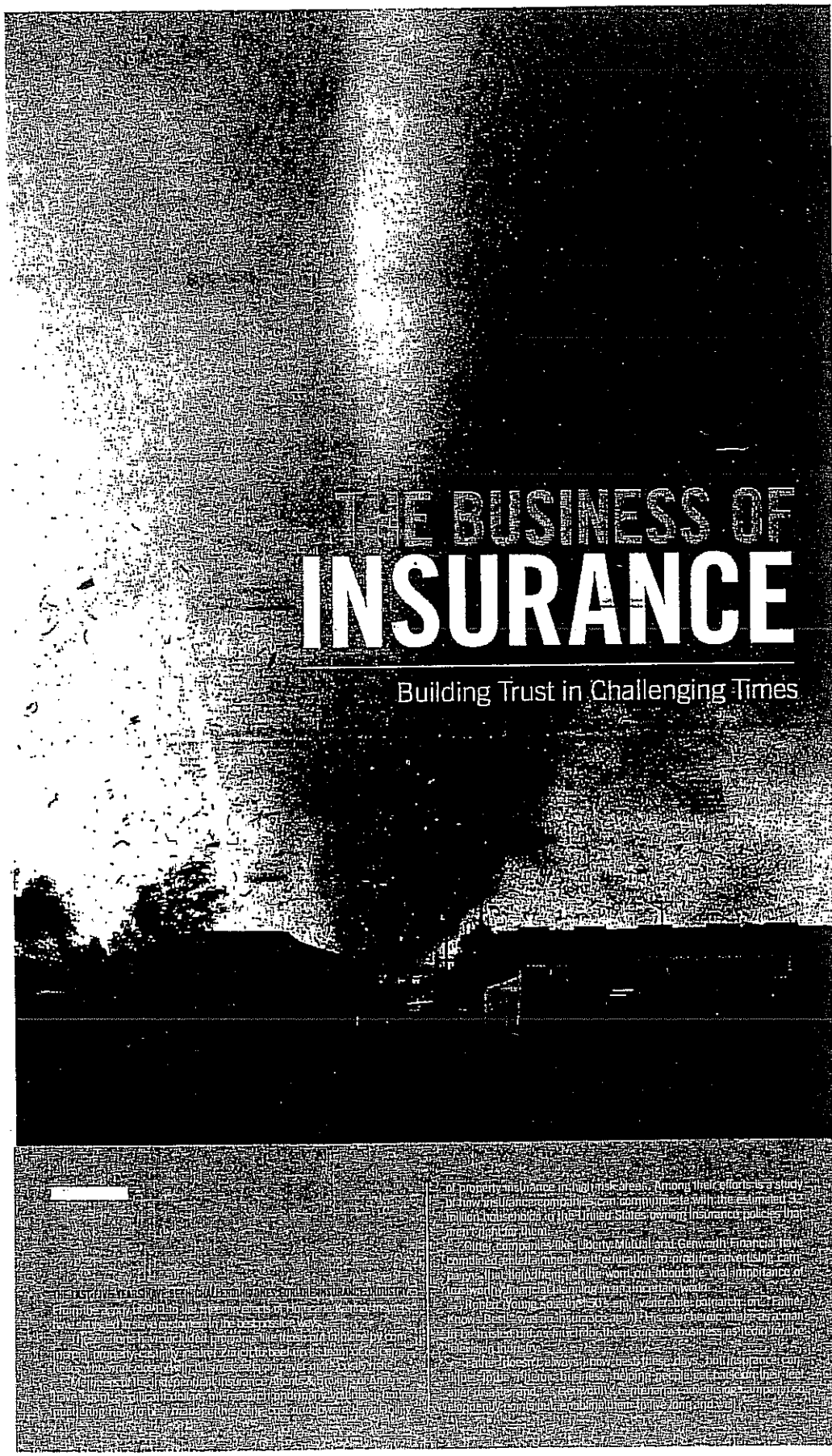
APPENDIX A

A SPECIAL ADVERTISING SUPPLEMENT TO THE NEW YORK TIMES



Financial Challenges Hurt Business

In a world in which the costs of disaster can spike to astronomical highs, insurance companies' sufficient financial capacity to sell products to any business or resident needing them is an increasingly serious issue.

Discussion of this topic dominated an informal meeting of members of the Independent Insurance Agents & Brokers of America, or as it is known in the industry, the Big "I." The meeting was held in June at The New York Times.

"If we were widget salesmen, we'd have to tell customers there are no widgets in the cupboard," complained Alex Soto, an insurance professional at InSource Inc., in Miami, Fla., and president of the Big "I."

In the wake of two successive years of severe hurricanes, insurers have been dropping coverage areas and pulling out of Florida altogether. It is difficult to explain to his customers, mostly homeowners, why insurance is so expensive and, in some cases, difficult to find, Mr. Soto said. "The whole marketplace is in a meltdown," he added.

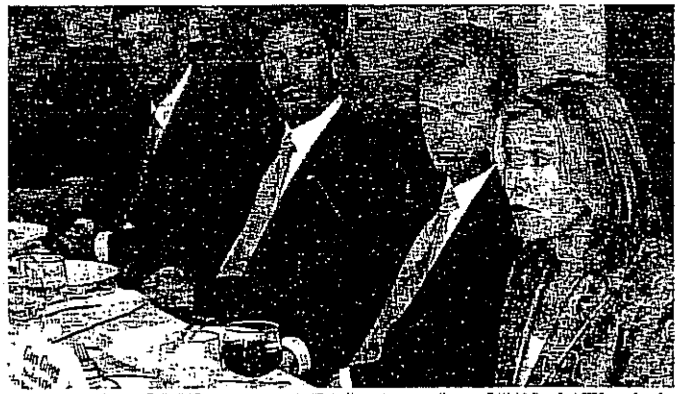
The problem isn't just customers' unwillingness to pay rising insurance rates, explained Gary R. Gregg, C.E.O. of Liberty Mutual Agency Markets. Perception of increased risk is what's driving up insurance costs and reducing its availability, he said.

"The perception is that we're going to have more storms and catastrophes in general, and that affects how much capital insurance companies need. No company can take on an unlimited amount of risk. We have to look at the options for deploying the capital we have, to use it wisely."

This problem isn't unique to Florida and Louisiana, insurers say. Homeowners on Long Island and near the New Jersey shore are faced with similar difficulties, said independent agent Dr. Sharon Emek of CBS Coverage Group in Manhattan.

If Jeanne M. Heisler of The Ronan Agency in Brick, N.J., could persuade her customers to buy federal flood insurance, she believes it would broaden the availability of all homeowners insurance. Insurers would be reassured that they are unlikely to face the sort of lawsuits that flood victims in Louisiana have brought against insurance companies whose policies don't cover floods, and therefore didn't pay claims, in the wake of Hurricane Katrina.

"I have about 2,400 coastal policyholders and only about 25 percent of them have flood insurance. We beg them, but if they aren't sitting on the ocean, they don't want to buy it," Ms. Heisler said.



Members of the IIABA met last June at The New York Times to discuss the increasing difficulty of insuring homeowners and businesses. Right to left: Sharon Emek, CBS Coverage Group; Gary Gregg, president & C.E.O., Liberty Mutual Agency Markets; Steve Spiro, Spiro Risk Management; Tom Van Berkel, president & C.E.O., Main Street America; Jeanne Heisler, The Ronan Agency.

Increasing diversity among her clients adds to the problem of insurance availability, said Sandra K. Lee, of Harold L. Lee & Sons, Inc., based in New York City's Chinatown. "We represent many new immigrants. Their locations and financial challenges combine to make it difficult for them to get insurance."

Members of the insurance industry aren't in agreement over how disaster coverage should be regulated, who should provide oversight and whether the ultimate responsibility for disaster protection should rest with the federal government.

Some in the industry, including those attending this June's roundtable discussion, think the government should stay out of the equation and let the free market bring the problem into balance, while others believe in a private-public partnership to ensure market dislocation doesn't hurt consumers.

"Part of how we got into this mess is allowing so much development in coastal areas," says Tom Van Berkel, C.E.O. of The Main Street America Group. "When you provide federally backed flood coverage, you enable a whole new generation to build along the coast. Does the federal government become the arbiter of where we build our houses?"

Robert Rusbuldt, C.E.O. of the Big "I," concurred. "The free market — the private sector — is always more effective, but we don't always have free markets when it comes to insurance..."

But there might be a potential federal role, according to Bill Mullaney, president of MetLife Auto & Home. "I think that the private insurance market works well. Having said that, there could be mega-events, and we need to have better national planning on how resources get deployed. ■

AGENTS ADAPT TO MARKET CHALLENGES

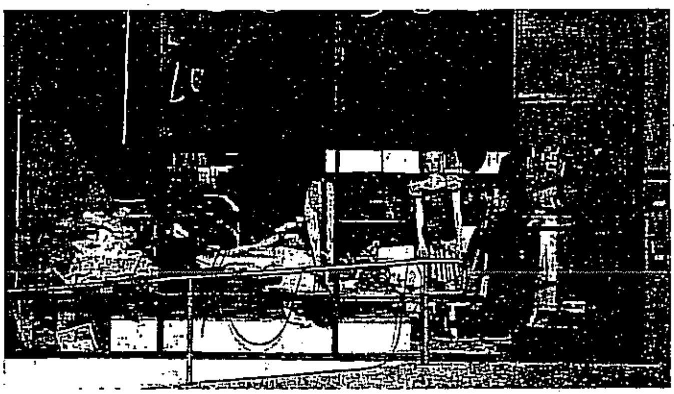
A survey of 450 independent insurance agents, members of the Independent Insurance Agents & Brokers of America (the Big "I") found that [illegible] a reduction in availability of homeowners insurance in certain areas of the country, agents aren't [illegible] concerned that there will soon be fewer insurance companies to underwrite policies.

■ Half of the surveyed agents, each of whom represented a single agency, said they regularly work with three or four primary insurance carriers. [illegible]

■ [illegible] of the agents had customers who experienced losses related to the natural disasters of the last two years. A majority of the agents with disaster experience say that they choose insurers based on the company's fair and timely claims payment as well as the quality of their products. The agents also make an insurance company's ability to understand their markets and customers a deciding factor.

■ About [illegible] percent of agents believe that their best opportunity for growth is in selling business rather than personal insurance, and [illegible] percent of all agents intend to increase their efforts in this area.

■ Agents listed the complexity of using insurance providers' differing computer interfaces as one of their primary challenges. About [illegible] percent of agents said this was their biggest [illegible] challenge facing their growth. Thirty percent mentioned hiring support staff as another serious hurdle. [illegible]



Business Interruption Insures the Bottom Line

After Hurricane Katrina struck New Orleans last year, Zurich, one of the world's largest commercial property-casualty insurers, sent 75 risk engineers to the city to help its customers get back in business.

"It was an eye-opening experience," said James Breitkreitz, vice president of property and boiler and machinery services within Zurich's Risk Engineering division. "It was an opportunity to see firsthand what happened to our customers and have a greater appreciation for what can happen."

There aren't very many businesses out there that neglect having coverage on property or their workers' ability to get the job done well and safely. But a surprising number, and not just in New Orleans, don't bother to insure the real purpose of all their hard work — the profits.

A major industry survey found that 55 percent of businesses have no business interruption income insurance; 63 percent of businesses aren't familiar with this form of insurance.

Business interruption insurance is similar to disability insurance for workers, keeping the money flowing when the operation is out of action. Or as the classic definition of business interruption insurance explains, it's insurance "designed to do for the insured...what the business itself would have done if no interruption had occurred."

After a disaster, an estimated 25 percent of businesses are unable to reopen. As few as one or two weeks of lost income can be enough to close the doors forever.

Business interruption insurance comes in two forms: perils policies, which are limited and cover only disasters listed in the policies. All-risk policies cover a wider variety of disasters, although they often exclude earthquakes and floods — at least without an additional fee.

- **What it pays** — In the event of a disaster, a company's business interruption insurance will provide money to continue to meet the payroll, pay rent and utilities and/or finance the move to a new temporary or permanent location. This insurance will also replace lost inventory, wrecked machinery and help with additional expenses such as advertising and letting the world know the company is still in business.
- **Protection from others' troubles** — Contingent business interruption insurance also protects a firm from another company's bad luck. "If you're in the computer business and you can't get chips from your supplier, contingent business interruption coverage can help," said Zurich's Mr. Breitkreitz.

Zurich tells companies that they can reduce their costs by having a safety program, good maintenance procedures and a thoughtfully created, regularly tested disaster-recovery plan. "We find that many plans end up as three-ring binders in the bookcase. If the plan is never tested, it won't be as effective as it would be had the company invested the time and money required to insure the plan is sound, and understood," Mr. Breitkreitz said.

Part of the service Zurich offers is expert advice from a team of risk-engineering consultants — safety professionals with various specialties who can work with a company to recognize risk and minimize it. The benefits are mutual, Mr. Breitkreitz said, creating a partnership resulting in a better operation for the insured company and a reduced risk of loss for the insurer. ■

We can handle the big ones.

At Zurich, we understand that complex businesses face a wide range of risk. Our industry specialists are trained to look for possible exposures, then devise risk management solutions to help minimize the potential for loss. Because of our experience, our customers can feel protected.

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Because change happens.

ZURICH

N.Y. Times
Sept. 25, 2006
at ZW8

APPENDIX B

Royal College Shop, Inc. v. Northern Ins. Co., 895 F.2d 670 (10th Cir. 1990) (applying Kansas law) (affirming judgment awarding consequential damages for loss of policyholder's business caused by insurance company's breach of contract).

Bettius & Sanderson, P.C. v. National Union Fire Ins. Co., 839 F.2d 1009, 1014-15 (4th Cir. 1987) (applying Virginia law) (awarding consequential damages for loss of profits of law firm forced to dissolve by insurance company's breach of contract).

Murphy v. Cincinnati Ins. Co., 772 F.2d 273, 276-77 (6th Cir. 1985) (applying Michigan law) (recognizing that damages recoverable for breach of an insurance contract include "those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made," and, in this case, included attorneys' fees incurred in bringing the coverage action).

Salamey v. Aetna Casualty & Sur. Co., 741 F.2d 874, 877 (6th Cir. 1984) (applying Michigan law) (allowing, as consequential damages for the breach of an insurance contract, lost profit from the policyholder's inability to reopen his store without an insurance recovery: ""The policy limits restrict the amount the insurer may have to pay in the performance of the contract, not the damages that are

recoverable for its breach.'") (quoting Lawton v. Great Southwest Fire Ins. Co., 392 A.2d 576, 579 (N.H. 1978)).

Don Burton, Inc. v. Aetna Life & Cas. Co., 575 F.2d 702, 708 (9th Cir. 1978) (in dicta, noting that, for breach of an insurance policy, the policyholder could recover consequential damages for the loss of his business, if sufficient evidence of a causal relationship between the breach and the anticipated net profits were demonstrated).

Alliance Ins. Co. v. Alper-Salvage Co., 19 F.2d 828 (6th Cir. 1927) (applying Tennessee law) (holding policyholder was entitled to damages for loss of use of its property caused by breach of insurance company).

Heller Int'l Corp. v. Sharp, 839 F. Supp. 1297, 1302-05 (N.D. Ill. 1993) (applying Illinois law) (noting that the "general principles of contract law apply equally well in the insurance contract context," and that "[i]n many instances, the measure of damages is governed by the contractual policy amount. That rule is not an absolute. As noted above, Illinois law does allow recovery of consequential damages 'where they were reasonably foreseeable, were within the contemplation of the parties at the time the contract was entered, or arose out of special circumstances known to the parties.'").

Haardt v. Farmer's Mut. Fire Ins. Co., 796 F. Supp. 804, 811 (D.N.J. 1992) (applying New Jersey law) (holding policyholder could recover consequential

damages for insurance company's breach of contract in failure to pay for repair of house, including devaluation of property and loss of rents).

Pacific Employers Ins. Co. v. P.B. Hoidale Co., 789 F. Supp. 1117, 1124 (D. Kan. 1992) ("Employers concedes that lost profits are recoverable for breach of an insurance policy. Such damages are limited to those which may fairly be considered to arise ""in the usual course of things, from the breach itself, or as may reasonably be assumed to have been within the contemplation of both parties as the probable result of the breach"") (citations omitted).

Red Cedars, Inc. v. Westchester Fire Ins. Co., 686 F. Supp. 614, 616 (E.D. Mich. 1988) (applying Michigan law) ("An insured may recover consequential damages for the insurer's breach of contract. . . . The policy's limits on losses do not restrict consequential damages claimed as a breach of the policy.").

Diaz Irizarry v. Ennia, N.V., 678 F. Supp. 957, 962 (D.P.R. 1988) (applying Puerto Rico law) (holding that consequential damages are recoverable for breach of an insurance policy if "foreseeable").

Earth Scientists (Petro Servs.) Ltd. v. United States Fidelity & Guar. Co., 619 F. Supp. 1465, 1474-75 (D. Kan. 1985) (applying Kansas law) (permitting policyholder to seek as consequential damages lost profits, including those for closing down its operations, as a result of insurance company's failure to pay for damage to policyholder's oil rig).

Ingersoll Milling Mach. Co. v. M/V Bodena, 619 F. Supp. 493, 507 (S.D.N.Y. 1985) (holding policyholder was entitled to recover expenses of bringing action against other companies to cover the cost of a loss after insurance company breached its contract by failing to cover the loss).

Strader v. Union Hall, Inc., 486 F. Supp. 159, 164 (N.D. Ill. 1980) (applying Illinois law) (permitting policyholder to seek consequential damages for breach of an insurance policy).

Mann v. Glens Falls Ins. Co., 418 F. Supp. 237, 249 (D. Nev. 1974), rev'd on other grounds, 541 F.2d 819 (9th Cir. 1976) (adopting Reichert v. General Ins. Co., 428 P.2d 860, 866-67 (Cal. App. 1967), vacated on other grounds, 442 P.2d 377 (Cal. 1968) in toto and holding policyholder could recover consequential damages for insurance company's breach of its policy).

McDowell v. Union Mut. Life Ins. Co., 404 F. Supp. 136, 140-41 (C.D. Cal. 1975) (applying California law) (holding that insurance company's breach of an insurance contract exposed it to liability for consequential damages, including expenses associated with the policyholders having been driven into bankruptcy, including filing fees, legal expenses, and loss of credit reputation).

Asher v. Reliance Ins. Co., 308 F. Supp. 847, 852 (N.D. Cal. 1970) (applying Alaska and California law) (holding policyholder could recover as consequential damages from insurance company's breach of contract loss of rents

because of insurance company's failure to pay for burned property under fire insurance policy if "such damage were 'proximately caused' by or 'flowed naturally and expectedly' from the defendant's breach").

Scrima v. Insurance Co. of N. Am., 116 Bankr. 951, 960-62 (Bankr. W.D. Mich. 1990) (allowing consequential damages — loss of profits — for insurance company's breach of insurance policy).

Independent Fire Ins. Co. v. Lunsford, 621 So. 2d 977, 979 (Ala. 1993) (affirming a verdict for the policyholder "of compensatory damages for breach of contract, including damages for mental anguish)).

Reichert v. General Ins. Co., 428 P.2d 860, 866-67 (Cal. App. 1967), vacated on other grounds, 442 P.2d 377 (Cal. 1968) (policyholder, forced into bankruptcy by insurance company's breach, permitted to seek damages for "detriment flowing from the breach which the breaching party contemplated or should have contemplated at the time of contracting as likely to result from his failure to perform": "Where the owner of a heavily mortgaged motel or other business property suffers a substantial fire loss, the owner may be placed in financial distress, may be unable to meet his mortgage payments, and may be in jeopardy of losing his property and becoming a bankrupt. A major, if not the main, reason why a businessman purchases fire insurance is to guard against such eventualities if his property is damaged by a fire. Certainly, the property owner

who purchases fire insurance may reasonably expect that if a fire occurs, the insurance proceeds will be promptly available to protect him from those eventualities. The business of the fire insurer is to provide such protection. Insurers are, of course, chargeable with knowledge of the basis reasons why fire insurance is purchased, and of the likelihood that an improper delay in payment may result in the very injuries for which the insured sought protection by purchasing the policies") (later ruling held it was the trustee in bankruptcy and not the policyholder to whom the cause of action accrued); but see United States Fire Ins. Co. v. Moseley, 551 S.W.2d 429, 431 (Tex. App. 1976) (holding, with regard to consequential damages for being driven into bankruptcy by insurance company's breach, "it appears that Receiver did not succeed to the Debtor's cause of action for damages resulting from the fact that Debtor was forced into bankruptcy. Although such damages may have stemmed from a wrong perpetrated before bankruptcy, such damages are not suffered until the bankruptcy petition is filed").

Travelers Ins. Co. v. Wells, 633 So. 2d 457, 461-63 (Fla. App. 1993), clarified, 1994 Fla. App. LEXIS 2445 (Fla. App. 1994) (allowing consequential damages — projected net profits — for breach of insurance contracts for loss of business caused by failure of insurance company to renew insurance policy causing

policyholder's business to cease: "[c]onsequential or resulting collateral damage may also be recovered if it can be sufficiently proved").

Life Investors Ins. Co. v. Johnson, 422 So. 2d 32, 34 (Fla. App. 1982) (applying Hadley and finding that a breach of an insurance policy "may give rise to damages which were in contemplation of the parties at the inception of the contract").

Florida Farm Bureau Cas. Ins. Co. v. Evans, 419 So. 2d 709, 710 (Fla. App. 1982) (affirming award of "compensatory" damages for breach of an insurance contract which included loss of use of the money owed for four years).

Leader Nat'l Ins. Co. v. Smith, 339 S.E.2d 321, 329-31 (Ga. App. 1985) (finding that, as with other contracts, "'[r]emote or consequential damages are not recoverable unless they can be traced solely to the breach of the contract or unless they are capable of exact computation, such as the profits which are the immediate fruit of the contract, and are independent of any collateral enterprise entered into in contemplation of the contract,'" noting "[l]oss of profits has often been regarded as consequential damages and is recoverable in contract actions," and noting "'[d]amages growing out of a breach of contract . . . must have arisen according to the usual course of things, and be such as the parties contemplated as a probable result of the breach'") (citations omitted).

Clark v. Standard Life & Accident Ins. Co., 386 N.E.2d 890, 898 (Ill. App. 1979) (holding that, for breach of an insurance contract, "consequential damages may be recovered when they 'were reasonably foreseeable and were within the contemplation of the parties at the time the contract was executed' arising out of special circumstances communicated and known to both parties").

Indiana Ins. Co. v. Plummer Power Mower & Tool Rental, Inc., 590 N.E.2d 1085, 1089-92 (Ind. App. 1992) (finding proper an award of consequential damages caused by insurance company's breach of policy: "When a business owner contracts for insurance on his primary source of income, he has the expectation of prompt payment so that he can rebuild and continue his business after the occurrence of a catastrophe such as the fire involved in this case. Delayed payment, whether as a result of good or bad faith, will undoubtedly result in the failure of the owner's business. The damages incurred from such inability to pay bills flow directly, and are proximately caused by, the insurer's failure to pay. The likelihood of such damages is only unforeseeable to unreasonably narrow-minded insurers.").

Salvator v. Admiral Merchants Motor Freight, 509 N.E.2d 1349, 1359-61 (Ill. App.), appeal denied, 515 N.E.2d 126 (Ill. 1987) (affirming award of consequential damages — loss of earnings — for insurance company's breach of contract).

Mohr v. Dix Mut. County Fire Ins. Co., 493 N.E.2d 638 (Ill. App. 1986) (noting "[c]onsequential damages . . . may be recovered where they were reasonably foreseeable, were within the contemplation of the parties at the time the contract was entered, or arose out of special circumstances known to the parties," and that "[l]ost profits may be recovered where the loss is shown with reasonable certainty, the defendant's wrongful action caused the loss, and the lost profits were within the contemplation of the parties when they entered the contract").

Hochman v. American Family Ins. Co., 673 P.2d 1200, 1203 (Kan. App. 1984) (affirming award of interest paid by a policyholder on loan to repair tractor as consequential damages for insurance company's failure to pay for tractor repair, noting "[d]amages recoverable for breach of contract are limited to those which may fairly be considered as arising, in the usual course of things, from the breach itself, or as may reasonably be assumed to have been within the contemplation of both parties as the probable result of the breach").

Hinson v. Zurich Ins. Co., 196 So. 2d 827 (La. App. 1967) (finding that a policyholder can recover consequential damages for loss of wages and humiliation incurred by loss of employment on account of insurance company's breach of contract, but finding that lost wages were not sufficiently proved in this case).

Pennsylvania Threshermen & Farmers' Mut. Casualty Ins. Co. v. Messenger, 29 A.2d 653 (Md. 1943) (willful failure to comply with obligations

under liability insurance policy requires insurance company to respond in damages for any loss suffered as a consequence: "[t]he damages allowed for breach of a contract should compensate the injured person for the loss he has sustained as a result of the breach. The court should endeavor to place the injured person as far as possible by monetary award, in the position in which he would have been, if the contract had been properly performed").

Lawrence v. Will Darrah & Assocs., Inc., 516 N.W.2d 43, 45-48 (Mich. 1994) (finding policyholder could recover as consequential damages for insurance company's breach of its insurance policy those damages "the promisor knows or has reason to know" about, including lost profits from trucking business by reason of insurance company's failure to pay for repair of truck).

Miholevich v. Mid-West Mut. Auto Ins. Co., 246 N.W. 202 (Mich. 1933) (damages sustained by policyholder in body execution following failure of insurance company to pay judgment were such as were contemplated by the parties and hence recoverable).

Wendt v. Auto-Owners Ins. Co., 401 N.W.2d 375, 377-78 (Mich. App. 1986) (finding policyholder could bring action for damages consequential to insurance company's breach of its obligation to pay for the repair of a truck, including loss of use of the owed money, default on a note upon which the truck

was security, loss of use of the truck, decline in policyholder's business, and storage costs of damaged truck).

Parmet Homes, Inc. v. Republic Ins. Co., 314 N.W.2d 453, 457-58 (Mich. 1981), leave denied, 415 Mich. 851 (1982) (although disallowing consequential damages for unrelated venture which policyholder could not participate in because of failure of insurance company's to fulfill contract and pay on policies, on the ground that damages from such unrelated venture were not foreseeable, noting "the damages recoverable for breach of contract are those that arise naturally from the breach and were within the contemplation of the parties at the time the contract was executed. Loss of profits which result from the breach may be considered in assessing damages").

Olson v. Rugloski, 277 N.W.2d 385, 388 (Minn. 1979) (holding that policyholder, whose insurance company breached its insurance contract to reimburse him for the loss of his trucks, was responsible for consequential damages from that breach, including lost profits: "When the insurer refuses to pay or unreasonably delays payment of an undisputed amount, it breaches the contact and is liable for the loss that naturally and proximately flows from the breach. . . . Lost profits may recovered if they are a natural and proximate result of the breach and are proved with reasonable, although not absolute, certainty.").

Aetna Casualty & Sur. Co. v. Day, 487 So. 2d 830, 835 (Miss. 1986) ("Although the insurance policy expressly limits coverage to a specific amount, this is not to say that damages for breach of contract are limited to those of mere repair. In a contract action, generally a plaintiff may recover consequential damages reasonably foreseeable at the time the contract was made and established at trial, where properly pled and supported by substantial evidence.").

Landie v. Century Indem. Co., 390 S.W.2d 558, 562 (Mo. App. 1965) (""Thus, all the cases agree that where it is the insurer's duty to defend, and the insurer wrongfully refuses to do so on the ground that the claim upon which the action against the insured is based is not within the coverage of the policy, the insurer is guilty of a breach of contract which renders it liable to the insured for all damages resulting to him as a result of such breach.'") (citation omitted).

A.B.C. Builders, Inc. v. American Mut. Ins. Co., 661 A.2d 1187, 1191-92 (N.H. 1995) (awarding costs of financing settlement and other consequential damages proper in breach of insurance policy action "because an insurance policy is a contract" and "its breach may result in an award of consequential damages if they were foreseeable and can be proved").

Drop Anchor Realty Trust v. Hartford Fire Ins. Co., 496 A.2d 339, 342-43 (N.H. 1985) (finding compensable consequential damages from insurance company's breach of duties under an insurance policy to pay for repair of

policyholder's hotel, including loss of good will and business reputation and lost profits for vacation season).

Jarvis v. Prudential Ins. Co., 448 A.2d 407, 410 (N.H. 1982) (finding "[t]he insured may recover specific consequential damages if he can prove that such damages were reasonably foreseeable by the insurance company and that he could not have reasonably avoided or mitigated such damages").

Lawton v. Great Southwest Fire Ins. Co., 392 A.2d 576, 578-80 (N.H. 1978) (holding consequential damages may be recovered for breach of an insurance contract, thereby holding that (i) consequential damages are not limited by doctrine that insurance policies are mere contracts to pay money; (ii) the policy limits are merely limits for payments owed on account of an insurable event and not limits for damages from breach of contract and (iii) financial injuries from an insurance company's breach of its duty).

Pickett v. Lloyd's (a Syndicate of Underwriting Members), 600 A.2d 148, 155 (N.J. App. Div. 1991), aff'd, 621 A.2d 445 (N.J. 1993) (finding policyholder could recover consequential damages — including loss of use — for breach of insurance policy to pay for replacement of tractor-trailer: "we consider the damages awarded here to have been reasonably foreseeable at the time the policy was issued, and thus recoverable in an action for breach of contract. Here, the insurer knew it was insuring a commercial tractor used by [the policyholder].

Although the insurance application is not part of the record, the policy form issued on January 5, 1987 described the vehicle and its use as commercial. Thus, it was reasonably foreseeable to both parties at the time the contract was entered into that if the vehicle was totally destroyed the insured's livelihood and income would be affected.").

Exum v. Ferguson, 637 P.2d 553, 554-55 (N.M. 1981) (holding that policyholder was entitled to consequential damages from insurance company's breach — failure to pay for damage to his truck — including loss of profits and loss of equity in the truck that was repossessed).

Mitchell v. Intermountain Casualty Co., 364 P.2d 856, 857 (N.M. 1961) (although noting "contractual damages recoverable for breach of the contract are those damages contemplated by the parties at the time of the making of the contract," finding that the damages were not foreseeable).

Gentry v. American Motorist Ins. Co., 867 P.2d 468, 474 (Okla. 1994) (implying that consequential damages for breach of an insurance policy are available under 23 O.S. 1991 § 23: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of

contract, which are not clearly not clearly ascertainable in both their nature and origin").

Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977) (holding that certain insurance policies are not merely contracts to pay money, and, thus, breach of them does not limit one to merely policy limits).

Van Nes Allen v. Home Indem. Co., 604 P.2d 385, 387 (Okla. App. 1979) (upholding award of consequential damages for damage to policyholder's car from failure of insurance company to perform upon its contract).

Bibleault v. Hanover Ins. Co., 417 A.2d 313, 318 (R.I. 1980) (noting that "[t]raditionally, recovery in contract for breach of a unilateral or independent obligation to pay a certain sum of money is confined to the actual amount owed under the contract plus legal interest," but holding "[t]he duty of an insurer to deal fairly and in good faith with an insured is implied by law. Since violation of this duty sounds in contract as well as in tort, the insured may obtain consequential damages for economic loss and emotional distress and, when appropriate, punitive damages").

Brown v. South Carolina Ins. Co., 324 S.E.2d 641, 645-47 (S.C. 1984), appeal dismissed, 348 S.E.2d 530 (S.C. 1985) (finding bad faith to be an action based on contract, but noting that "the insurer is liable for whatever consequential damages follow as a natural consequence and proximate result of the breach," and

holding that damages consequential to insurance company's breach in failing to pay for damage to car, including lost income, were recoverable); see also Carter v. American Mut. Fire Ins. Co., 307 S.E.2d 225, 226 (S.C. 1983).

Holmes v. Nationwide Life Ins. Co., 258 S.E.2d 924, 927 (S.C. 1979) (holding that "'[i]n breach of contract actions, only such damages as may reasonably be supposed to have been in the contemplation of both parties at the time the contract was made may be collected,'" and allowing, as consequential damages for insurance company's breach, interest on loan policyholder was forced to procure to pay medical expenses) (citation omitted).

Adcox v. American Home Assurance Co., 188 S.E.2d 785, 789 (S.C. 1972) (noting implicitly that consequential damages for damage to credit because of insurance company's breach would be recoverable, but denying relief in this instance as such damages were unproved).

Beck v. Farmers Ins. Exch., 701 P.2d 795, 801-02 (Utah 1985) (allowing consequential damages — "those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made" — for breach of an insurance policy, noting "a broad range of recoverable damages is conceivable, particularly given the unique nature and purpose of an insurance contract. An insured frequently faces catastrophic consequences if funds are not available within a reasonable period of time to cover an insured loss; damages for

losses well in excess of policy limits, such as for a home or business, may therefore be foreseeable and provable").

Hayseed's, Inc. v. State Farm Fire & Casualty, 352 S.E.2d 73, 7980 (W. Va. 1986) (noting that "[i]t is now the majority rule in American courts that when an insurer wrongfully withholds or unreasonably delays payment of an insured's claim, the insurer is liable for all foreseeable, consequential damages naturally flowing from the delay," and, thus, "the policyholder is entitled to damages for net economic loss caused by the delay in settlement, as well as an award for aggravation and inconvenience").

Newhouse v. Citizens Security Mut. Ins. Co., 501 N.W.2d 1, 6 (Wis. 1993) (finding, upon breach of contract, "[t]he insurance company must pay damages necessary to put the insured in the same position he would have been in had the insurance company fulfilled the insurance contract. Policy limits do not restrict the damages recoverable by an insured for a breach of the contract by the insurer").

Wells Dairy, Inc. v. Travelers Indem. Co., 241 F.Supp. 2d 945, reconsideration denied, 336 F.Supp. 2d 906 (N.D. Iowa 2004) (holding that consequential damages are available for breach on an insurance policy).

Spencer v. Michigan Basic Prop. Inc. Ass'n, No. 217508, 2001 WL 812087 (Mich. Ct. App. July 17, 2001) (acknowledging that consequential damages are

recoverable for breach of insurance policy, even if policy contains a consequential loss exclusion).

Barker v. Underwriters at Lloyd's. London, 564 F.Supp. 352 (E.D. Mich. 1983) (noting that Michigan applies Hadley to actions for recovery of consequential damages for breaches of insurance policies).

Liddell v. Detroit Auto. Inter-Ins. Exch., 302 N.W.2d 260 (Mich. Ct. App. 1981) (noting that Michigan applies Hadley to actions for recovery of consequential damages for breaches of insurance policies).

Weiner v. Unumprovident Corp., No. 00 Civ. 9315 (NRB), 2002 WL 31108182 (S.D.N.Y. Sept. 20, 2002) (holding that consequential damages would be recoverable for breach of a group disability insurance policy if the insurance company "kn[e]w or should . . . have reasonably foreseen that the insureds were 'at risk' of economic loss in addition to the policy benefits"; but rejecting claim for consequential damages tied to worsening physical condition of policyholder).

Birth Center v. St. Paul Ins. Cos., 747 A.2d 858, 859 (2000), aff'd, 787 A.2d 376 (Pa. 2001) (holding that consequential damages were available for contractual breach of the implied covenant of good faith and fair dealing, despite such damages not being specifically listed in Pennsylvania's bad faith statute).

Mellow v. Medical Malpractice Joint Underwriting Ass'n of R.I., No. NC870414, 1991 WL 789775 at *3 (R.I. Super. Ct. Apr. 5, 1991) (citing Hadley

and finding that award of attorney's fees to successful policyholder was "consistent with the basic, long recognized principle that damages recoverable for breach of contract include the foreseeable consequential damages from the breach").

Black v. Allstate Ins. Co., 100 P.3d 1163, 1169 (Utah 2004) (recognizing that "'consequential damages for breach of contract may reach beyond the bare contract terms,' [and] that '[a]lthough the policy limits defined 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'").

Billings v. Union Bankers Ins. Co., 918 P.2d 461 (Utah 1996) (holding that attorneys' fees were recoverable as consequential damages for breach of first-party insurance policy).

Johnson v. Life Investors Ins. Co. of Am., [216 F.3d 1087], Nos. 98-4120, et al., 2000 WL 954840 *6 (10th Cir. July 11, 2000) (following Billings and holding that "[a]n insured may recover attorney fees as consequential damages for the breach of an express term in the contract if the fees 'were reasonably within the contemplation of, or reasonably foreseeable by the parties at the time the contract was made'").

General Star Ins. Co. v. Bankruptcy Estate of Lake Geneva Sugar Shack, Inc., 572 N.W.2d 881 (Wis. Ct. App. 1997) (noting that consequential damages are recoverable in claims for beach of insurance policy).