Procrastinators’ Programs℠

Louisiana Insurance Penalties - Recent Developments

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Madeleine Fischer is chair of the Insurance Law Committee of the New Orleans Bar Association. Ms. Fischer has represented clients in litigation for more than 30 years and has extensive trial experience in state and federal courts, for the last decade focusing her practice on insurance coverage and claims handling disputes. Ms. Fischer has represented a variety of both policyholders and insurance companies in insurance coverage and bad faith litigation. She is a vice chair of the Insurance Coverage Litigation Committee of the American Bar Association's Section of Tort Trial and Insurance Practice. She is currently a member of the Editorial Board of the CGL Reporter, a publication of the Insurance Risk Management Institute. Ms. Fischer contributes articles on insurance coverage to the CGL Reporter and other publications and is a frequent speaker on insurance coverage and bad faith.
DAVID STRAUSS is a managing member of King, Krebs & Jurgens, PLLC in its New Orleans office. He is an experienced litigator, concentrating his practice on the representation of insurers in bad faith litigation, catastrophe/mass tort defense, insurance fraud, insurance coverage and maritime matters. Representative matters are: mass joinder and class actions related to insurance coverage, first and third party property damage and personal injury, business interruption coverage, commercial general liability, premises liability, Jones Act, condominium, construction, flood/N.F.I.P., and agency issues. David has handled every manner of insurance fraud cases, including: arson, theft and organized personal injury fraud rings. His casualty practice emphasizes serious and catastrophic injury cases. He is presently handling bad faith litigation related to Hurricanes Katrina and Gustav involving several hundred claims.
Overview of Bad Faith

Elements of the Bad Faith Claim
Insurer’s Duties – First Party

- Pay Claim due within 30 Days after Receipt of Satisfactory Proofs of Loss
- Initiate Loss Adjustment within 14 days (not a catastrophic loss) or 30 days (catastrophic loss) after Notification
- Make Written Offer to Settle Property Damage Claims within 30 Days of Receipt of Satisfactory Proofs of Loss

- Fail to Pay Settlement within 30 Days after Written Agreement
- Fail to Pay Amount due within 60 Days of Satisfactory Proof of Loss
- Violate La. R.S. 22:658.2 (Immovable Property Claims)
- Deny Coverage or Fail to Settle Based on Altered Application and No Notice
- Misrepresent Coverages
- Mislead Re: Applicable Rx Period

Insurer’s Duties – Third Party

- Offer to Settle Property Damage Claims within 30 Days of Satisfactory Proof of Loss
- Pay within 30 Days of Settlement
- Misleads Re: Prescription Period
- Misrepresents Coverage
- Fails to Pay within 30 Days of Written Agreement

- Strict Liability for Failure to Timely Initiate Adjustment:
  
\textit{Oubre v. Louisiana Citizens Fair Plan}
**Oubre v. Louisiana Citizens Fair Plan**

- Class action brought by thousands of insureds of Louisiana Citizens for Hurricanes Katrina and Rita damages
- Plaintiffs sought partial MSJ requesting legal ruling re: what constituted “initiation of loss adjustment” within the meaning of La. R.S. 22:658

**Oubre v. Louisiana Citizens Fair Plan**

- Court found: “making an appointment to assess the damage to the property or an adjuster inspecting the property without an appointment does satisfy the requirement of La. R.S. 22:658(A)(3)”
- Fourth Circuit and La. Supreme Court denied Citizen’s applications for review

**Oubre: Lower Court Proceedings**

- Plaintiffs filed another MSJ seeking penalties under La. R.S. 22:1220(C) for Citizens’ failure to timely initiate adjustment of thousands of claims, seeking $5,000 penalty/class member
- Citizens argued:
  - The court could not impose penalties without first making a factual determination that Citizens’ conduct was arbitrary, capricious, or without probable cause
  - La. R.S. 22:1220 (C) provides max penalty of $5,000 when damages not proven
  - Any assessment requires individual factual determinations of appropriate penalty up to $5,000
**Oubre: Lower Court Proceedings**

District Court granted plaintiffs’ MSJ and imposed penalty of $5,000/class member for a total judgment of $92,865,000, not including interest.

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**Oubre: Louisiana Fifth Circuit**

Reversed lower court, holding:
- Factual determination of whether the insurer breached duty of good faith is required before assessing penalties
- Any assessment of penalties necessarily requires assessment of facts and thus trial court’s grant of penalties under La. R.S. 22:1220 (C) is discretionary

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**Oubre: LA Supreme Court**

- Narrow 4-3 opinion
- Imposes Strict Liability:
  - La. R.S. 22:658 requires only proof of notice + inaction for over 30 days. “It is the insurer’s inaction alone that triggers the penalty; no justification or lack thereof on the part of the insurer need be shown
  - $5,000 is ceiling when damages not proven
  - Nevertheless, “no error” with the trial court’s decision to impose max $5,000/claimant
**Oubre: Lessons Learned**

**Bright Line Rules:**
- Initiate loss adjustment = make an appointment to inspect or inspect if no appointment, within requisite time
- Issuing advance payments does not constitute initiation of loss adjustment
- Failure to timely initiate adjustment = per se liability; no need to prove bad faith
- Even if the insured cannot prove any damages, based on the majority's ruling, the penalty to be imposed for failure to comply will necessarily result in a fine of $5,000

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**Insurer Penalties for Misinterpreting Its Policy**

- The Louisiana Supreme Court leaves little room for error: *Louisiana Bag Co. v. Audubon*
- The U.S. Fifth Circuit's Limits to *Louisiana Bag*: No penalties for good faith policy misinterpretations
  - *Seaco Holding, Inc. v. Commonwealth Ins. Co*

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**Louisiana Bag v. Audubon Indem. Co.**

- 4/20/03 – Plaintiff’s manufacturing plant & warehouse destroyed in fire
- Plaintiff immediately reported claim to Audubon
- 4/22/03 – Defendant’s adjuster inspected property:
  - Determined loss exceeded policy limits for all coverages
  - Identified potential coverage issues, including whether policy provided for stock coverage on blanket or per location basis
  - Audubon was unable to ascertain stock coverage because it could not obtain a copy of the subject policy (issued by Defendant itself)
**Louisiana Bag v. Audubon Indem. Co.**
- Even with potential coverage issues, investigation indicated amount due
- Stock coverage issue resolved in July 2003
- Adjuster issued five reports between 4/25/03 and 8/21/03, each of which recommended that Defendant pay policy limits
- Defendant hired numerous experts – all indicated total loss > policy limits

**Louisiana Bag**
- Plaintiff sued for unpaid policy limits, damages and penalties for bad faith
- Plaintiff argued no reasonable basis for delay in payment
- Defendant argued, *inter alia*, it had legit reasons to delay the payments: it could not pay stock loss until counsel issued coverage opinion that policy provided blanket coverage, which it could not request until 7/8/03 when it received policy

**Louisiana Bag: LA Supreme Court’s Holding**
Defendant’s conduct = bad faith
- Defendant had knowledge of undisputed portions yet still did not tender and thus was arbitrary, capricious and without probably cause
- There can be no good reason—or no probably cause—for withholding an undisputed amount
**Louisiana Bag: LA Supreme Court’s Holding**

Stock coverage: regardless of blanket or per location, Defendant should have paid undisputed portion – the $750,000 per location limit – within 30 days

- Even after coverage opinion, Defendant still failed to timely pay in full
- Even without benefit of opinion, Defendant’s potential error interpreting policy is not reasonable ground for refusing to timely pay

**U.S. 5th Circuit Limits to Louisiana Bag: Seacor Holdings v. Commonwealth**

- Plaintiff made a claim under all-risk policy for Hurricanes Katrina and Rita
- Defendant paid Plaintiff over $4 million in undisputed claims, but parties disagreed about deductible and applicable liability provisions
- Plaintiff filed suit seeking interpretation of subject provisions and additional payments under the contract. Plaintiff, relying on *LA Bag*, later added bad faith claims for Defendant’s failure to timely pay because it misinterpreted its own policy

**U.S. 5th Circuit Limits to Louisiana Bag: Seacor Holdings v. Commonwealth**

U.S. Fifth Circuit held Defendant owed additional policy limits but was not in bad faith for failure to timely pay:
- Not a “coverage question” – only which deductible and liability limits applied
- No *stare decisis* in Louisiana so *LA Bag* not authoritative source of law
- LA Supreme Court’s guidance “less than uniform”
U.S. 5th Circuit Limits to Louisiana Bag: Berk-Cohen v. Landmark

- Plaintiff’s apartment complex suffered damages from various things, including Hurricane Katrina
- Landmark paid over $20 million but didn’t pay additional lost income from increased rents after Katrina, alleging increase was due to flooding, which was excluded
- Plaintiff sued for additional lost income and bad faith
- Fifth Circuit held policy covered additional lost income but refused to assess penalties – insurer made good faith error in interpreting policy. “The penalty does not apply when there is a reasonable and legitimate question as to the extend and causation of the claim”

U.S. 5th Circuit Limits to Louisiana Bag: Berk-Cohen v. Landmark

Court distinguished LA Bag:
- Policy provision susceptible to two different interpretations so Defendant’s refusal not arbitrary or capricious
- Unlike Defendant in LA Bag, Defendant here paid undisputed portions

Lessons Learned

- Bad facts make bad law
- Always pay undisputed portion
Calculating Penalty Under La. R.S. 22:658 – “Amount Found to be Due”

If insurer fails to pay undisputed amount within 30 days, penalty assessed on everything it owes, even amounts disputed in good faith.

LA Supreme Court: Sher v. Lafayette
- Defendant withheld payment of personal property claim since Plaintiff didn’t have personal property coverage
- Defendant argued it disputed personal property claim in good faith and thus shouldn’t be subject to penalties on this amount
- Court held it was irrelevant—Defendant failed to pay undisputed loss of rents and property damage claims within 30 days and was therefore liable for penalties on entire amount due

Calculating Penalty Under La. R.S. 22:658 – “Amount Found to be Due”

U.S. 5th Circuit: French v. Allstate
- Defendant’s adjuster recommended payment in excess of $80,000
- Defendant timely paid $10,000 but was six days late in paying the remainder
- Court found Defendant owed policy limits and assessed 25% penalty on policy limits
- 5th Circuit held court must subtract $10,000 timely paid before assessing 25% penalty

Calculating Penalty Under La. R.S. 22:658 – “Amount Found to be Due”

U.S. 5th Circuit: LA Bag v. Audubon
- Defendant made one timely payment but failed to timely pay total undisputed portion
- Defendant liable for penalties on total, less timely payment
Penalties Under La. R.S. 22:1220

• If insurer breaches duty of good faith, insured may be entitled to penalties for damages sustained by breach (in addition to any contractual damages)
• LA courts had typically calculated the penalties by doubling consequential damages insured proved were caused breach, or by awarding $5,000 if no consequential damages proven
• LA 4th and 3rd Circuits recently issued several opinions miscalculating these penalties

Miscalculations of Penalties

• 4/29/09: Neal Auction v. Lafayette – 4th Circuit doubled total damages (both consequential and contractual). LA Supreme Court denied writs.
• 3/10/10: Wegener v. Lafayette – 4th Circuit found no consequential damages yet doubled contract damages & awarded penalties >$91K
• 4/14/10: Buffman v. Lafayette – 4th Circuit upheld penalty of more than $1.4 million even though jury found no consequential damages (nor did Plaintiff seek such damages) – court doubled contract damages. Plurality notes considerable body of law that rejected its conclusion but still found the issue was “an open question.”

Miscalculations of Penalties

• 4/21/10: Audubon v. Lafayette – Seven days after Buffman 4th Circuit held penalties must be based on consequential damages, not contract damages
• 8/10/10: Ferrara v. Lafayette – 4th Circuit affirmed award of $777K in "consequential damages" though Plaintiff didn’t even offer evidence of consequential
• 12/8/10: Durio v. Horace Mann – 3rd Circuit affirmed $761K in penalties, $426,796 of which court classified as "contractual damages" calculated by doubling contract damages and $334,666 in “general/special” penalties
LA Supreme Court Reinstates Proper Calculation: *Durio v. Horace Mann*

- Supreme Court reversed 3rd Circuit, finding penalties are calculated by doubling damages attributable to breach – contract damages are not to be considered in calculation
- "Damages sustained" of section (C) = "damages sustained as result of breach" of section (A):
  - 22:1220 (A) – "damages sustained as a result of the breach" of duty imposed
  - 22:1220 (C) – "in addition to damages, discretionary penalties can be awarded, limited to 2x "damages sustained" or $5K, whichever is greater

LA Supreme Court Reinstates Proper Calculation: *Durio v. Horace Mann*

- If legislature intended penalties to be calculated based on contract damages, it would have said so, like it did in 22:658, which provides that penalties are calculated based on amount due
- Would be inconsistent to include contract damages in penalty
  - 22:1220 duties distinct from contract duties – two separate causes of action
  - Violation of the statute, not breach of the contract, triggers penalty

Lessons Learned

- Courts more willing than ever to impose penalties on insurance companies
- Counsel on both sides need to mind their P’s and Q’s during all stages of litigation to ensure issues are perfected for appeal
Mental Anguish: LA Supreme Court

- **Sher v. Lafayette**: Plaintiff sought mental anguish damages under C.C. Art. 1998 (which requires proof of intent to aggrieve), but did not argue 22:1220. LA Supreme Court held mental anguish damages were not available in that case but left open whether such damages available under 22:1220.
- **Wegener v. Lafayette**: La. C.C. art. 1998 has no applicability in claim for emotional distress/mental anguish damages under La. R.S. 22:1220, and a plaintiff need not prove intent to aggrieve.

Mental Anguish: LA Supreme Court

- **Durio v. Horace Mann**: affirmed $57K for mental anguish under 22:1220.
  - Trial court called Defendant’s conduct egregious & found Plaintiff proved mental anguish with medical testimony.
  - 3rd Circuit affirmed, finding Defendant’s conduct intentional, in bad faith, designed to discourage Plaintiff from pursuing claims. Plaintiff suffered from anxiety, had to take meds, adjust employment & seek medical care for stress.
  - Supreme Court mentioned lower court’s findings but didn’t discuss mental anguish.

Mental Anguish: U.S. 5th Circuit

*Dickerson v. Lexington*

- Legislature clearly intended to permit recovery of mental anguish under 22:1220 by authorizing any damages, including general and special damages.
- Sufficiency of evidence:
  - No clear standard for mental anguish; up to fact-finder.
  - Plaintiff proved $25K in general damages with own testimony and testimony of his daughter re: mental and physical health.
Mental Anguish: U.S. 5th Circuit
French v. Allstate
- Only evidence Plaintiffs put forth was own testimony of emotional & physical stress which was insufficient proof of mental anguish
- Failed to show Defendant’s adjustment caused stress

Mental Anguish: 4th Circuit – Burke v. Lafayette
- $200,000 award of consequential damages for mental anguish
- Only evidence Plaintiff put forth was general testimony from daughter that Plaintiff was upset:
  ... [The Plaintiff’s daughter] offered testimony that her mother was upset and angry and would get mad about the “run around” she felt Lafayette was giving to her. She testified that her mother’s face was always red and that her mother spent numerous hours on the phone with Lafayette and the insurance commissioner’s office trying to secure the necessary funds to start her rebuilding. Ms. Burke had no choice but to sue Lafayette and the testimony reveals that process was long, tedious and emotionally draining.
- Court relied on 

Lessons Learned
- Mental anguish damages are clearly recoverable under La. R.S. 22:1220
- La. C.C. Art. 1998 not applicable (Plaintiff need not prove intent to aggreive)
- Plaintiff need not offer much to support claim
  - Red face + aggravation + inconvenience = $200K
    (supported by own daughter’s testimony)
  - Durio – at least some medical evidence and more reasonable award
No Bad Faith Where Reasonable Basis to Investigate Car Theft

Claims

Johnson v. State Farm (ED LA 5/16/12)

• BMW was discovered burned in a rural area shortly after it was reported stolen; not stripped of any major component parts other than the wheels
• Plaintiffs provided inconsistent statements with respect to the facts and circumstances before and after the alleged theft
• Expert examination of the vehicle = vehicle could only move under its own power with a properly programmed key and Plaintiffs confirmed that they had the only two properly programmed keys for the vehicle

No Bad Faith Where Reasonable Basis to Investigate Car Theft

Claims

Johnson v. State Farm (ED LA 5/16/12)

• No evidence of forced entry and Plaintiffs denied hearing any car alarms, breaking glass, squealing tires, or tow trucks despite vehicle was stolen from just outside of their bedroom window
• Plaintiffs' financial condition = motive for fabricating a theft
• Plaintiffs have come forward with no facts showing that State Farm lacked a reasonable basis to investigate and defend against the claim rather than to "simply pay the claim without question"

No Bad Faith Where Reasonable Basis to Investigate Car Theft

Claims

• Lesson Learned: Post suit expert report not enough to defeat MSJ on bad faith
• To the extent the Plaintiff’s expert report may be considered evidence contradicting Defendant’s expert report, such evidence was produced long after the claim was denied and this litigation commenced
Bad Faith Penalties

Strict Liability for Failure to Timely Pay

Instant Replay Sports Inc. v Allstate Insurance Co. (1st Cir.)

- The mediation agreement required the parties to draft a settlement and release agreement, but also provided that payment “will be made within 30 days from today”
- The Court held the 30-day period for imposition of penalties under R.S. 22:1973 for failure to pay a settlement began to run from the date of the settlement agreement and not from a later date caused in part by the manner in which the checks were issued to insureds.

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Strict Liability for Failure to Timely Pay

Katie Realty v. Louisiana Citizens (La SCT 10/12)

- Decided just after Instant Replay
- Parties settled claim at mediation. Citizens failed to pay the settlement within 30 days of the mediation agreement—it was eight days late
- Plaintiff owed ½ the value of the sum paid in settlement (which would have been $125,000 penalty) under Section 22:1892, the sister bad faith statute to 22:1973 at issue in Instant Replay. The insured argued the settlement agreement constituted “proof of loss” under this statute to trigger the penalty for arbitrary failure to pay a claim owed within 30 days of proof of loss.

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Strict Liability for Failure to Timely Pay

The Supreme Court rejected this argument, and said settlement of a disputed claim is not proof of loss, but

- Penalties for failure to pay a settlement are limited to claims under 22:1973, and the penalty under that statute would be $5,000
- Under 22:1973 the penalty is $5,000 or twice the damages sustained as a result of the bad faith – there was no evidence of damages sustained by the insured for the late payment
- And it confirms strict liability for late payment of a settlement
In Re: Zuber (La SCT 2012)

- To be compliant with the Louisiana Rules of Disciplinary Conduct, a written communication that outlines the representation of the insured is limited by the terms of the policy, especially where a “consent to settle” clause in present, is required.
- As long as the insured is clearly apprised of the limitations on the representation being offered by the insurer and that the lawyer intends to proceed in accordance with the directions of the insurer, the insured has sufficient information to decide whether to accept the defense offered by the insurer or to assume responsibility for his own defense at his own expense. No formal acceptance or written consent is necessary.

In Re: Zuber (La SCT 2012)

- A prudent lawyer hired by an insurer to defend an insured will communicate with the insured concerning the limits of the representation at the earliest practicable time.
- Thus, if the lawyer fails to advise the insured of the limited nature of the representation and his intention to proceed in accordance with the directions of the insurer early in the representation, the lawyer may find himself trying to advise the insured of a proposed settlement at the last minute under short time constraints, when the insured will have little practical opportunity to reject the defense offered by the insurer and assume responsibility for his own defense.