Trying the Bad Faith Insurance Case: A Requiem on Hurricane Losses

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1. Introduction

On August 29, 2005, Hurricane Katrina changed the face of the insurance industry. Hurricane Katrina spawned a substantial amount of litigation by insureds against their insurers for payment under their insurance policies. The majority of plaintiffs also sought damages and penalties for their insurer’s alleged bad faith actions in adjusting the insureds’ claims. This article will address the major issues that arose in bad faith litigation in Louisiana. The issues addressed in bad faith litigation in Louisiana will also have an impact on bad faith litigation in other states.

2. Relevant Statutes and Code Articles

The Louisiana Insurance Code contains two important statutes that allow insureds to recover penalties as a result of an insurer’s bad faith – Louisiana Revised Statutes § 22:658, which was amended August 16, 2006 and redesignated as Louisiana Revised Statutes § 22:1892 effective January 1, 2009, and Louisiana Revised Statutes § 22:1220, which was redesignated as Louisiana Revised Statutes § 22:1973 effective January 1, 2009. The Louisiana Civil Code contains two important code articles that are also relevant to bad faith insurance suits, Louisiana Civil Code articles 1997 and 1998.
a. Louisiana Revised Statutes § 22:658 and § 22:1220

Louisiana courts have held that the purpose of Louisiana Revised Statutes § 22:658 and § 22:1220 is to insure that the insurer does not arbitrarily or capriciously deny a claim that is due. Ken Brady Ford, Inc. v. Roshto, 607 So. 2d 1062 (La. App. 3d Cir. 1992). Pursuant to Amended Louisiana Revised Statutes § 22:658, insurers are obligated to pay the insured any amounts owed within 30 days of receipt of satisfactory proof of loss. When this failure is arbitrary, capricious, and without probable cause, the insurer shall be subject to:

a penalty, in addition to the amount of the loss, of fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, or to any of said employees, or in the event a partial payment or tender has been made, fifty percent of the difference between the amount paid or tendered and the amount found to be due as well as reasonable attorney fees and costs.

Also, pursuant to Amended Louisiana Revised Statutes § 22:658, in the case of catastrophic loss, the insurer is obligated to initiate adjustment of the insured’s loss within 30 days of notice of loss. The failure to do so subjects the insurer to the statutory penalty of two times the insured’s damages sustained, as provided by Louisiana Revised Statutes § 22:1220.

Former Louisiana Revised Statutes § 22:658 allowed a penalty of only 25%, rather than 50%. In addition, the former statute did not allow an insured to recover “reasonable attorney fees and costs.” The revision went into effect on August 15, 2006. There was no legislative statement regarding whether the amendment was retroactive, which led to litigation regarding the retroactivity of Louisiana Revised Statutes § 22:658 that will be discussed below.

Pursuant to Louisiana Revised Statutes § 22:1220, insurers owe its insureds a duty of good faith and fair dealing and an affirmative duty to adjust the claims fairly and promptly and make a reasonable effort to settle claims. Any one of the enumerated acts in the statute constitutes a breach of the insurer’s duties, which are as follows:

(1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.

(2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.

(3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.

(4) Misleading a claimant as to the applicable prescriptive period.
(5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.

(6) Failing to pay claims pursuant to R.S. 22:658.2 when such failure is arbitrary, capricious, or without probable cause.

According to Louisiana Revised Statutes § 22:1220, in addition to general or special damages, the insurer may be awarded penalties “in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater” (emphasis added).

The major difference in the penalties between Louisiana Revised Statutes § 22:1220 and Louisiana Revised Statutes is that the penalty in § 22:1220 uses the amount of damages sustained by the breach to determine the penalty whereas § 22:658 uses the “amount found to be due” under the policy. The “amount found to be due” is the “amount ultimately found to be owed by the insurer to the insured.” Ibrahim v. Hawkins, 2002-0350 *13 (La. App. 1st Cir. 2/14/03); 845 So.2d 471, 483. The court in Ibrahim found that “amount found to be due” must mirror the first portion of the penalty provision. Id. at p. 14. The first portion of the provision states that the insurer “shall pay the amount of any claim due any insured.” La. Rev. Stat. § 22:658. Thus, the “amount found to be due” are the proceeds due under the policy.

Section 22:1220 “provides for a doubling of damages attributable to the insurer’s breach of duties imposed under the statute or $5,000, whichever is greater.” Pride v. Am. Sec. Ins. Co., No 02-2748, 2003 WL 1618566 *2 (E.D. La. March 26, 2003). The United States Fifth Circuit Court has held that the “double damages provision applies only after a showing of damages arising from the breach.” Hannover Corp. v. State Farm Mut. Auto. Ins. Co., 67 F.3d 70, 76 (5th Cir. 1995). If the insured cannot prove any damages, he may still be awarded the $5,000 penalty. Id. (citing Hall v. State Farm. Mut, Auto. Ins. Co., 658 So.2d 204, 207 (La. App. 3d Cir. 1995) (stating “The amount of penalties to be awarded is not . . . based upon the amount of damages claimed or awarded in damages but the amount of damages sustained by the breach. If there are no damages proven as a result of the breach itself, then the maximum amount that can be awarded is $5,000.00 in penalties.”)

The Eastern District Court of Louisiana has found that plaintiffs are not always able to prove their damages and that ultimately the only damages sustained are legal interest for the delay in payment. The court did find, however, that the law and jurisprudence does not limit the damage to legal interest only. Princess Boat Rental, Inc. v. McGriff, Seibels & Williams of Texas, No, 98-782, 1999 WL 893569 (E.D. La. Oct. 15, 1999). In Princess Boat, the Eastern District cited Williams v. La. Indemnity Co., which awarded damages for the plaintiff having to purchase a replacement vehicle due to the insurers denial. No. 98-782 1999 WL 893569 (E.D. La. Oct. 15, 1999). The court recognized that while courts use legal interest to determine the amount of the penalty, “courts regularly assess damages based on the facts of the individual case and evidence presented therewith, and do not limit the plaintiff’s recovery to legal interest.” Id.

Both statutes are similar in that they both provide “penalty awards when an insurer has arbitrarily, capriciously, or without probable cause failed to timely settle a claim.” Hannover Corp. v. State Farm Mutual Auto. Ins. Co., 67 F.3d 70, 75 (5th Cir. 1995). According to the United States Fifth Circuit Court of Appeals in Hanover, the primary difference is that § 22:1220 provides that an insured or
claimant can sue whereas § 22:658, only an insured can sue. *Id.* The Louisiana Supreme Court has recognized that other differences are that penalties under § 22:1220 are discretionary whereas penalties under § 22:658 is mandatory and that § 22:658 allows 30 days to pay the claim and § 22:1220 allows 60 days. *Calagero v. Safeway Ins. Co.,* 1999-1625 (La. 1/19/00); 753 So. 2d 170. Because the courts have found that they are similar, the courts do not allow insureds to recover under both statutes. The Louisiana Supreme Court found in *Calagero* that:

> Whereas La. R.S. 22:1220 provides the greater penalty, La. R.S. 22:1220 supersedes La. R.S. 2:658 such that [plaintiff] cannot recover penalties under both statutes . . . However, because La. R.S. 22:1220 does not provide for attorney fees, [plaintiff] is entitled to recover attorney fees under La. R.S. 22:658 for [insurer’s] arbitrary and capricious failure to pay his claim within 30 days of receiving satisfactory proof of loss. *Id.*

Thus, an insured may not recover penalties under both statutes, but if the penalty under Louisiana Revised Statutes § 22:1220 is greater than the penalty in Louisiana Revised Statutes § 22:658, the insured may still recover attorney fees under Louisiana Revised Statutes § 22:658 in addition to the penalty under § 22:1220.

1. **Arbitrary, Capricious, and Without Probable Cause**

A finding of actions that are “arbitrary, capricious, and without probable cause” are crucial for a bad faith claim. The United States Fifth Circuit Court of Appeals, in addressing an insurer’s obligation under § 22:658, has held that whether an insurer’s refusal to pay a claim is arbitrary, capricious, or without probable cause depends on the facts known to the insurer at the time of its action. *Real Asset Mgmt., Inc. v. Lloyd's of London*, 61 F.3d 1223, 1231 (5th Cir. 1995). Louisiana courts have held that the purpose of § 22:658 and § 22:1220 is to insure that the insurer does not arbitrarily or capriciously deny a claim that is due. *Ken Brady Ford, Inc. v. Roshto*, 607 So. 2d 1062 (La. App. 3d Cir. 1992).

In *Becnel v. Lafayette Insurance Co.*, 1999-2966 (La. App. 4 Cir. 11/15/2000), 773 So.2d 247, the Louisiana Fourth Circuit Court of Appeal held that the insurer violated § 22:658 and § 22:1220 by ignoring the appraisal of its own adjuster and failing to tender the recommended payment, and thus the insurer’s refusal to pay was arbitrary, capricious, and without probable cause, rendering the insurer liable for penalties to its insured. In *Becnel*, an insured filed suit against its property insurer to recover the cost to replace a barn and house roof damaged by hail and to recover penalties for bad faith. The insurer retained a property damage adjuster to inspect the damage. The adjuster submitted a report with photographs recommending that both roofs be replaced and estimated that the repairs would cost approximately $16,000. Despite its own adjuster’s report, the claims supervisor thought that each roof only suffered minor damage and hired a person from a roofing company to inspect the damage. This person found that only thirteen shingles should be replaced rather than the whole roof. The insurer then paid the plaintiff for the thirteen shingles rather than the whole roof as determined by the insurer’s adjuster. The plaintiff hired another company to prepare an estimate. This person agreed with the insurer’s adjuster that the whole roof should be replaced. The plaintiff requested payment for the cost to replace the roof because the insurer’s adjuster and the person hired by the plaintiff found that it needed to be replaced, but the insurer refused to pay. The plaintiff then filed suit for damages for
failure to pay for replacement of the roof and for penalties and attorney’s fees for the insurer’s arbitrary and capricious refusal to settle the claim.

The trial court rendered judgment for the plaintiff for payment to replace the roof and for penalties and attorney’s fees pursuant to Louisiana Revised Statutes §§ 22:658 and 22:1220. The court stated that penalties under Louisiana Revised Statutes § 22:658 are due if the claimant establishes “that the insurer received satisfactory proof of loss, failed to pay the claim within 30 days of the proof of loss, and that its failure to pay the claim was arbitrary, capricious, or without probable cause.” The court’s reasoning for finding the insurer’s denial of the claim was arbitrary, capricious, and without probable cause is as follows:

Unlike the circumstances where an insured obtains an estimate for the repair of a loss covered under a policy of insurance and the insurer subsequently obtains its estimate of the repair of the loss, the defendant choose [sic] to ignore the appraisal of plaintiff's loss by its own appraiser. Defendant then obtained another appraisal which was substantially lower than its original appraiser and decided to in effect deny plaintiff's claim for damage to his roof. After receiving another estimate of repairs from plaintiff together with a Proof of Loss, defendant still choose [sic] to deny plaintiff's claim. The Court finds that the actions of the defendant were arbitrary capricious and without probable cause .... Further, the defendant's course of action in totaling [sic] ignoring the appraisals of its own appraiser and the subsequent estimate of repair presented by the plaintiff constitutes bad faith dealings with its insured.

The Louisiana Fourth Circuit Court of Appeal affirmed the ruling, finding that there was no manifest error in the lower court’s determination that the insurer’s handling of plaintiff’s claim was arbitrary, capricious, and without probable cause.

Additionally, in Louisiana Maintenance Service Inc. v. Certain Underwriters at Lloyd’s of London, 616 So. 2d 1250 (La. 1993), the Louisiana Supreme Court held that when the defendant insurer “ignored the advice of its agent and its adjuster,” the insurer was subject to penalties under § 22:658 and § 22:1220.

Also, in Real Asset Management, Inc. v. Lloyd's of London, 61 F.3d 1223 (5th Cir. 1995), the United States Fifth Circuit Court of Appeals held that the defendant insurer acted arbitrarily and capriciously in failing to tender payment owed “despite the clear evidence that this was a legitimate claim.” The court held:

A series of communications between the adjusting company and the underwriters makes it clear that the defendants were well aware that there was legitimate damage to the insured property directly and unequivocally resulting from the storm winds. Despite the clear evidence that this was a legitimate claim, they chose to take an adversarial stance with their insured.

In Sher v. Lafayette Insurance Co., 2007-2441 (La. 4/8/08); 988 So.2d 186, reh’g granted in part, No. 2007-2441, 2008 WL 2655664 (La. 7/7/2008), the court found that Lafayette Insurance Company’s refusal to pay Mr. Sher’s claim was “arbitrary, capricious, and without probable cause.” Sher is one of the models of Hurricane Katrina insurance litigation thus far. Sher addressed other major issues in bad faith insurance litigation, which are addressed below.

Joseph Sher’s property in New Orleans was damaged by Hurricane Katrina. Mr. Sher sued his insurer for failure to tender payment for his damages. The jury found that Lafayette Insurance Company arbitrarily and capriciously violated Louisiana Revised Statutes §22:658 by refusing to pay Mr. Sher’s claim, and that Lafayette was liable for all proceeds owed, including proceeds for water damage sustained from the broken levees, and the applicable penalties under the amended version of §22:658. On appeal, the Louisiana Fourth Circuit Court of Appeal upheld the district court’s motion for summary judgment ruling regarding the ambiguity of the policy’s water damage exclusion, but reversed the award of the increased penalties under the new version of §22:658, holding that the amended version of §22:658 is not to be applied retroactively. The issue went before the Louisiana Supreme Court. The Supreme Court held that the amended Court held that the amended version did not apply, which is discussed later.

In Sher, the Supreme Court held that both Louisiana Revised Statutes § 22:658 and § 22:1220 “require proof that the insurer was ‘arbitrary, capricious, or without probable cause,’ a phrase that is synonymous with ‘vexatious.’ This court has noted that ‘vexatious refusal to pay’ means unjustified, without reasonable or probable cause or excuse. Both phrases describe an insurer whose willful refusal of a claim is not based on a good-faith defense.” The Supreme Court, citing Reed v. State Farm Auto, Ins. Co., 03-0107 (La. 10/21/03); 857 So. 2d 1012, 1020-21, stated:

Whether or not a refusal to pay is arbitrary, capricious, or without probable cause depends on the facts known to the insurer at the time of its action ... Because the question is essentially a factual issue, the trial court's finding should not be disturbed on appeal absent manifest error. However, when the record does not support the trial court's determination on this issue, the trial court's decision will be reversed. Id. at 207.

The Court found that “with regard to the initiation of loss adjustment, Lafayette asserts that it first received notice of plaintiff's claim on October 5, 2005; that it assigned an adjuster that same day; that the adjuster called plaintiff on October 9, 2005, but was unable to speak to him; that the adjuster spoke to plaintiff later in October and made arrangements to inspect the property on November 1, 2005; that the property was inspected on November 1, 2005; and that evidence of each of these facts was presented to the jury.” The court found that Mr. Sher largely agreed with this sequence of events, except that his son testified that he had provided notice to Lafayette of the claim during the first two weeks of September, 2005. The court found that based on these facts, the jury was not manifestly erroneous in accepting plaintiff's son's testimony and concluding that Lafayette failed to initiate loss adjustment within thirty days after receiving notice of the claim. Id. at 208. Also, the court found that:
Lafayette, after its initial inspection, found that most of the damage to the property was not covered under the policy due to lack of maintenance, and disrepair. Lafayette estimated plaintiff's damages at $3,307.09. Lafayette had inspected the building in 1994, 2001, 2002, and 2003, each time finding that the property was well maintained. Further, Lafayette's own engineer did not feel that the property was poorly maintained or in disrepair, and Lafayette misrepresented the engineer's findings in a letter to plaintiff, stating that the engineer had concluded that “the majority of the damages were pre-existing and caused by a lack of maintenance.” Despite plaintiff sending numerous estimates and invoices to Lafayette, the insurer refused to reconsider its damage estimate. Finally, Lafayette failed to tender the undisputed portion of plaintiff's lost rents.

The court held that “based upon the evidence presented, the jury was not manifestly erroneous in concluding that Lafayette's actions were 'vexatious,' and thus arbitrary, capricious, and without probable cause.” Id. at 208

The cases cited above are several examples of actions that have been found to be arbitrary, capricious, and without probable cause. As discussed above, whether insurer's refusal to pay a claim is arbitrary, capricious, or without probable cause depends on the facts known to the insurer at the time of its action. *Real Asset Mgmt., Inc. v. Lloyd's of London*, 61 F.3d 1223, 1231 (5th Cir. 1995).


The Supreme Court of Louisiana recently addressed the issue of whether the insurer’s delay in payment was arbitrary, capricious, or without probable cause in *Louisiana Bag v. Audubon Indemnity Co.*, 2008-0453 (La. 12/2/08); 2008 WL 5246674. A fire had destroyed Louisiana Bag’s manufacturing plant and warehouse facilities. Louisiana Bag sued its insurer for payment under the policy and penalties. The trial court ruled in favor of the insurer and Louisiana Bag appealed. The Third Circuit Court of Appeal reversed the judgment and found that the insurer was liable to Louisiana for payment under the policy and penalties under Louisiana Revised Statutes § 22:658.

The insurer argued that it could not be liable for penalties because neither the court of appeal nor the plaintiffs had identified a “specific incident” of conduct that was arbitrary and capricious. The insured, on the other hand, argued that the record was full of evidence establishing the insurer’s arbitrary and capricious conduct.

The Court in determining the meaning of arbitrary, capricious, or without probable cause looked to *Reed v. State Farm Auto. Ins. Co.*, 03-0107 (La. 10/21/03); 857 So. 2d 1012, in which the Court stated:

> The New Oxford English American Dictionary defines an “arbitrary” act as one “based on random choice or personal whim, rather than reason or system,” and “capricious” as “given to sudden and unaccountable changes in behavior.” *Id.* at 1020. The phrase “arbitrary, capricious, or without probable cause” is synonymous with “vexatious,” and a “vexatious refusal to pay” means “unjustified, without reasonable or probable cause or excuse.” *Id.* at 1021. . . Both phrases describe an insurer whose willful refusal of a claim is not based on a good-faith defense. *Reed*, 857 So. 2d at 1021.
The Court found that “an insurer need not pay a disputed amount in a claim for which there are substantial, reasonable, and legitimate questions as to the extent of the insurer’s liability or of the insured’s loss.” 2008 WL 5246674 at p. 8. However, “an insurer must pay any undisputed amount over which reasonable minds could not differ” and that “[a]ny insurer who fails to pay said undisputed amount has acted in a manner that is, by definition, arbitrary, capricious, or without probable cause, . . . and will be subject to penalties therefore on ‘the difference between the amount paid or tendered and the amount found to be due.’” Id.

The Court found that the facts in the record established that the insurer conducted a significant investigation that consistently revealed that the insured suffered a total loss. Id. The court found that by late August 2003, the insurer had received satisfactory proof of loss and its own adjuster had recommended paying policy limits. Id. The insurer had argued that there was a reasonable dispute as to the extent of the insured’s loss which was sufficient to justify payment. The court found that the record showed that the insurer’s reasons for non-payment were insufficient to relieve the insurer of its duty to pay the undisputed portions of the claim. The court found that the insurer’s actions appeared to be “based on random choice or personal whim” and were thus, “unjustified and without reasonable or probable cause or excuse.” Id. at p. 12.

In addressing the insurer’s argument that there was no evidence of a specific act that was arbitrary, capricious, or without probable cause, the Court stated that “a review of the applicable jurisprudence illustrates that it is ‘sufficient that the vexatious character of the insurer’s refusal to pay can reasonably be found from a general survey of all the facts in evidence, specific evidence thereof not being necessary.’” Id. at p. 13 (citing 14 Couch on Insurance 3d § 204:108). Thus, “direct and positive evidence of vexatious refusal is not necessary to impose the statutory penalty.” Id.

The Court found that there was “significant proof in a general survey of the record of the vexatious character of Audubon’s refusal to pay.” Id. at p. 13. Specifically the Court found that the insurer was notified by its adjuster at the beginning of the investigation that the insured suffered a total loss and that the adjuster notified the insurer of the insured’s demands for payment and the insurer failed to respond to same. Id. The Court found that the insurer may have been justified in withholding payment at the beginning, but that the insurer was not justified in continuing to withhold payment. Based on the significant information presented to the insurer by its adjusters, the uncontested nature of the adjuster’s calculations, and the lack of a reasonable basis for failing to tender any of the undisputed portions of the claim, the Court held that the court of appeal correctly overturned the trial court and found that the insurer failure to timely tender payment was arbitrary, capricious, or without probable cause. Id.

ii. Satisfactory Proof of Loss

Whether an insured submitted a “satisfactory proof of loss” is crucial to the determination of an insurer’s bad faith. In Sevier v. U.S. Fidelity & Guaranty Co., 497 So. 2d 1380, 1384 (La. 1986), the Louisiana Supreme Court, relying on a long line of Louisiana jurisprudence, held that the “proof of loss” requirement under § 22:658 and § 22:1220 is a flexible requirement merely to advise the insurer of the facts of the claim and is not required to be in any formal style. See also Louisiana Bag Co., Inc. v. Audubon Indemnity Co., 2008-0453, 2008 WL 5146674, p. 11 (La. 12/2/08); Nguyen v. St. Paul Travelers Ins. Co., No. 06-4130, 2007 WL 1672504 (E.D. La. 6/6/2007); Spalitta v. Hartford Fire Ins.
Co., 428 So. 2d 824, 827 (La. App. 5th Cir. 1983); Gatte v. Coal Operators Cas. Co. 225 So. 2d 256, 258 (La. App. 3d Cir. 1969). In other words, as long as the proof of loss “fully apprise[s] the insurer of the insured’s claim,” the “satisfactory proof of loss” requirement of Section 22:658 is met. Gulf Wide Towing, 554 So. 2d at 1353. The United States Fifth Circuit Court of Appeals has also recognized Louisiana’s flexible “proof of loss” requirement in holding that as long as the insurer receives sufficient information to act on the claim, the manner in which it obtains the information is immaterial. Austin v. Parker, 672 F.2d 508 (5th Cir. 1982). In Gulf Wide Towing, for example, the court held that telexes sent by the owner of a sunken tugboat to the boat’s insurers “established that notice of the sinking (proof of loss) was made.” Id. at 1354. The insurer’s subsequent failure to pay subjected it to penalties under Section 22:658. See id.

Further, in Haynes v. Shumake, the court found that a petition for damages could constitute a satisfactory proof of loss. 582 So. 2d 959 (La.App. 2 Cir. 1991). Thus, by filing a complaint, a plaintiff puts the insurer on notice to pay what is owed under the policy. Indeed, under Louisiana law, the very purpose of a petition is to “apprise defendants of all the elements” of a plaintiff’s claim. Texas Gas Transmission Corp. v. Soileau, 251 So. 2d 104, 107 (La.App. 3 Cir. 1971) (emphasis added). A complaint therefore meets the requirement for a satisfactory proof of loss.

1. Kiln Underwriting Limited v. Jesuit High School of New Orleans

The Eastern District Court of Louisiana recently addressed the proof of loss issue in Kiln Underwriting Limited v. Jesuit High School of New Orleans, 2008 WL 4724390 (E.D. La. October 24, 2008). In Kiln, the insurer filed a complaint seeking a declaratory judgment on the rights and obligations it had towards Jesuit High School for Jesuit’s Hurricane Katrina damage. Jesuit filed a counterclaim seeking payment under the policy and penalties under Louisiana Revised Statutes § 22:658 and § 22:1220. Among other damages, Jesuit sought payment for Extra Expenses under the policy for the amount of $34,555.55, which was the amount they paid St. Martin’s Episcopal School in order to rent facilities to hold classes and $203,434.00 for expenses it incurred in using Strake Jesuit of Houston’s facilities to provide classes for students who temporarily relocated to Houston. The court found that the rental payments to St. Martin’s were covered by the policy but that the expenses incurred at Strake were not covered because Jesuit did not actually incur the expenses. Instead, the court found that Strake actually incurred the expenses and that the expenses were being covered by a special fund they had set established.

As for the penalties claim, the court found that in order to recover penalties, the claimant must show that (1) the insurer received a satisfactory proof of loss; (2) the insurer failed to pay the claim within the applicable statutory period; and (3) the insurer’s failure to pay was arbitrary, capricious, or without probable cause. The court stated that the Louisiana Supreme Court has interpreted the phrase, “satisfactory proof of loss” as “that which is sufficient to fully apprise the insurer of the insured’s claim.” Id. (citing Hart v. Allstate Ins. Co., 437 So. 2d 823, 828 (La. 1983). Further, the court stated that the proof of loss was not required to be in any formal style as long as the “insurer receives sufficient facts to fully apprise him of the nature, basis, and extent of the insured’s claim.” Id. (citing Nguyen v. St. Paul Travelers Ins. Co., 2007 WL 1672404, at*4 (E.D. La. 2007); Sevier v. U.S. Fidelity & Guar. Co., 497 So. 2d 1380 (La. 1986); McDill v. Utica Mut. Ins. Co., 475 So. 2d 1085, 1089 (La. 1985). Also, the court found that “[i]mportantly, the insured need not establish the precise amount of
the loss; so long as he has “made a showing that the insurer will be liable for some general damages, the satisfactory proof of loss requirement is satisfied.” Id. (citing McDill, 475 So. 2d at 1091).

The court held that there was no doubt that the insurer received satisfactory proof of loss for the expenses paid to St. Martin. Jesuit had submitted an initial proof of loss that contained an attachment breaking down the estimated rental payments by month. Jesuit then submitted a supplemental claim that further described the expenses and included copies of checks to St. Martin’s. Jesuit also submitted a report that stated how much Jesuit incurred in paying rent. The court found that there was never a dispute regarding the amount of the expenses or their existence.

The insurer had argued that Jesuit’s partial proof of loss was unsatisfactory because “it did not comply with a provision in the policy requiring all submitted proofs of loss to be sworn.” Id. at p. 6. The court held that the insurer’s argument misunderstands the statutory requirement. The court stated:

As the Louisiana courts have interpreted the proof of loss provision, an insurer need only be “fully apprise[d]” of the insured’s claim. As this standard was designed to be flexible, it does not incorporate the more exacting proof of loss requirements of the underlying insurance policy. To the extent that an insured’s failure to comply with a “proof of loss” clause is relevant at all, it is to the question of arbitrary or capricious behavior. That it, if the noncompliance gives the insurer a reason to believe that the claim can be denied, its failure to pay the insured’s claim within the statutory period may be excusable. Id.

The court found that the proof of loss requirement had been met. The court also found that the second and third requirements had been met as well. The second requirement required the claim to show that the insurer failed to pay the claim within the applicable statutory period. The court found that the insurer still had not paid Jesuit for its extra expense claim, which was more than 10 months after the insurer received the report confirming the amount of extra expenses.

The third requirement requires the claimant to demonstrate the insurer’s failure to pay was arbitrary, capricious, or without probable cause. The court stated that the inquiry depended on the facts known to the insurer at the time of its action. Because Louisiana law requires an insurer to tender the undisputed amount due, an insurer who failed to tender any amount within the statutory period must rely on a reasonable defense that would preclude all recovery.

Even though arbitrariness is generally left for the jury to decide, the court found that a judge can decide the issue on summary judgment if “there is no genuine issue of material fact as to the vexatiousness of the parties’ actions. Id. at p. 7. The court found that there was no good faith basis for the insurer to have denied the extra expense claim in its entirety. The court found that the fact that the proof of loss was unsworn did not cause any prejudice to the insurer or at least not the prejudice that would justify denying the claim in its entirety. The court, therefore, granted Jesuit’s motion for partial summary judgment with respect to bad faith penalties for failure to pay the St. Martin’s extra expenses.
Louisiana Civil Code Article 1997

Louisiana Civil Code article 1997 states that “An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.”

One of the issues in bad faith litigation that was addressed in Sher concerns recovery of attorneys’ fees under Louisiana Civil Code article 1997. Mr Sher argued that he was entitled to attorneys’ fees under Louisiana Civil Code article 1997 for its bad faith breach of contract. Article 1997 states that “An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.” The Louisiana Supreme Court, however, refused to allow recovery of attorneys’ fees under article 1997. The court’s reasoning was that the article and the contract did not mention attorneys’ fees, and that Louisiana courts have consistently not allowed attorneys’ fees in the absence of a specific authority for the award.

e. Louisiana Civil Code Article 1998

Louisiana Civil Code article 1998 provides:

Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.

Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.

The issue of damages for mental anguish was addressed in Sher. Mr. Sher argued that the trial judge had erred in excluding a jury instruction on mental anguish damages under Civil Code Article 1998 and that the Louisiana Fourth Circuit Court of Appeal failed to correct the error. The Supreme Court held that the trial judge did not err because the Court concluded that the provisions of Article 1998 had not been satisfied. Specifically, the Court held that although Mr. Sher proffered evidence of his mental anguish, he had not offered any evidence to support the requirement that the insurer have intended to “aggrieve the feelings of” the policyholder or that the insurance contract was intended to “gratify a significant nonpecuniary interest” of the policyholder.

Although Mr. Sher did not recover for mental anguish, other plaintiffs in bad faith litigation, however, have been able to recover damages for mental anguish. Particularly in Weiss v. Allstate Ins. Co., a jury awarded $1.5 million for mental anguish to insured homeowners under Louisiana Revised Statutes § 22:1220. No. 06-3774 (E.D.La. 4/16/2007). In Orellana v. Louisiana Citizens Property Corp., 2007-1095 (La. App. 4 Cir. 2008), 972 So. 2d 1252, the Louisiana Fourth Circuit Court of Appeal held that an award of $125,000 for mental anguish not an abuse of discretion.

Also, in Veade v. Louisiana Citizens Property Corp., No. 2008-0251, 2008 WL 2344671 (La. App. 4 Cir. 6/4/08), the Louisiana Fourth Circuit Court of Appeal affirmed a jury’s award of $10,000 each to homeowners for mental anguish in a similar type claim. Veade demonstrates what an insurer did to “intend to aggrieve” the insured. In Veade, the Louisiana Fourth Circuit Court of Appeal affirmed the
The insureds’ second home had been destroyed during Hurricane Katrina. The insureds notified their insurer shortly after the hurricane, and an adjuster was sent to inspect the property. The adjuster told the insureds that their dwelling claim was worth $100,000. The insureds repeatedly made calls to the insurer regarding payment. They were told that, notwithstanding what the initial adjuster told them, their claim was denied and that their file was not complete and was being reassigned to another adjuster. The second adjuster told the insureds that there was no wind damage to their property. The insurer later stated, however, that it owed money for roof replacement and asked the adjuster to prepare an estimate. The insurer also hired an engineer who prepared a report. Despite reports showing that money was owed for damage, the insurer failed to tender any payment until nearly 4 months after the Veades filed suit. The trial court ordered the insurer to pay the policy limits and attorneys’ fees. The parties filed motions for a partial new trial, which the court granted. The trial court amended its judgment and awarded $10,000 each in damages for mental anguish and $10,000 in penalties pursuant to Louisiana Revised Statutes § 22:1220.

The court found that in order to recover for mental anguish, there must be evidence of the “intent to aggrieve” the plaintiff. The court found that the record contained evidence of the insurer’s intent to distress the insureds. The facts in Veade did not directly show statements from the insurer stating that it was intending to cause the insureds pain. Thus, in Veade, circumstantial evidence was enough for the court to find evidence of the “intent to aggrieve.” The evidence in Veade showed that the insurer lied to the insureds regarding whether an adjuster submitted a report. The insurer admitted at trial that the insurer misrepresented the status of the claim. Also, Mr. Veade testified that the insurer did not return his phone calls after the second adjuster informed him that it was waiting on the insurer to tell it how to write the insurer’s claim. The insurer waited months after its adjuster and engineer finalized their reports to finally pay undisputed losses. Last, the evidence showed that the insurer “was aware, according to the Veades’ claims file, that Mrs. Veade was in counseling as a result of attempting to settle the insurance matter with [the insurer].” Mrs. Veade testified that her husband had to talk to a friend, who was a stress therapist, as a result of the insurer’s behavior. The court found that the record revealed an “intent to delay payment of undisputed covered losses as well as disputed” losses and attempted to decrease liability by hiring the second adjuster. The record also revealed that the claims file contained information regarding the insureds’ stress. As a result, the court found that the record supported the damages for mental anguish.

3. Relevant Issues in Bad Faith Insurance Litigation

   a. Retroactivity of Louisiana Revised Statutes § 22:658 and Applicability of Statute to Post-Amendment Bad Faith Conduct

The retroactivity of Louisiana Revised Statutes § 22:658 was one of the major issues addressed in Sher. Mr. Sher argued that there are two bases for applying Act 813, which amended Louisiana Revised Statute 22:658(B)(1), to a plaintiff’s claims against an insurer. First, he argued that the Louisiana Legislature intended that Act 813 apply retroactively to govern all claims arising out of Hurricanes Katrina and Rita. Second, he argued that even if Act 813 applies prospectively only, the
amended version of the statute still governs a plaintiff’s claims if the insurer continued to deny the plaintiff’s claim in bad faith after Act 813 was enacted.

Mr. Sher first contended that the amendment applies retroactively because of the amendment is remedial in nature as it effects only the means of enforcing a violation of §22:658 rather than changing an insured’s rights under the statute itself. Further, he argued that the Louisiana Legislature intended for the amendment to §22:658 to apply retroactively as evidenced by the comments of Senator Edward Murray regarding Senate Bill 620. Senator Murray declared that the “penalties were not enough to encourage these insurers to be more timely in getting adjusters to these people’s homes so that these claims can be settled.” House Committee on Insurance, Minutes of Meeting, 2006 Regular Session, May 31, 2006, p. 2. In arguing in support of an attorneys’ fees provision, Senator Murray stated that it would be wrong to force insureds who have “to deal with costs associated with a disaster” to “pay for an attorney in order to get their claims settled.” Id. at p. 3. Mr. Sher the legislature enacted Act 813 to provide consequences for insurance companies who did not timely and in good faith handle claims related to Hurricane Katrina (and Rita), regardless of when these claims were filed. Thus, the Louisiana Legislature intended for Act 813 to apply retroactively to increase the penalties to all bad faith insurance claims related to Hurricanes Katrina and Rita. The claims for bad faith already existed. The amendment simply increased the remedy. Thus, Mr. Sher argued that the amendment should have applied retroactively.

Moreover, Mr. Sher argued that the Fourth Circuit erred in failing to address the argument that Lafayette’s post-amendment conduct subjected it to the increased penalties provided by the amended version of §22:658, which became effective August 15, 2006. He argued that even assuming that Act 813 applies prospectively only, Act 813 still governs certain plaintiff’s claims against insurers. Governor Blanco signed Act 813 into law on June 30, 2005. See Bill History, 2006 Regular Session, Senate Bill 620. The Bill History lists the effective date of Act 813 as August 15, 2006. Louisiana Revised Statutes § 22:658(A)(4) declares that all insurers “shall make a written offer to settle any property damage claim . . . . within thirty days after receipt of satisfactory proofs of loss.” See id. The penalty provisions of Section 22:658 apply when an insurer fails to pay what it owes “within thirty days after receipt of satisfactory proofs of loss.” As discussed above, Louisiana courts interpret the phrase “satisfactory proof of loss” very liberally.

Insurers argued that applying Act 813 to post-Complaint conduct is an impermissible retroactive application because the execution of the policy and the event that caused the damage, i.e., Hurricane Katrina, occurred before Act 813 became effective. This argument, however, had been rejected in Manuel v. Louisiana Sheriff’s Risk Management Fund, 93-2177 (La.App. 1 Cir. 11/18/1994), 647 So. 2d 363. In Manuel, plaintiff was injured in an auto accident in March 1988 and, in November 1991, plaintiff completed a settlement agreement with the tortfeasor’s insurer. When the insurer refused to fund the settlement, plaintiff filed suit, seeking statutory penalties and damages, under Louisiana Revised Statutes § 22:1220, for failure to pay within thirty days after a settlement agreement has been reduced to writing. The effective date of Section 22:1220, July 6, 1990, was subsequent to the date of the accident and the date that the policy was issued, but before the dates that the insurer had consented to the settlement agreement and then refused to fund it. See id. at 364-365.

The Louisiana First Circuit Court of Appeal held that the statute’s application to events occurring after its effective date was “prospective, not retroactive, regardless of whether the insurance policy and
ensuing accident or injury pre-existed the effective date.” *Id.* at 367 (emphasis added). The court held that Section 22:1220 applied to “pre-existing policies . . . where the complained-of conduct of the insurer occurs after the effective date” of the statute. *Id.* at 370 (emphasis added). In *Manuel*, the “complained-of conduct” was the insurer’s “delay in payment after the settlement agreement was reduced to writing,” which occurred after the effective date of Section 22:1220. *Id.* at 371.

In certain cases, the “complained-of conduct” is the insurer’s failure to make any payments after a plaintiff supplied it with a complaint, a satisfactory proof of loss, which occurred after the Legislature passed Act 813.

Louisiana Revised Statutes §22:1220 and §22:658 impose a duty of good faith and fair dealing on an insurer, specifically to “adjust claims fairly and promptly and to take reasonable steps to settle valid claims.” *Chargois v. Guillory*, 97-439 (La. App. 3 Cir. 10/29/1997), 702 So. 2d 1068, 1069. In Louisiana, this duty is a continuing duty of good faith and fair dealing on the part of the insurer. See *Conlee v. Fireman’s Fund Ins. Co.*, No. 07-660, 2007 WL 2071860 (E.D. La. 9/18/2007); See also *Kodrin*, 2007 EL 4163437; See also *Robert C. Evans*, 2007 WL 4365386. Accordingly, Mr. Sher argued that Lafayette’s duty to adjust his claim in good faith continued beyond the August 15, 2006 effective date of the amended version of §22:658. Indeed, in *Theriot v. Midland Risk Ins. Co.*, this Court held that the duties of good faith and fair dealing imposed on insurers by §22:658 “continue throughout the litigation.” 664 So. 2d at 550, rev’d on other grounds, 694 So. 2d 184 (La. 1997). Further, in *Harris v. Fontenot*, the court found that nowhere in either §22:1220 or §22:658 is there an express distinction limiting the application to the pre-litigation conduct of the insurer.” 606 So. 2d 72, 74 (La. App. 3 Cir. 1992) (emphasis added). The court reasoned that the “requirements [of good faith and fair dealing] are no less important after litigation has begun.” *Id.* (emphasis added). The Harris court also noted that in *McDill v. Utica Mutual Insurance Co.*, this Court imposed penalties on an insurer for post-litigation conduct. 475 So. 2d 1085 (La. 1985). Thus, because an insurer’s duty of good faith and fair dealing continues beyond the effective date of the amended version of §22:658 and throughout the litigation, Mr. Sher argued that Lafayette should be subject to the increased penalty of 50% and attorneys’ fees.

At least two judges from the United States District Court of the Eastern District of Louisiana have acknowledged an insurer’s continuing duty to adjust a claim under Louisiana law in applying the amendment to §22:658 prospectively. In *Kodrin, et al v. State Farm Fire Insurance Company, et al*, Judge Carl J. Barbier, acknowledging the Fourth Circuit’s ruling that the amended version of §22:658 is not retroactive, held that because the insurer had a continuing duty to adjust the claim in good faith post-amendment, the insurer was subject to the increased penalties. 2007 WL 4163437 (E.D. La. 11/21/2007). Specifically, Judge Barbier recognized that “in Louisiana an insurer owes its insured a continuing duty of good faith and fair dealing.” *Id.* at *1. Judge Barbier further recognized that because State Farm had a continuing duty to adjust the plaintiffs’ claims, State Farm’s bad faith conduct occurred both before and after the effective date of the amended version of §22:658, and thus, the plaintiffs were entitled to recover attorneys fees incurred after the effective date of the amendment. *Id.* Indeed, Judge Barbier stated:

> While the Court is aware that other cases have held that only the version of the statute in effect at the time of the original breach can apply, this interpretation of the amendments does not seem to be justified by the obvious purpose of the legislative
amendments increasing the penalty and providing for recovery of attorneys fees. If the notion of a “continuing duty” has meaning, then an insurer who initially denies a claim cannot simply ignore its continuing obligation to its own policyholder to further investigate or review the pending claim. Continuing to act unreasonably by failing to pay a legitimate claim even after the legislature acted to increase the penalties for such behavior seems to be precisely the conduct that the legislature sought to address. *Id.* (emphasis added).

Further, in *Robert C. Evans d/b/a Evans & Company and Breadfruit Tree, LLC v. Lafayette Ins. Co*, Judge Mary Ann Vial Lemmon adopted Judge Barbier’s decision in *Kodrin*, holding that the insurer, ironically also Lafayette, continued to act in bad faith post-amendment and was thus, subject to increased penalties and attorneys’ fees. No. 06-6783 (E.D. La. 12/11/2007).

More recently, in *Johnson v. State Farm Fire & Casualty Co.*, No. 07-1486, 2008 WL 2510088 (June 18, 2008), Judge Barbier found that Louisiana Revised Statutes § 22:658 is not retroactive but that “as to whether State Farm violated Louisiana Revised Statutes § 22:658 post August 15, 2006, the Court will instruct the jury on this issue based on the evidence adduced at trial.” *Id.* at p. 1.

In *Sher*, Mr. Sher argued that Lafayette’s duty to adjust claims fairly and promptly extended beyond August 15, 2006, and continued, thus subjecting it to the increased penalties provisions set forth in Act 813. Accordingly, Mr. Sher argued that even if the Legislature did not intend for Act 813 to apply retroactively, a prospective application of the Act still subjects insurers to the increased penalties imposed by statute for an arbitrary and capricious failure to pay. The Louisiana Supreme Court, however, held that Mr. Sher’s claim arose before the amendment and that Mr. Sher first made his satisfactory proof of loss before the amendment as well. Under those circumstances, the court concluded that the pre-amendment statute governed the case. In Mr. Sher’s case, the Supreme Court held that Lafayette’s post-amendment acts did not give rise to the increased penalty under Amended Louisiana Revised Statutes § 22:658, but, as shown above, there are some cases in which the court will apply the amended version of the statute.

The ruling in *Sher* will affect other bad faith insurance suits. The court in *Sher* found that the amended version of Louisiana Revised Statutes §22:658 may apply to Hurricane Katrina claims in the event a plaintiff discovers new damage and makes subsequent proof of loss, separate from the original one, and the payment of which has not been made with the time period contained in the statute. The court in *Sher* set forth two scenarios in which the amended version of Louisiana Revised Statutes § 22:658 could apply to Hurricane Katrina claims. The first situation involves insureds who had not previously made a satisfactory proof of loss prior to the amendment of § 22:658 and whose petition for damages could subject the insurer to the amended penalties of 22:658 because it could have served as proof of loss after the amendment became effective. *Sher v. Lafayette Insurance Co.*, No. 2007-2441, 2008 WL 928486, p. 14 (La. 4/8/08), reh’g granted in part, No. 2007-2441, 2008 WL 2655664 (La. 7/7/2008). The second situation envisioned by the Supreme Court in *Sher* is as follows:

. . . had plaintiff discovered new damage and made satisfactory proof which Lafayette failed to pay within the time period contained in the statute, but after the amendment became effective, Lafayette could have been subject to the penalties
contained in the amendment because the claim would have arisen after the effective date of the amendment. Id. at p. 14-15 (emphasis in original).

b. Judicial Interest on Penalties

The Louisiana Supreme Court addressed for the first time in Sher whether judicial interest on penalties pursuant to Louisiana Revised Statutes § 22:658 ran from the date of judicial demand or the date of the judgment. The Court likened penalties pursuant to Louisiana Revised Statutes § 22:658 to penalties pursuant to worker’s compensation statutes and held that because penalties are not due until the date of the award, that interest on such penalties are due only from the date of judgment.

4. Examples of Other Recent Bad Faith Litigation

a. Marketfare Annunciation v. United Fire & Casualty, 06-7155 (E.D. La 6/2/08)

In Marketfare Annunciation v. United Fire & Casualty, 06-7155 (E.D. La. 6/2/08), the insured operated several grocery stores in the New Orleans area prior to Hurricane Katrina. Following the loss, the insurer paid approximately $3 million on the loss and the insured recovered $1 million under flood policies. The jury in Marketfare, awarded the maximum amount sought for property damage and business interruption loss ($17 million) and awarded $4 million in bad faith damages under a combination of Louisiana Revised Statutes § 22:658 and/or § 22:1220. United Fire posted cash to secure the judgment pending appeal.

b. Consolidated Companies, Inc. v. Lexington Insurance Co, 06-4700 (E.D. La. 7/11/08)

In Consolidated Companies, Inc. v. Lexington Insurance Co., 06-4700 (E.D. La. 7/11/08), a jury verdict awarded an insured $19 million for business interruption damages and $2.5 million in actual damages under Louisiana Revised Statutes § 22:1220. The insurer was awarded an additional $2.5 million as a penalty under Louisiana Revised Statutes § 22:1220.


In Dickerson v. Lexington Ins. Co., Nos. 07-30823, 07-30868, 2008 WL 5295389 (5th Cir. Dec. 22, 2008), the United States Fifth Circuit Court of Appeals upheld the trial court’s award of mental anguish damages under Louisiana Revised Statutes § 22:1220. The court in Dickerson noted that neither it nor the Louisiana Supreme Court had addressed the interaction of Louisiana Civil Code article 1998 and Louisiana Revised Statutes § 22:1220 regarding mental anguish damages. The court found that a review of the case law revealed that Louisiana courts have regularly permitted mental anguish damages under § 22:1220. The court also found that two federal district courts (Faust v. State Farm Fire & Cas. Co., No. 06-8470, 2007 WL 1191163 at *4 (E.D. La. 2007) and Bowers v. State Farm Fire & Cas. Co., No. 06-830, 2007 WL 2670087 at *1 (E.D. La. 2007)) have determined that article 1998 does not bar mental anguish damages under § 22:1220 for insurance contracts because § 22:1220 “addresses a harm distinct from breach of contract: breach of the duty of good faith.” Id. at p. 9.
The court found that § 22:1220 specifically refers to a breach of duty of good faith and does not refer to breach of contract. Also, it found that the statute is broadly worded and explicitly permits “liability for ‘any damages sustained,’ including, without limitation, ‘any general or special damages’” and that general damages are those that may not be fixed with pecuniary exactitude, which “involve mental or physical pain or suffering, inconvenience, the loss of intellectual gratification or physical enjoyment, or other losses of life or life-style which cannot be definitely measured in monetary terms.” Id. Thus, the court concluded that by “authorizing ‘any damages’ including ‘any general or special damages,’ the legislature pointedly permitted the award of mental anguish damages” under § 22:1220. Id.

The trial court awarded the plaintiff $25,000 in “general damages for mental anguish he suffered from Lexington’s arbitrary refusal to pay.” Id. at 10. The plaintiff did not offer expert or medical testimony at trial, but he presented testimony of his daughter regarding the deterioration of the plaintiff’s mental state, his short-temper, and his anti-social behavior as a result of the insurer’s actions. The U.S. Fifth Circuit Court held that the district court was in the best position to make credibility determinations and that there was no error in the trial court’s determination based on the evidence.


In *Grilletta v. Lexington Insurance Co.*, 07-30963, 2009 WL 46886 (5th Cir. Jan. 8, 2009), the United States Court of Appeals for the Fifth Circuit addressed the meaning of the “amount found to be due” under § 22:658. Specifically, the court had to determine whether the penalty under § 22:658 applied to the entire amount owed by the insurer or just the undisputed portion. The insureds sought statutory penalties for the additional amount awarded to the plaintiffs by the trial court for their property that was destroyed by Hurricane Katrina. The trial court denied the request for penalties because “it concluded that there was a reasonable dispute as to the nature of the total loss of the structure.” Id. at p. 9. The plaintiffs appealed this issue among others. The insurer argued that Louisiana courts have construed the term “amount found to be due” under § 22:658 to mean “that amount over which reasonable minds could not differ.” Id. The U.S. Fifth Circuit Court, however, found that Louisiana courts have held that the “amount found to be due” was the “total amount of the Plaintiffs’ loss.” Id. The court found that the insurer did not pay the plaintiffs anything within the deadline set by § 22:658, and, thus, was liable for the statutory penalty under § 22:658. The court reversed the trial court’s judgment regarding this issue and remanded it for the imposition of a penalty on the entire amount due.

5. Discovery Issues in Bad Faith Insurance Litigation

A contested discovery issue in bad faith insurance litigation is whether an insured is entitled to discover information from his insurer regarding reserves and reinsurance. Several Louisiana courts have ruled that reserve and reinsurance information is discoverable and relevant in Hurricane Katrina insurance litigation and have ordered insurers to produce said information. In *Historic Restoration, Inc. v. RSUI Indemnity Company*, for example, Judge Lloyd Medley of the Civil District Court for the Parish of Orleans ordered the defendant insurers to produce all responsive reserve and reinsurance information in granting a similar motion to compel. *Historic Restoration, Inc. v. RSUI Indemnity Company, et al*, No. 06-4990, Civil District Court for the Parish of Orleans, Division “D.” Moreover,
upon being ordered to produce the reserve and reinsurance information by the district court, the
defendant insurers applied for supervisory writs to the Louisiana Fourth Circuit Court of Appeal on
this very issue, and said writs were denied. See March 13, 2007 Judgment in Historic Restoration, Inc.
v. RSUI Indemnity Company, et al, No. 07-C-0311, Louisiana Fourth Circuit Court of Appeal; March
14, 2007 Judgment, Historic Restoration, Inc. v. RSUI Indemnity Company, et al., No. 07-C-0305,
Louisiana Fourth Circuit Court of Appeal.

Further, it is well-settled that since Louisiana’s discovery rules were obtained from the federal rules,
Louisiana courts may look for guidance to the federal decisions which have interpreted the issues in
question. See Williams v. Smith, 576 So. 2d 448, 450 (La. 1991); Madison v. Travelers Ins. Co., 308
So. 2d 784, 786 (La. 1975). For example, in Children’s Hospital et al v. Continental Casualty
Company, Judge Carl J. Barbier of the Eastern District of Louisiana ordered the defendant insurance
company to produce its reserve and reinsurance information where the case involved similar
allegations of bad faith violations of § 22:1220 and § 22:658 regarding the adjustment of plaintiff’s
Hurricane Katrina claims. Children’s Hospital et al vs. Continental Casualty Company, Civil Action
No. 06-3548, Section J(4). Similar rulings followed in Harborside, LLC. v. Pacific Insurance
Company, Civil Action No. 06-5319, Section K(3), Royal Cosomopolitan LLC v. Scottsdale
Insurance Company, Civil Action No. 06-4557, Section B(5), and Hurwitz Mintz Finest Furniture
Store South, L.L.C. et al v. United Fire & Casualty Co. Civil Action No. 06-4817, Section J(3).

Notably, courts have ruled that reserve and reinsurance information is relevant to claims involving
allegations of an insurer’s bad faith in litigation preceding Hurricane Katrina. In Silva v. Fire
Insurance Exchange, the District Court for the District of Montana explicitly stated that a plaintiff in
a first-party bad faith action is entitled to discover the entire claims file kept by the insurer. 112
F.R.D. 699, 699 (D. Mont. 1986) emphasis added). In fact, the court in Silva observed that “[u]nder
ordinary circumstances, a first-party bad faith claim can be proved only by showing the manner in
which the claim was processed, and the claims file contains the sole source of much of the needed
information.” Id. at 699.

Further, the United States District Court for the Eastern District of Louisiana has specifically held that
reserve information is discoverable in cases involving allegations of bad faith on behalf of an
insurance company. In Culbertson v. Shelter Mutual Insurance Company, plaintiffs filed a motion to
compel responses to requests for production including reserve information from the defendant
information is discoverable where a claim of bad faith is asserted, stating:

The information sought may demonstrate or lead to admissible evidence with respect
to the thoroughness with which defendant investigated and considered plaintiff’s loss
of income claim. It is therefore discoverable and may be relevant to the good or
bad faith of defendant in denying the claim. Id. at *1 (emphasis added).

Additionally, in First National Bank of Louisville v. Lustig, the District Court for the Eastern District
of Louisiana concluded that “[r]eserve information, including any post-litigation reserve information,
is relevant to show the insurer’s state of mind in relation to its claims settlement practices” and that
“examination with respect to the reserve may develop evidence on the issue of the defendant’s bad
v. National Union Fire Ins. Co., No. Civ. A. 98-1788, 1999 WL 781495 (E. D. La. Sept. 29, 1999) (concluding that, given that there was an issue of whether the defendant insurer acted in bad faith, the reserve information could show how that insurer’s evaluation of the case impacted its decision to deny coverage). Of course, in Hurricane Katrina cases, insureds are alleging that their insurers, in bad faith, did not thoroughly investigate and consider their claimed losses as a result of Hurricane Katrina. Therefore, the insurers’ reserve and reinsurance information is discoverable as it may be relevant to the good or bad faith of the insurers in failing to pay all proceeds owed under their policies.

In Pain Clinic, Inc. v. Banker Ins. Co., Magistrate Judge Wilkinson expressed the opposite view — that reserves information is not discoverable. See No. 06-4572-J(2), Record Doc. No. 25 (E.D. La. April 5, 2007). However, the portion of his decision concerning reserves information was reversed in the Pain Clinic case by Judge Barbier, Record Doc. No. 41, No. 06-4572-J(2), Record Doc. No. 41 (E.D. La. March 19, 2007) and since the other district judges in the Eastern District who have considered the issue have not accepted his view, Magistrate Judge Wilkinson now defers to the majority view expressed by the district judges of his court, although he respectfully disagrees.

Whitney Place Condominium Ass’n v. James River Ins. Co., C.A. No. 06-4154, Record Doc. No. 81.

6. Example Jury Instructions Used in Bad Faith Insurance Cases

Below are some examples of jury instructions used in bad faith insurance cases.

a. Jury Instructions Regarding Bad Faith Claims Used in Sher

There are two statutes that apply to this phase of trial. You should not conclude that because I am going to speak to you about arbitrary and capricious behavior, I have any opinion of whether or not Mr. Sher should recover under either one of these statutes.

Louisiana Revised Statute 22:658 (A)(3) provides:

Except in the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim and of a claim for reasonable medical expenses within fourteen days after notification of loss by the claimant. In the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim within thirty days after notification of loss by the claimant.

The insurer, Lafayette, must initiate loss adjustment of a property damage claim within thirty days after notification of loss by Mr. Sher in the case of catastrophic loss. In order to initiate loss adjustment, Lafayette must have taken some substantive and affirmative step to accumulate the facts that are necessary to evaluate the claim. Simply opening a file does not satisfy this requirement.

Louisiana Revised Statute 22:658 (A)(4) provides:

All insurers shall make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim.

Louisiana Revised Statute 22:658 (B)(1) provides:

Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor or failure to make a written offer to settle any
property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim, as provided in Paragraphs (A)(1) and (4), respectively, or failure to make such payment within thirty days after written agreement or settlement as provided in Paragraph (A)(2), when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, or to any of said employees, or in the event a partial payment or tender has been made, fifty percent of the difference between the amount paid or tendered and the amount found to be due as well as reasonable attorney fees and costs. Such penalties, if awarded, shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings.

An insurer issuing the type of policy at issue here must pay a claim within thirty days after it receives satisfactory proof of loss.

You must determine whether Lafayette failed to pay Plaintiff’s claim within the thirty-day period, whether satisfactory proof of the loss was received, and whether the Lafayette's failure was arbitrary, capricious or without probable cause.

You must look at the facts known to Lafayette and its adjusters, Property Loss Consulting, at the time of its action to determine if Lafayette’s failure to pay is arbitrary, capricious, or without probable cause.

An insurer’s actions are arbitrary or capricious when its willful refusal of a claim is not based on a good faith defense. If an insurer has no basis for failing to tender amounts due for uncontested aspects of the claim, that can constitute being arbitrary, capricious or without probable cause. Further, unreasonably delaying investigation of a claim and seeking to avoid a duty owed under the insurance policy can also constitute being arbitrary, capricious or without probable cause.

Louisiana Revised Statute 22:1220 provides:

A. An insurer, including but not limited to a foreign line and surplus line insurer, owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.

B. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A:

1. Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.

2. Failing to pay a settlement within thirty days after an agreement is reduced to writing.

3. Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.

4. Misleading a claimant as to the applicable prescriptive period.
(5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.

(6) Failing to pay claims pursuant to R.S. 22:658.2 when such failure is arbitrary, capricious, or without probable cause.

To bring a claim under this statute, there must be a valid underlying claim for insurance coverage. An insurer owes its insured a duty of good faith and fair dealing. It has an affirmative duty to make a reasonable effort to settle claims with its insured. An insurer which breaches this duty is liable for any damages sustained as a result of this breach.

You must determine whether the duty has been breached. In this case, it is claimed that the following breaches of duty occurred: Lafayette failed to adjust Mr. Sher’s claims fairly and promptly, Lafayette failed to make a reasonable effort to settle Mr. Sher’s claim; and Lafayette failed to pay the amount of the claim within 60 days of satisfactory proof of loss.

Affirmatively delaying paying an insurance claim with the knowledge that it was a legitimate claim is a breach of the duty of good faith.

In addition to any general or special damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater. Such penalties, if awarded shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings.

Insurance companies have the right to litigate questionable claims without being subjected to damages and penalties.

Joseph Sher also claims that Lafayette, after receipt of satisfactory proof of loss, failed to pay the undisputed amount due and failed to make written settlement of his claim within thirty days, in violation of statute 22:658. Under this statute, not every failure to timely pay an amount due or make a written offer of settlement renders the insurance company liable. Rather, an insurance company who did not timely pay an amount due or make a written offer of settlement is liable only when such failure to timely pay is arbitrary, capricious, or without probable cause.

Under statute (22:658), to prevail, Joseph Sher, must prove two things by a preponderance of the evidence:

(1) that Lafayette failed to pay an undisputed amount due or make a written offer of settlement within thirty days of its receipt of a satisfactory proof of loss and

(2) that Lafayette’s failure was arbitrary, capricious, or without probable cause.

The plaintiff also claims Lafayette failed to comply with Louisiana Revised Statute 22:1220, which, like Louisiana Revised Statute 22:658, imposes certain duties on an insurance company, including the duty to pay within sixty days the undisputed portion of an insurance claim. Under this statute, not every failure to timely pay an undisputed amount due renders the insurance company liable. Rather, an insurance company who did not timely pay within sixty days and undisputed amount due only is liable when such failure to timely pay is arbitrary, capricious, or without probable cause. Plaintiff has the burden to prove that Lafayette failed to timely pay an amount due without probable cause or because of arbitrariness or capriciousness.

To prevail on a claim under this statute, Section 1220, Joseph Sher must prove that Lafayette knowingly committed actions which were completely unjustified, without reasonable or probable excuse. The policyholder’s burden is great.
To hold Lafayette liable under section 1220, you must determine whether plaintiffs proved two things by a preponderance of the evidence:

(1) that Lafayette failed to pay the undisputed portion of plaintiff’s claim within sixty days of its receipt of a satisfactory proof of loss, and

(2) that Lafayette’s failure to timely pay was arbitrary and capricious or without probable cause.

Where there is a reasonable disagreement between the insured and the insurer as to the amount of loss, the insurer’s refusal to pay it not arbitrary, capricious, or without probable cause and failure to pay within the statutory delay does not subject the insurer to penalties. However, if part of a claim for property damage is not disputed, the failure to the insurer to pay the undisputed portion of the claim within the statutory delay will subject the insurer to penalties on the entire claim. Consequently, when such a dispute arises, to avoid the imposition of penalties, the insurer must unconditionally tender to the insured the undisputed portion of the insured’s claim. The undisputed portion of the claim is the amount over which reasonable minds could not differ.

b. **Jury Instructions Regarding Bad Faith Claims Used in Marketfare**  
   **Annunciation v. United Fire & Casualty**

**Claims Handling – Section 22:658**

Under Louisiana Revised Statute Section 22:658, an insurer must pay a claim and/or make a written offer to settle a claim within thirty days after it receives satisfactory proof of loss. If the insurer fails to pay or offer to settle the claim within thirty days after receipt of satisfactory proof of loss and its failure is arbitrary, capricious, or without probable cause, the insurer is liable to pay a penalty, in addition to the amount due under the policy. To determine if a penalty is sued under Louisiana Revised Statute Section 22:658, you must determine whether United Fire received satisfactory proof of loss, whether it then failed to pay or make a written offer to settle the claim within the thirty-day period after receipt of such proof, and whether United Fire’s failure was arbitrary, capricious, or without probable cause.

A proof of loss is satisfactory if it informs the insurer of the facts of the claim. The proof of loss is not required to be in any formal style. As long as the insurer receives sufficient information to act on the claim, the manner in which it obtains the information is immaterial.

Whether United Fire’s refusal to pay the plaintiff’s claims is arbitrary, capricious or without probable cause depends on the facts known to the insurer at the time of its action. An insurer’s action is arbitrary and capricious when its willful refusal of a claim is not based on a good faith defense, or is unreasonable or without probable cause. An insurer’s refusal to pay is not arbitrary, capricious, or without probable cause when the insurer has a reasonable basis for denying the claim. The question is whether the insurer acted reasonably in failing to timely pay the claim once it had adequate notice.

If you find that plaintiffs are entitled to a penalty under Section 22:658 for United Fire’s arbitrary or capricious failure to pay or offer to settle the plaintiff’s claims within thirty days after it received satisfactory proof of loss, then plaintiffs are entitled to receive a penalty based on the amount due to them under the insurance contract. In that instance, the court will calculate the amount of the penalty based on the amount you determine to be due under the contract.

**Claims Handling – Section 22:1220**

Plaintiff also claims penalties and damages under Louisiana Revised Statute Section 22:1220. Under that statute, an insurer owes to its insured a duty of good fait and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured.
You must determine whether United Fire has breached its duty to the plaintiffs. In this case, the plaintiffs each claim that United Fire breached the duty of good faith and fair dealing by failing to pay the amount of their claim within sixty days after United Fire received satisfactory proof of loss and that such failure was arbitrary, capricious, or without probable cause.

The plaintiffs must prove by a preponderance of the evidence that United Fire failed to pay the amount of their claim within sixty days after it received satisfactory proof of loss and that such failure was arbitrary, capricious, or without probable cause. You are to determine whether United Fire received satisfactory proof of loss, whether it then failed to pay the plaintiffs within the sixty day period after it received such proof, and whether United Fire’s failure to pay was arbitrary, capricious, or without probable cause.

As I instructed you earlier, a proof of loss is satisfactory if it informs the insurer of the facts of the claim. The proof of loss is not required to be in any formal style. As long as the insurer receives sufficient information to act on the claim, the manner in which it obtains the information is immaterial.

As I instructed you earlier, whether United Fire’s refusal to pay the plaintiff’s claim is arbitrary, capricious, or without probable cause depends on the facts known to the insurer at the time of its action. An insurer’s action is arbitrary or capricious when its willful refusal of the claim is not based on a good faith defense, or is unreasonable or without probable cause. An insurer’s refusal to pay is not arbitrary, capricious, or without probable cause when the insurer has a reasonable basis for denying the claim. The question is whether the insurer acted reasonably in failing to timely pay the claim one it had adequate notice.

If you find that United Fire failed to pay the amount of plaintiffs’ claim within sixty days after it received satisfactory proof of loss and that its failure was arbitrary, capricious, or without probable cause, then plaintiffs are entitled to any damages sustained as a result of United Fire’s failure to pay. In assessing any damages for United Fire’s failure to pay, plaintiffs are entitled to general damages sustained as a result of United Fire’s failure to pay but you may not award damages for losses covered under the policy. Plaintiffs must prove by a preponderance of the evidence that they suffered damages from United Fire’s arbitrary or capricious failure to pay their claim within sixty days of receipt of satisfactory proof of loss.

To recover for the arbitrary or capricious failure to pay, an award must be fair in light of the evidence presented. Plaintiffs must prove that they suffered damages that resulted because of United Fire’s failure to pay their claims after notification of loss. If you award such damages, the amount you determine may not be used as a punishment and cannot be imposed or increased to penalize the defendant. You should not award recovery for speculative damages, but only for those damages that plaintiffs have actually sustained.

If you find that United Fire failed to pay the amount of plaintiffs’ claim within sixty days after receipt of satisfactory proof of loss from plaintiffs and that such failure was arbitrary, capricious, or without probable cause, then in addition to these damages, you may award the plaintiffs a penalty of up to two times the damages awarded as a result of that conduct or five thousand dollars, whichever is greater. The penalties assessed against an insurer for breaching its duty of good faith and fair dealing are not limited to a single amount, rather each claimant is entitled to a penalty. If you find that United Fire failed to pay the amount of plaintiffs’ claim within sixty days after it received satisfactory proof of loss and that its failure was arbitrary, capricious, or without probable cause, but that plaintiffs did not suffer any damages as a result of that conduct, then you may award the plaintiffs five thousand dollars as a penalty under Louisiana Revised Statute Section 22:1220.

7. Conclusion
Hurricane Katrina spawned a substantial amount of bad faith litigation in Louisiana. Many issues had not been addressed before Hurricane Katrina. The issues addressed above will highly affect insureds’ cases against their insurance companies for bad faith, whether it be Hurricane Katrina cases still pending or cases that may arise from another hurricane.