Update on Bad Faith Penalties and Attorney Fees

MADELEINE FISCHER
Jones Walker LLP
201 St. Charles Avenue
New Orleans, LA 70170
Telephone: (504) 582-8208
Fax: (504) 589-8208
Email: mfischer@joneswalker.com

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Louisiana's bad faith law stems primarily (although not entirely) from two statutes, La. R.S. 22:1892 (formerly 658) and La. R.S. 22:1973 (formerly 1220). Of these statutes, La. R.S. 22:1892 is by far the oldest, going back to its first version in 1908. It's also the more "objective" of the two. It has particular concrete deadlines and carries a penalty of up to 50% of the amount due under the policy for certain violations as well as attorney fees.

La. R.S. 22:1973 in its first version was enacted in 1990. It was intended to codify a general duty of good faith of the insurer to its insured – one which had been developing in the jurisprudence apart from La. R.S. 22:1892. It also added some protections for third parties in certain specific situations. While it does contain a couple of provisions with a time deadline, it mostly deals with situations that are not necessarily so concrete – like whether an insurer has misrepresented policy provisions. The penalty for violation is up to two times the damages that the plaintiff has suffered totally apart from the amount due under the policy – which is sometimes nothing. If you can't prove damages, the maximum penalty is $5,000.

Failure to timely initiate loss adjustment

The loss adjustment penalty sprang to life after Hurricanes Katrina and Rita. In *Oubre v. Louisiana Citizens Fair Plan*, No. 2011-0097, 79 So. 3d 987 (La. 2011), the Louisiana Supreme Court reinstated a trial court judgment of over $92 million in favor of a class of homeowners whose post-hurricane property damage claims had not been promptly addressed by Louisiana Citizens Fair Plan, Louisiana's state-run insurer of last resort. The court held that the language of subsection (A)(3) of La. R.S. 22:1892, particularly its use of the word "shall," meant that an insurer *must* initiate loss adjustment within thirty days, and if the insurer does not, the imposition of a penalty is mandatory. The court noted that there was no reference to good or bad faith in this particular part of the statute. The insurer's inaction alone triggered the penalty. Further, requiring proof of bad faith would interfere with the statute's goal of encouraging insurers to timely commence loss adjustment with their insureds. The court rejected the argument that the extreme circumstances of the hurricanes excused the delay. Specifically, the court noted that the delay for initiation of loss adjustment in non-catastrophic cases was 14 days, as opposed to the 30 days allowed in catastrophic cases. Accordingly, the statute already took into account the difference in circumstances when losses are caused by a major catastrophe.

In 2009, the Louisiana Legislature amended La. R.S. 22:1892(A)(3) to allow the Commissioner of Insurance to extend the delay for initiating a loss adjustment for damages arising from a presidentially-declared emergency or disaster or a gubernatorially-declared emergency or disaster up to an additional 60 days.

Actual damages not required

Another controversy resolved by the Louisiana Supreme Court in *Oubre* was whether a plaintiff must prove actual damages in order to recover the penalty of La. R.S. 22:1973(C) of the statute. The court examined the plain language of 22:1973(C) which provides for a penalty award of "two time the damages sustained or five thousand dollars, whichever is greater." The court hearkened back to an earlier decision in *Sultana Corp. v. Jewelers Mut. Ins. Co.*, 860 So. 2d 1112 (La. 2003), in which it held that an insured is not required to prove that it suffered damages as a prerequisite for a discretionary award of penalties under § 22:1220. Thus, when damages are not proven, as was the case in the *Oubre* class action, the five thousand dollars acts as a ceiling on the penalty award. In *Oubre*, the Supreme Court affirmed the penalty of $5,000 per class member upon simple proof that the insurer failed to initiate loss adjustment within the required time period, resulting in a total award of over $92 million.

Arbitrary, capricious or without probable cause

A case from 2008 from the Louisiana Supreme Court set a concerning precedent for insurers about the standards for bad faith: *Louisiana Bag Co., Inc. v. Audubon Indem. Co.*, 2008-0453 (La. 12/2/08), 999 So. 2d 1104. In *Louisiana Bag*, the insured's manufacturing plant and warehouse facilities were destroyed by fire. Early on, the adjuster informed the insurer that the loss would exceed policy limits, but questions remained about the type of coverage and the extent of the loss. The insurer made payment of full limits, less an advance, six months after the point in time when it was deemed the insurer had sufficient information to pay.

The Louisiana Supreme Court affirmed the intermediate court of appeals' decision that penalties were in order under the penalties statute then in effect, La. R.S. 22:658 (now 22:1892). The following are the essential holdings of the Louisiana Supreme Court's opinion:

- While an insurer need not tender payment for amounts that are reasonably in dispute, "there can be no good reason " – or no probable cause – for withholding an undisputed amount. Where there is a substantial, reasonable and legitimate dispute about the extent or amount of the loss, the insurer can avoid the imposition of penalties only by unconditionally tendering the undisputed portion of the claim. An insurer cannot "stonewall" an insured simply because the insured is unable to prove the exact extent of his damages.

- An insurer "must take the risk of misinterpreting its policy provisions," and if an insurer "errs in interpreting its own insurance contract, such error will not be considered as a reasonable ground for delaying payment of benefits, and it will not relieve the insurer of the payment of penalties and attorney's fees. Therefore, the insurer cannot avoid the payment of penalties for delay in tendering payment within the statutorily mandated time period by reason of its interpretation of the coverage afforded by its policy.
- A "satisfactory proof of loss" is only that which is "sufficient to fully apprise the insurer of the insured's claims." The proof of loss requirement is flexible. An insurer's requirement that it receive its form of proof of loss before payment is insufficient to create probable cause to delay payment. To permit an insurer to insist upon its own proof-of-loss form would frustrate the intent and purpose of La. R.S. § 22:658 (now 1892) because it would allow the insurer to be solely in control of when proof of loss is received.
- An insured need not identify any specific conduct by the insurer that was arbitrary, capricious or without probable cause. Proof of specific acts or proof of the insurer's state of mind is generally not required to establish conduct that is arbitrary, capricious or without probable cause.

Under *Louisiana Bag*, the best grounds to avoid penalties is to argue that the insurer had a good faith disagreement with the insured over the cause and the extent of the loss. Arguing that there was a dispute over the legal interpretation of the policy language will only work if you ultimately win that argument.

Merwin v. Spears, 2012-0946 (La. 6/22/12), 90 So. 3d 1041 was a per curiam opinion by the Louisiana Supreme Court. The plaintiffs had a water leak in their bathroom. They made a claim with their homeowners' insurer, Farmers. Farmers investigated and determined the damage was due to a slow, long-term leak in the wall of the master bedroom and therefore was not covered. Plaintiffs then hired their own expert. Farmers investigator met with plaintiffs' expert, after which Farmers maintained its position that the damage was not covered.

Then plaintiffs filed suit against Farmers alleging bad faith. After suit was filed, Farmers conducted a detailed examination to determine if the leak could be replicated. They then decided that some of the plaintiffs' damages were caused by a sudden and accidental water leak. Only then did Farmers tender unconditional payment of the claim to the plaintiffs, within thirty days of this post-suit determination.

Plaintiffs filed a motion for summary judgment on their bad faith claim which the trial court granted. The court of appeal denied supervisory review and Farmers sought review from the Louisiana Supreme Court which granted the writ. This was a per curiam opinion with a dissent by Knoll who would have denied the writ altogether.

The per curiam held that it was only "with the benefit of hindsight" that Farmers policy covered at least part of plaintiffs' damages. The court found though that hindsight was not the standard. The sole issue was whether Farmers' failure to make timely payment at the outset was arbitrary, capricious, or without probable cause. The court found that there were genuine issues of material fact as to whether the initial decision to deny, based on its investigation and consultation with plaintiffs' expert, was reasonable under the totality of the facts. Therefore, the trial court should not have granted summary judgment. The Supreme Court quoted from an older case that summary judgment is "rarely appropriate for a determination based on subjective facts such as intent, motive, malice, knowledge or good faith."

The case, although only a very short per curiam opinion, seems to constitute a retreat from *Louisiana Bag* – if not in direct conflict, a retreat from the spirit of the earlier case. This was a supervisory writ – why did the Supreme Court even accept it? It does not seem to be an issue of major importance – it was really a factual dispute. Did the Supreme Court want to put the brakes on bad faith litigation?

Let's look at the similarities and differences of this case with *Louisiana Bag*.

Similarities:

1) Initial investigation incomplete or inaccurate – no payment made

2) Plaintiff had to press before payment was made

Differences:

1) In *Merwin* Farmers totally denied coverage before suit was filed and paid nothing; in *Louisiana Bag* the insurer, Audubon, eventually paid the claim, and the plaintiff sued only for bad faith – that should have made *Merwin* the stronger case for plaintiff;

2) In *Merwin* plaintiff had to hire their own expert to prove the facts (i.e. sudden and accidental leak); in *Louisiana Bag* the insurer used its own experts but just dragged out payment – that could have made *Merwin* the stronger case for plaintiff.

3) In *Merwin* the court found that the insurer's state of mind was important and was not a good subject for summary judgment. In *Louisiana Bag* the Court said that it was not necessary to have direct evidence of the insurer's state of mind. If the insurer fails to pay an undisputed amount within 30 days, this is by definition arbitrary, capricious and without probable cause.

4) In *Merwin* the issue on which coverage turned was factual – was the leak a longstanding slow leak which would not be covered, or was it sudden and accidental which would be covered? In *Louisiana Bag*, the only coverage issue was a legal question which turned on the language of the policy, i.e. was the coverage blanket or per location? Perhaps it is harder to prove bad faith if the issue is factual. An insurer is presumed to know the contents of its policy and bears the risk of misinterpreting the policy language.

5) *Merwin* was decided on a motion for summary judgment. *Louisiana Bag* was decided after a trial.

So if you're a policyholder, you want to make your case more like *Louisiana Bag*. Look for legal issues about the policy. If the insurance investigation comes up with dollars, see if that might be acceptable to you – you need undisputed amounts.

If you're an insurer, you want to make your case more like *Merwin*. You will be in better shape if the issues in the case are about the nature and extent of the loss, rather than legal issues about policy language.

Circuit Court Decisions

Citadel Broad. Corp. v. Axis U.S. Ins. Co., 2014-0326 (La. App. 4 Cir. 2/11/15), 162 So. 3d 470, *writ denied*, 2015-0514 (La. 5/15/15), 170 So. 3d 969. Citadel, a broadcasting company owned three New Orleans radio stations that were damaged during Hurricane Katrina. The stations were off the air for various periods of time. Citadel made claims against its insurer, Axis, for physical damage, business interruption and contingent business interruption. Axis paid property damage and business interruption during the extended period of indemnity and refused to pay any part of the contingent business interruption claim on the ground that Citadel's listeners were not its customers. Citadel sued Axis for breach of contract and bad faith. The jury awarded over $3 million for lost profits during the extended period of indemnity and over $2 million for contingent business interruption losses. The jury found Axis was in bad faith under La. R.S. 22:1892 and awarded a penalty of almost $3 million and a like amount of attorneys' fees. The Fourth Circuit affirmed all awards except for the attorneys fees. The court found that Axis had received satisfactory proof of loss no later than December 2006 and failed to make any payment on the claim within the applicable statutory period. Axis also incorrectly asserted an exclusion which its adjuster had not asserted because he did not believe it was applicable. Thus there was sufficient proof of bad faith. The attorneys fees were vacated, however, because there was no record evidence of the fees or their reasonableness. The case was remanded for a hearing where evidence regarding the attorneys fees could be examined.

Gaspard v. S. Farm Bureau Cas. Ins. Co., 2013-0800 (La. App. 1 Cir. 9/24/14), 155 So. 3d 24. The First Circuit affirmed a jury verdict finding no bad faith on the part of the UM insurer who had tendered $28,500 on a claim in which the jury wound up awarding $292,000. The evaluation of the insurer's conduct depends on the facts known to the insurer at the time of its action. The jury could have reasonably concluded that the insurer had a reasonable and legitimate question as to the extent of its liability and Gaspard's loss. Interestingly, the plaintiff attorney managed to get into evidence that the insurer had set a reserve of $500,000 on the claim. The First Circuit found that this was error, although harmless. The First Circuit said that the reserve amount does not equate to the amount over which reasonable minds could not differ and was thus not relevant to the bad faith claim.

Lemoine v. Mike Munna, L.L.C., 2013-2187 (La. App. 1 Cir. 6/6/14), 148 So. 3d 205. Whether an insurer has been arbitrary and capricious is a fact question. In this UM case the First Circuit found that Allstate did not act arbitrarily or capriciously in failing to make an unconditional tender. The record reasonably supported the determination that there were substantial, reasonable, and legitimate questions as to the extent of Allstate's liability and plaintiff's loss. The case contains a good discussion of the law on the meaning of "arbitrary capricious and without probable cause."

Barton v. Avoyelles Parish Sch. Bd., 2013-445 (La. App. 3 Cir. 4/9/14), 153 So. 3d 448, *writ denied*, 2014-0989 (La. 9/19/14), 148 So. 3d 953. The parents of a student injured while playing football brought an action against the school board and its insurer. The insurer, National Union, sought summary judgment claiming that their policy did not cover the claim because the student's accident occurred outside the official football season. National Union also sought summary judgment on the plaintiff's claim for penalties. The trial court denied both motions, holding there were issues of fact. The Third Circuit affirmed. First, it held that the policy was ambiguous in its use of phrases such as "official season of the sport" and "practice sessions." Thus, applying the rule that ambiguities are construed against the insurer, National Union was not entitled to a summary judgment of no coverage. Second, it held that until the coverage issue was resolved through trial, summary judgment on penalties was premature. The Third Circuit acknowledged that, "an insurer takes the risk of misinterpreting its own policy provisions" "even when the issues involved are *res nova*." Judge Gremillion dissented arguing that the questions about the meaning of policy language were legitimate and therefore National Union could not be in bad faith. Although the court never mentioned the *Louisiana Bag* case, this case demonstrates that an insurer who defends on the basis of a question about the interpretation of its own policy (as opposed to extent of damages or liability) runs a risk of being found in bad faith if the court finds its interpretation was wrong.

Mason v. Bankers Ins. Grp., 13-704 (La. App. 5 Cir. 1/31/14), 134 So. 3d 29, *writ denied*, 2014-0433 (La. 5/2/14), 138 So. 3d 1246 *and writ denied*, 2014-0448 (La. 5/2/14), 138 So. 3d 1250. Substantial, reasonable and legitimate questions as to the extent and causation of the damage to plaintiffs' plumbing system were enough to prevent insurer's denial from being arbitrary and capricious, even though, at trial, the cause was determined and the insurer was found to cover the claim.

Iteld v. Four Corners Const., L.P., 2013-0692 (La. App. 4 Cir. 1/30/14), 133 So. 3d 312. Here, an additional insured claimed that the insurer failed to defend it and its failure was in bad faith. The Fourth Circuit affirmed the district court's ruling that there was no bad faith because the additional insured's voluminous legal billing entries and invoices were excessive and in some instances unintelligible. In short, there was no satisfactory proof of loss to start the statutory time period running.

Cochran v. Safeway Ins. Co., 2013-688 (La. App. 3 Cir. 12/11/13), 128 So. 3d 1286. Plaintiff Cochran sued Green and his insurer Safeway for injuries and property damages sustained in an auto accident. During the investigation there was a dispute over whether Cochran bore some degree of fault in the accident. Safeway tendered Cochran half of her property damages. At trial Green was found 100% at fault for the accident, and the trial court awarded Cochran her full property damage plus penalties and attorneys fees. On appeal, the Third Circuit rejected the argument that Safeway owed no duty to Cochran because it was not Cochran's insurer. La R.S. 22:1892 *does* impose penalties for failure to pay property damage claims of third parties within 30 days of satisfactory proof of loss. However, the Third Circuit overturned the trial court's award of penalties because it found that Safeway's offer of one-half the amount of the property damage was reasonable given that there was a dispute at the time about whether Cochran's actions played a part in causing the accident.

Upchurch v. State ex rel. Louisiana Dep't of Transp. & Dev., 48,354 (La. App. 2 Cir. 8/7/13), 123 So. 3d 228, *writ denied*, 2013-2153 (La. 11/22/13), 126 So. 3d 489. UM carrier's failure to tender any amount to plaintiff was not arbitrary or capricious when there was a genuine dispute whether the other driver bore any fault at all for the accident.

Daniels v. Imperial Fire & Cas. Ins. Co., 47,572 (La. App. 2 Cir. 1/16/13), 109 So. 3d 32. In seeming contradiction to the rule of *Louisiana Bag* the Second Circuit found that an insurer who failed to pay the plaintiff's UM claim within the statutory time period was not arbitrary, capricious or without probable cause because at the time, there existed inconsistent treatment between Louisiana appeal courts concerning the enforceability of the insurer's policy language – an inconsistency that was eventually resolved by a Louisiana Supreme Court decision.

Mental anguish damages available

In *Wegener v. Lafayette Ins. Co.*, 2010-0810 (La. 3/15/11), 60 So. 3d 1220, the Louisiana Supreme Court held that mental anguish damages are available under La. R.S. 22:1973 and that they may be awarded regardless of the insurer's intent. The court supported its decision by reference to its prior opinion in *Manuel v. Louisiana Sheriff's Risk Management*, 95–0406 (La. 11/27/95), 664 So. 2d 81. Although *Manuel* did not deal with mental anguish damages, the court in *Manuel* explained that the duties imposed by La. R.S. 22:1973 are separate and distinct from any duties imposed by the contract of insurance. In further support of its decision that damages under La. R.S. 22:1973 do not necessarily follow rules applicable to damages for breach of contract, the court also cited with approval a recent case from the United States Fifth Circuit Court of Appeals interpreting Louisiana law, *Dickerson v. Lexington Ins. Co.,* 556 F.3d 290 (5th Cir. 2009).

Duty to attempt settlement

In *Kelly v. State Farm Fire & Casualty Company*, No. 2014-1921, 169 So. 3d 328 (La. 2015), the Louisiana Supreme Court held that under La. R.S. 22:1973 liability insurers who fail to settle claims on behalf of their insureds may, in some circumstances, be responsible for judgments in excess of their policy limits – even if the plaintiff never submitted a firm settlement demand.

Louisiana courts have long held that insurers have a duty of good faith to their insureds and must endeavor to protect their insureds from judgments in excess of their insurance coverage. Thus, insurers must conscientiously evaluate cases against their insureds both as to liability and damages. If a case presents a serious risk of a judgment against the insured that would exceed the available insurance limits, the insurer should try to settle the case. Until the *Kelly* decision, however, no court had held that an insurer could be found to be in bad faith unless the plaintiff had first submitted a firm settlement demand within policy limits. The Louisiana Supreme Court in *Kelly* held that the insurer's duty to settle could be triggered by information other than the mere fact that the plaintiff made a settlement demand.

In *Kelly*, Danny Kelly was injured in an automobile accident. The circumstances of the accident strongly suggested that Henry Thomas, an insured of State Farm, was at fault: Thomas and Kelly were driving in opposite directions when Thomas turned left and struck Kelly. Kelly broke his leg, was hospitalized for six days and incurred medical bills of $26,803.17. Thomas's State Farm policy had limits of $25,000.

Less than two months after the accident Kelly's attorney wrote to State Farm with the medical records and bills and stated he would *recommend* release of Kelly and State Farm for the policy limits. State Farm didn't respond to the letter. However, a few months later Kelly's attorney had conversations with State Farm representatives and during one of those conversations State Farm offered to settle the case for $25,000, the policy limits. Kelly's attorney wrote to State Farm rejecting the offer and then filed suit. State Farm then wrote to its insured Thomas and told him that he could face personal liability in the case, but State Farm did not inform Thomas of the early letter from Kelly's attorney, State Farm's offer to Kelly, or the amount of Kelly's medical bills. The case was tried and Thomas was found liable and cast in judgment for $176,464.07 plus interest.

Thomas assigned his right to pursue a bad faith case to Kelly in exchange for Kelly's promise not to enforce the judgment against Thomas. Kelly sued State Farm for bad faith and the case was sent to federal court. The district court granted summary judgment for State Farm, and Kelly appealed. The United States Fifth Circuit certified two controlling questions of law to the Louisiana Supreme Court: 1) is a firm settlement demand a prerequisite to a bad faith failure to settle claim?; and 2) can an insurer be liable for failing to disclose facts to its insured that are not related to the policy's coverage?

In answering these questions, the Louisiana Supreme Court emphasized that it spoke only on the duties of an insurer to its own insured. Although Kelly, the personal injury plaintiff, brought the bad faith claim against State Farm, he did so only as the assignee of Thomas, State Farm's insured. Insurance companies do not owe general good faith duties to third parties (although certain specific duties to third parties are enumerated in the second part of La. R.S. 22:1973). Insurance companies *do* owe certain fiduciary duties to their insureds.

Even before the enactment of La. R.S. 22:1973, Louisiana case law recognized a cause of action in favor of insureds for an insurer's bad faith failure to settle. La. R.S. 22:1973 embodied that cause of action in statutory form. As noted, La. R.S. 22:1973(A) imposes an "affirmative duty" of good faith on the insurer to take positive actions to comply with a legal standard, specifically to adjust claims fairly and promptly and to make a reasonable effort to settle claims. The court observed that the statute does not mention a firm settlement offer, and to add that requirement would be to change the meaning of the statute.

In addition to the plain wording of the statute, the Louisiana Supreme Court found that practical considerations supported its interpretation. The insured has no control over whether a firm offer will ever be submitted, despite which the insurer has the obligation to protect the insured. The court concluded: "[W]e see no practical reason why the insurer's obligation to act in good faith should be made subject to the tenuous possibility that an insurer will receive a firm settlement offer." Instead, whether an insurer has made a reasonable effort to settle a claim must be determined on a case-by-case basis, without any bright line rule. Five *non-exclusive* factors include: the probability of the insured's liability, the extent of the damages, the amount of the policy limits, the adequacy of the insurer's investigation, and the openness of communications between the insurer and the insured.

The court devoted the majority of its opinion to the first certified question, but also went on to address whether State Farm's failure to disclose prior communications with Kelly's attorney to its insured could constitute a "misrepresentation" under La. R.S. 22:1973(B) which prohibits, *inter alia*, "Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue." State Farm took the position that any misrepresentation of facts must relate to coverage. But the Louisiana Supreme Court held otherwise. The court held that the word "or" was disjunctive, meaning that an insurer can be liable for misrepresenting either 1) "pertinent facts" or 2) "insurance policy provisions relating to coverage."

The court's opinion represents a major shift in Louisiana bad faith law in the failure to settle context. While liability insurers had previously regarded policy limit settlement demand letters warily, concerned about a "bad faith set-up," now that the Louisiana Supreme Court has abolished the firm demand requirement, insurers may come to regret the absence of any bright signal of an incipient bad faith claim.

Settlement not proof of loss

Katie Realty, Ltd. v. Louisiana Citizens Prop. Ins. Corp., 2012-0588 (La. 10/16/12), 100 So. 3d 324.

This Louisiana Supreme Court case from October 2012 examined issues of proof of loss and failure to pay settlements of insurance claims.

The plaintiffs owned commercial property in Houma, Louisiana that was damaged during Hurricane Gustav. They were insured with Citizens. On October 24, 2008 the plaintiffs presented Citizens with a damage estimate of $192,423. Citizens did not pay within 30 days and on December 4, 2008 the plaintiffs filed suit for the loss as well as for penalties under both of the penalty statutes. About a year and half later, the parties entered into a mediation and signed a written settlement agreement settling the case for $250,000 to be paid within thirty days of the date of signing, July 16, 2010.

On August 11, 2010 the plaintiff's attorney e-mailed Citizens attorney and asked him to make sure the funds were received by the close of business on August 16th or his client would insist on penalties as allowed by law. On August 16th Citizens attorney asked plaintiffs to give him a W-9 form which they did the same day. However, Citizens did not pay the settlement that day. Instead they sent a proposed receipt and release about a week later; there were some negotiations about the language of that; and finally the settlement checks were received by plaintiffs on August 31, 2010 (having been mailed the day before).

Thus, despite the reminders and the language of the mediation agreement, the settlement funds were not paid until 45 days had gone by. A few days before receiving the check, the plaintiffs filed a motion to enforce the settlement and for penalties. At the hearing of the motion, the trial judge ruled in favor of the plaintiffs and awarded the 50% penalty available under 22:1892 (formerly 658) – in other words $125,000 on top of the $250,000 settlement. In his reasons, the trial judge stated that there was no evidence of any request by Citizens for more time to pay, there was no evidence as to why the payment was late and plaintiff's attorney had to remind Citizens to pay the settlement money. He said that Citizens demonstrated "callous indifference" to its insured and noted that "Plaintiff had to fight every step of the way of this case to get every penny he was entitled to. That's why laws were enacted by the Louisiana legislature – to stop this type of thing from going on." The First Circuit affirmed, and the Supreme Court accepted writs from Citizens.

The court began by recognizing that it was undisputed that Citizens failed to pay the settlement within 30 days. The only issue before the court was which of the two penalty statutes should apply. The plaintiffs argued for 22:1892 with its 50% penalty, while Citizens argued for 22:1973 with its $5,000 penalty.

The court agreed with Citizens and reversed the lower courts. The court rejected application of 22:1892 which applies when an insurer fails to pay an insurance claim within thirty days after receipt of satisfactory proofs of loss from the insured. Plaintiffs contended that the settlement agreement for $250,000 was itself a proof of loss, but the court disagreed.

The court examined the meaning of proof of loss. Looking back to *Louisiana Bag* and earlier case law, it is true that Louisiana courts do not require a proof of loss to be in any particular form. Especially, insurers are not entitled to insist that proof of loss be executed on their forms before they pay a claim. "Proof of loss" is simply any vehicle meant to advise an insurer of the facts and amount of the claim and often takes the form of an estimate of damages prepared on behalf of the insured.

The court found that the settlement agreement was not based on any factual determination of what the insured was owed. Rather, it was a compromise between the parties entered into in order to resolve a dispute. "Proof of loss" means proof of the amount of the claim due the insured or, to quote this decision "proof sufficient to establish the amount due on an insurance claim." A written settlement constitutes proof of the amount due on the settlement of a claim, not the amount due on the insurance claim itself.

There was no question that Citizens missed the deadline for paying the original claim. The plaintiffs sued for both the amount of the claim and penalties. Rather than wait out the litigation, the plaintiff settled the entire suit, which included the penalties claim. Having settled that and accepted the $250,000 check, plaintiff was barred from bringing a subsequent action on that penalty claim. To allow a second application of the penalty statute would revive the compromised claim.

There was a penalty that was available under La. R.S. 22:1973 (formerly 1220) however. That statute explicitly sets forth a penalty awardable for an insurer's knowing failure to timely pay settlement funds. The court found that this statute was controlling. The penalty available is up to two times the damages sustained or $5,000, whichever is greater. There was no proof of any actual damages, but the court agreed with the trial judge that Citizens' actions constituted a callous indifference to its insured who had to fight at every level for every cent it was owed. Therefore, the court awarded the maximum of $5,000.

La. R.S. 22:1892(A)(2) does provide a penalty for failure to pay a settlement with a third party claimant within thirty days after written agreement of settlement of the claim. It appears the reason this was not applicable here is that 1892(A)(2) addresses settlements with third party claimants, not with insureds. And, of course, third party claimants don't have insurance claims in the same way that insureds do. They have no direct contractual relation with the insurer, but are considered third party beneficiaries of liability insurance contracts under the direct action statute.

In this case, the insured's settlement included a claim for penalties under 22:1892. Thus, if the Supreme Court had upheld application of 1892 a second time, for failure the make timely payment of the settlement, that would have been a double penalty under 1879. This was a fair result.

But what if the original claim had only been for property loss and had not included a claim for penalties? If Citizens had settled that claim and then failed to timely pay, would the result have been the same, i.e. the penalty would be under 1973 and not under 1892? Under the Supreme Court's reasoning in this case, because a settlement is not proof of loss, the only penalty available to the insured would still be under 1973. Thus, the somewhat awkward result is that the penalty available to a third party for failure to pay a settlement, is much higher than what is available to the insurance company's own insured when the insurer fails to pay a settlement.

Circuit Court Decisions

> *Edwards v. Louisiana Farm Bureau Mut. Ins. Co.*, No. 2015-0292, 2015 WL 5522010 (La. App. 1st Cir. 2015). The plaintiff Edwards was hurt in an automobile accident. His UM insurer, Farm Bureau tendered $410,000, but Edwards went to trial and received a jury verdict of an additional $410,000 for a total of $820,000. Farm Bureau suspensively appealed and the court reduced the

judgment to $210,000 plus costs of approximately $24,000. The judgment became final, but Farm Bureau failed to pay within 30 days of the judgment becoming final.

Edwards then sued Farm Bureau seeking penalties and attorney fees for failure to pay the UM judgment within 30 days, and then 60 days of the judgment becoming final. Edwards cited both 22:1892 and 22:1973 arguing that the UM judgment constituted satisfactory proof of loss. Farm Bureau argued that the penalties statutes do not apply to a judgment and moved for summary judgment.

The record revealed that payment of the UM judgment was complicated by multiple seizures of Edwards' interest in the UM suit by third-party creditors. Farm Bureau attempted a concursus, but that was dismissed. Then Farm Bureau sent a check made jointly to Edwards, his attorney and the third parties. Edwards returned the check demanding that the entire check be payable to him and his attorney or pay the attorney fees and deposit the remainder in the registry of the court. Due to these delays, the proceeds were actually paid about four months after the judgment became final.

The First Circuit reasoned that the penalties statutes refer to payment of a "claim" and therefor the issue was whether a judgment is a "claim." The court went back to the Supreme Court's decision in the *Katie Realty* case where the Supreme Court held that a settlement agreement was neither a "claim" nor a "proof of loss" under La. R.S. 22:1892. The court explained that Edwards' assertion of a right to proceeds under the policy was a "claim." When judgment was entered, the claim was adjudicated and the judgment became the new source of the rights and obligations of the parties, rather than the policy. The enforcement of the judgment was not enforcement of the claim.

The court further referred to the definition of "claim" in La. R.S. 22:1188.1 which governs the duty of an insurer to promptly pay a claim under a long-term care insurance policy – not liability or property policies. There, a "claim" is defined as "a request for payment of benefits under an in-force policy." Although this is not the relevant statute, the court found that it was evidence that the term "claim" does not include a judgment.

The pertinent penalties statutes do not reference payment of a judgment. The purpose of the penalty statutes is to provide a mechanism for enforcing insurance policies and deterring bad faith by insurers. The penalty statues provide an incentive for prompt adjustment and payment during the claim process. Once a claim is reduced to judgment, the insured can compel payment by executing on the judgment. The court stated that the insured then no longer needed the mechanism of the penalty statutes.

For these reasons, the First Circuit held that the word "claim" in the penalty statutes does not encompass a judgment. Accordingly, the First Circuit affirmed summary judgment in favor of Farm Bureau.

Barnes v. West, 2014-1018 (La. App. 3 Cir. 2/4/15), 159 So. 3d 1075. The parties in an automobile accident suit agreed on a settlement. The plaintiff contended that the settlement had not been paid within the statutory time period under 22:1973(B)(2) – which requires a settlement be paid within thirty days after an agreement is reduced to writing. There was a dispute over when the settlement had been reduced to writing. The Third Circuit held that a letter by the insurer setting forth its understanding of the agreement was not an agreement of the parties reduced to writing. Only when the plaintiff wrote back confirming the agreement was the settlement reduced to writing. Therefore, the Third Circuit found the settlement was timely paid and vacated the penalty award of $5,000.

Holt v. Ace Am. Ins. Co., 2014-380 (La. App. 3 Cir. 10/1/14), 149 So. 3d 886. The trial court found that the date the settlement was reduced to writing was the date on which the plaintiff's counsel sent a letter back to the mediator confirming his agreement to the terms of the settlement – not the date when the parties signed the settlement agreement. The Third Circuit agreed and upheld the $5,000 penalty award. However, the Third Circuit reversed the award of attorney fees, holding that when a claim falls only under La. R.S. 22:1973, the statute does not authorize attorney fees.

Penalties for secondary adjustments?

Aghighi v. Louisiana Citizens Prop. Ins. Corp., 2012-1096 (La. App. 4 Cir. 6/19/13), 119 So. 3d 930, *writ denied sub nom. Aghighi v. Louisiana Citizens Ins. Corp.*, 2013-1737 (La. 10/30/13), 124 So. 3d 1102.

This is a Fourth Circuit case where the defendant was Citizens and the claim was for property damage during Hurricane Gustav.

Citizens timely sent an adjuster, Culbertson, to inspect the damage after the claim was reported by the plaintiff. Culbertson documented damage caused by the wind of the hurricane including a large tree which had fallen on the back portion of the home. Foundation cracks were shown in the photographs attached to Culbertson's report, but Culbertson did not include any adjustment for the foundation repairs. Further evidence of Culbertson's knowledge of the foundation damage was testimony by the plaintiff's son that he met Culbertson at the property and Culbertson suggested that the plaintiff get an estimate to repair the foundation damage. Culbertson estimated the damage to the house and its appurtenant structures as about $4500 and Citizens timely paid this amount to the plaintiff.

The plaintiff then contacted a construction company, an expert damage estimator, and an engineer to evaluate the damages. They estimated the repairs would be over $80,000. This estimate was submitted to Citizens in April 2009. Within 30 days Citizens responded with another inspection by a second adjuster, Finkus, and additional funds which it paid unconditionally, the total now amounting to about $13,000. The payments still included nothing for the foundation repairs.

The plaintiff sued Citizens for underpayment of his damages and for penalties under 22:1892, for nonpayment within 30 days of satisfactory proof of loss. The case was tried to Judge Julien in CDC. She found that Citizens had underpaid by nearly $50,000 and awarded that amount but refused to award penalties. Plaintiff appealed to the Fourth Circuit.

The case was affirmed in part, reversed in part and rendered. A five judge panel presided. The majority opinion was written by Judge Belsome who was joined by Judges McKay and Bonin. Judges Ledet and Jenkins concurred in part and dissented in part.

All of the judges agreed with the court's award of approximately $50,000 for the property damage. However, the majority reversed the trial judge on penalties and found that the trial court should have awarded penalties, while the dissenters felt that penalties were not warranted.

Writing for the majority, Judge Belsome reasoned that Culbertson's initial report for only $4500 was woefully inadequate. He argued this was demonstrated by the second adjuster's report in April which added approximately $8500. He stated that according to the second report, Citizens had not paid until more than six months from the date of the first report which he termed satisfactory proof of loss.

He rejected Citizens' argument that payment of the undisputed amount within thirty days of the second report was timely. Judge Belsome disagreed. The initial adjuster, Culbertson, failed in the first report to properly adjust a substantial amount of the damages. He excluded damage not because it was in dispute but because "the adjuster did not have the requisite knowledge to adjust the claim or simply chose not to do so." Citizens was bound by the errors of its adjuster.

Judge Belsome stated that the insurer had a duty to do more than just send an adjuster to take pictures and calculate numbers on less than all the damage. It would defeat the purpose of the statute to allow an inadequate and unreasonably low adjustment done within the requisite time delays, to satisfy the insurer's obligation to the insured. Likewise, allowing a "readjustment" done approximately six months later to cure the original bad conduct without penalty would condone the insurer's actions. Thus there was no excuse for the mishandling of the claim.

Because the failure to pay the undisputed amount within 30 days was found arbitrary, capricious, and without probable cause, penalties were mandatory and should have been awarded along with attorney's fees. Moreover, the penalty was calculated on the entire amount due (approximately $63,000) – if part of a claim for property damage is not disputed, the failure of the insurer to pay the undisputed portion of the claim within the statutory delay subjects the insurer to penalties on the entire claim.

Judge Ledet and Jenkins dissented from the reversal of the penalty ruling. They pointed out that the determination of whether the insurer's conduct was arbitrary, capricious, or without probable cause is a factual determination which should only be reversed if it is manifestly erroneous. They also commented that allowing penalties under the circumstances of this case penalizes and insurer for re-inspecting its insured's property and, based on that re-inspection, paying the insured an additional amount. Re-inspecting and paying more was not arbitrary or capricious.

From a policyholder's point of view, the majority was correct when it held that an insurer who performs a totally inadequate initial adjustment cannot avoid penalties by paying the inadequately calculated amount within 30 days. From an insurer's point of view, this holding could do one of two things: 1) it could encourage insurance companies to do thorough and reasonably accurate initial adjustments; but it might 2) discourage insurers from reinspecting properties and making additional payments.

No right of third party for bad faith failure to pay medical bills

Howard v. United Servs. Auto. Ass'n, 2014-1429 (La. App. 1 Cir. 7/22/15), 2015 WL 4497946. Plaintiff, Ms. Howard was rear-ended by Ms. Greenup. Greenup had liability limits of $25,000 with USAA and Ms. Howard had UM limits of $10,000 and med pay of $5,000 with her own carrier. Ms. Howard's UM carrier paid up but Greenup's carrier tried to settle the case against its insured for the policy limits of $25,000. Ms. Howard refused to release Greenup in the tendered settlement and therefore the case went to trial. Ms. Howard claimed that Ms. Greenup's insurer was in bad faith for failure to pay her medical bills. The First Circuit affirmed the trial court's dismissal of the bad faith claim because USAA was Ms. Greenup's insurer. Ms. Howard as a third party, had no bad faith claim against USAA for failure to pay her medical bills.

CONCLUSION

Louisiana's bad faith statutes continue to evolve both through legislative amendment and through interpretive jurisprudence. The number of reported cases seems to increase with each passing year. The crucible of damaging hurricanes beginning with Hurricane Katrina has heightened awareness in the plaintiff's bar of these statutes and their potential for adding value to a claim, either directly or as settlement leverage. At the same time there is an ebb and flow in the courts as to willingness or reluctance to find that insurers have acted in a manner that is "arbitrary, capricious or without probable cause."