KATRINA'S IMPACT ON LITIGATION OF INSURANCE CLAIMS UNDER LOUISIANA LAW

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[*] The authors would like to thank Janelle E. Sharer, Tulane University Law School Class of 2016, as well as Susan M. Rogge for their extensive contributions to this Article.

In the aftermath of Hurricanes Katrina and Rita, insurers faced unprecedented challenges in resolving over one million insurance claims filed by Gulf Coast residents in a timely manner. Many of these claims made their way to Louisiana's state and federal courts, presenting new issues related both to coverage for wind- and flood-related damage caused by catastrophic storms, as well as insurers' obligations to their insureds under Louisiana's "bad faith" insurance statutes.

The storms' devastation was felt in the legislature as well. The legislature recognized it was imperative that insurers quickly resolve claims so affected residents could rebuild their lives, but also acknowledged the immense challenges insurance companies faced as they tried to resolve claims in a region lacking even the most basic infrastructure. Mindful of the need to strike a balance between these competing concerns, the legislature revised the requirements and penalties for bad faith insurance claims in Louisiana. This Article examines the ways in which the post-hurricane litigation and legislative actions have transformed the landscape of Louisiana insurance law.

Section I addresses how the wave of post-hurricane insurance litigation significantly affected the development of certain coverage issues in the Louisiana courts. In particular, Katrina's extensive wind and water damage which destroyed hundreds of homes forced Louisiana courts to examine and resolve two critical coverage issues: (1) application of Louisiana's valued policy law to total loss claims under homeowner's policies and (2) enforceability of insurance policies' anti-concurrent cause provisions. Prior to Hurricane Katrina, Louisiana courts had not addressed either of these issues, leaving insurers and policyholders uncertain as to how coverage would be resolved under homeowners' policies for damages caused by a combination of both wind, a covered peril, and water, an excluded peril. The post-Katrina jurisprudence supplied new answers to these questions.

Section II considers changes affecting insurers' statutory obligations to their insureds under Louisiana's bad faith statutes.[1] This includes both legislative amendments to the

1. At the time of Katrina, the bad faith statutes were located at sections 658 and 1220 of the Louisiana Insurance Code (title 22 of the Revised Statutes). In 2008, the Insurance Code was renumbered; section 658 became section 1892 and section 1220 became section 1973. Act of June 21, 2008, No. 415, § 1, 2008 La. Acts 1846, 1905, 1908. For clarity, this Article will refer to the sections by their current numbers.

statute(s) and the courts' interpretations.

I. HURRICANE KATRINA'S IMPACT ON INSURANCE COVERAGE

A great number of homes were affected by Katrina—both via surging and flooding water damage and also by wind.[2] In many instances, homeowners returned to their properties only to discover that all that was remaining in place of their home was a concrete slab.[3] Soon thereafter, insureds began to make insurance claims for coverage of these total and sometimes partial losses both from their flood policies underwritten by the National Flood Insurance Program[4] as well as from their private "wind"/homeowners' insurers.[5] These losses created significant issues for insurers: what to do when no one knew whether the source of property damage was wind or flood or a combination of both, how to determine the extent and causation of damages, and how to determine which came first in the instance of both. Wind insurers soon turned to applicable statutes and clauses in their policies for the answers, oftentimes turning on whether their policies were obligated to cover total perils and whether another peril contributed concurrently to cause the loss. Extensive litigation followed, ultimately resulting in a conservative answer to these questions.

A. APPLICATION OF LOUISIANA'S VALUED POLICY STATUTE TO TOTAL LOSS CLAIMS UNDER HOMEOWNERS' POLICIES

Soon after Katrina, numerous policyholders filed lawsuits against their homeowners' insurers asserting their properties

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2. *See* Allison Plyer, *Facts for Features: Katrina Impact*, DATA CTR. (Aug. 28, 2015), http://www.datacenterresearch.org/data-resources/katrina/facts-for-impact/ ("Katrina damaged more than a million housing units in the Gulf Coast region.").

3. *See, e.g.*, Kodrin v. State Farm Fire & Cas. Co., 314 F. App'x 671, 672 (5th Cir. 2009); Greg Biondo, *Hurricane Katrina: A Look Back*, KEESLER AIR FORCE BASE (Sept. 1, 2015), http://www.keesler.af.mil/News/Features/Display/tabid/1006/Article/615502/hurricane-katrina-a-look-back.aspx.

4. Unfortunately, many individuals did not have flood insurance, causing an overload of claims under homeowners' insurance policies for full coverage of the damages. *See* Christopher Drew & Joseph B. Treaster, *Politics Stall Plan to Bolster Flood Insurance*, N.Y. TIMES (May 15, 2006), http://www.nytimes.com/2006/05/15/us/15flood.html; Joseph B. Treaster, *Katrina Victims Say Agents Advised Against Flood Coverage*, N.Y. TIMES (July 14, 2006), http://www.nytimes.com/2006/07/14/business/14insure.html.

5. "Wind" policies are subject to interpretation but primarily refer to any policy covering wind, fire, and theft damage as opposed to flood damage. *See infra* text accompanying notes 21–25 and 31–50.

were total losses due to wind and water and invoking Louisiana's valued policy statute as a basis to recover their full policy limits, without regard to their policys' loss settlement provisions.[6] The standard homeowner's insurance policy typically provides loss settlement provisions that obligate the insurer to pay for covered loss based either on "actual cash value," which involves a deduction for depreciation, or "replacement cost," which often requires the insured to complete repair of the damaged property before recovering any depreciated amount.[7] In contrast, Louisiana's valued policy statute requires insurers who determine an insured's premiums by assigning a particular valuation to the insured property to pay the insured the full amount of the valuation when there is a total loss of the insured property.[8]

The unanswered question presented by Katrina claims was whether the statute applied to non-fire claims under homeowners' policies, particularly in the case of a total loss caused in part by a non-covered peril, such as water damage. The relevant portions of Louisiana's valued policy statute provide:

> Under any fire insurance policy insuring inanimate, immovable property in this state, if the insurer places a valuation upon the covered property and uses such valuation for purposes of determining the premium charge to be made under the policy, in the case of total loss the insurer shall compute and indemnify or compensate any covered loss of, or damage to, such property which occurs during the term of the policy at such valuation without deduction or offset, unless a different method is to be used in the computation of loss, in which latter case, the policy, and any application therefor, shall set forth in type of equal size, the actual method of such loss computation by the insurer. Coverage may be voided under said contract in the event of criminal fault on the part of the insured or the assigns of the insured.
>
> Any clause, condition, or provision of a policy of fire

6. Numerous Katrina lawsuits asserting claims under Louisiana's valued policy law were consolidated in the federal district court for the Eastern District of Louisiana and heard by Judge Sarah Vance. *See* Chauvin v. State Farm Fire & Cas. Co., 450 F. Supp. 2d 660 (E.D. La. 2006).

7. *See, e.g.*, Landry v. La. Citizens Prop. Ins. Co., 2007-1907, pp. 17–19 (La. 5/21/08); 983 So. 2d 66, 77–78 (quoting an example of a loss settlement provision in a homeowners' policy).

8. LA. STAT. ANN. § 22:1318 (Supp. 2016); *see also* Act of June 21, 2008, No. 415, § 1, 2008 La. Acts 1846, 1891 (recodifying the statute from LA. STAT. ANN. § 22:695).

> insurance contrary to the provisions of this Section shall be null and void, and have no legal effect. Nothing contained herein shall be construed to prevent any insurer from canceling or reducing, as provided by law, the insurance on any property prior to damage or destruction.[9]

Accordingly, if the statute was applied to total loss claims under homeowners' insurance policies for losses caused other than by fire, insurers would have been required to pay the full valuation of the property, "without deduction or offset," and insurance provisions that were "contrary to the provisions of this Section [would have been] null and void, and [would] have no legal effect."[10]

As an initial matter, there was some question as to whether the valued policy law (VPL) would even apply to a homeowner's insurance policy because the express statutory language limited its applicability to "fire insurance" policies.[11] The Louisiana statute classifying kinds of insurance lists "fire and allied lines" and "homeowners' insurance" as two distinct categories.[12] "Fire and extended coverage" is defined, in part, as "[i]nsurance against loss or damage by fire, smoke and smudge, lightning or other electrical databases."[13] It also may include coverage for damage due to "earthquake, windstorm, cyclone, tornado, tempests, hail, frost, snow, ice, sleet, flood, rain, drought, or other weather or climatic conditions including excess or deficiency of moisture."[14] "[H]omeowners' insurance," in contrast, is defined as a bundle of insurance that "combines fire and allied lines with any one or more perils of casualty, liability, or other types of insurance within one policy form at a single premium."[15] The United States Fifth Circuit Court of Appeals, the first appellate court to examine application of Louisiana's VPL to Katrina claims, affirmed the lower court's decision, which had assumed without deciding that the statute applied to non-fire perils under a

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9. LA. STAT. ANN. § 22:1318 (Supp. 2016).

10. *Id.*

11. *Id.* § 22:1318(A) ("[u]nder any *fire insurance* policy" (emphasis added)).

12. *Id.* § 22:47(10), (15); *see also* Act of June 21, 2008, No. 415, § 1, 2008 La. Acts 1846, 1848 (recodifying the statute from LA. STAT. ANN. § 22:6).

13. LA. STAT. ANN. § 22:47(10)(a) (Supp. 2016).

14. *Id.* § 22:47(10)(b).

15. *Id.* § 22:47(15). The insurer's liability under a homeowners' policy, by definition, was "determined with reference to the replacement value of the premises." *Id.*

homeowner's policy.[16]

When the same issue was presented to the Louisiana Supreme Court for the first time in *Landry v. Louisiana Citizens Property Insurance Co.*, that court likewise left unresolved the question of the statute's applicability to a non-fire loss under a homeowner's policy.[17] However, in an extended footnote analyzing the issue, the court concluded that the statute was intended to apply *only* to fire insurance policies, which it found may include coverage against other perils, but was nevertheless distinct from homeowners' policies.[18] Because resolution of the issue did not impact the result in *Landry*, the court simply urged the state legislature to make changes to the statute if necessary to clarify its intended application.[19] The legislature provided this clarification in 2014, when it revised the VPL to add that "the term 'fire insurance policy' shall mean any property insurance policy, with the exception of builders risk policies of insurance, that provides coverage for the peril of fire, regardless of any other coverage provided by the policy."[20]

Having set aside the issue of the VPL's application to non-fire losses under homeowners' policies, the courts were left to resolve the issue of the statute's application to Katrina claims with respect to total losses caused by a combination of covered and non-covered perils. The argument presented to the *Chauvin* court framed the issue as "whether, as a matter of law, any amount of damage caused by a covered loss, however small, triggered the VPL, even though the total loss was the result of a non-covered peril."[21] While the homeowners maintained that they were entitled to the agreed face value of their policy under the VPL because their homes sustained some damage from wind, a covered peril, even though the total loss resulted from flooding, the insurers argued the VPL did not require such a result

16. Chauvin v. State Farm Fire & Cas. Co., 495 F.3d 232, 236–37, 241 (5th Cir. 2007).

17. *See, e.g.*, Landry v. La. Citizens Prop. Ins. Co., 2007-1907, p. 15 (La. 5/21/08); 983 So. 2d 66, 76.

18. *See id.* at p. 14 n.10; 983 So. 2d at 74 n.10.

19. *Id.*

20. LA. STAT. ANN. § 22:1318(D) (Supp. 2016). Prior to this revision, the statute simply provided that "this Section . . . shall not apply to a loss covered by a blanket-form policy of insurance nor to a loss covered by a builders risk policy of insurance" with no explanation of the term "fire insurance policy." *See* Act of June 21, 1995, No. 737, sec. 1, § 695(D), 1995 La. Acts 1980, 1980.

21. *Chauvin*, 495 F.3d at 236 n.4.

because the total loss was not caused by a covered peril.[22] After considering the purpose of Louisiana's valued policy statute: "to fix the value of the insured property in the event of a total loss and thus, operate[] as a form of liquidated damages," the court held the insurer's construction of the VPL best conformed with the legislative purpose.[23] Therefore, the court only required the insurer to pay the agreed face value of the insured property if the property was rendered a total loss from a covered peril.[24] The *Chauvin* court reasoned that because the focus of the VPL was on valuation and not coverage, the statute signaled no intent to expand coverage to excluded perils.[25]

Although the same issue regarding the VPL's applicability from *Chauvin* was present in *Landry*,[26] the Louisiana Supreme Court's resolution of the case turned on a different aspect of the statute. In *Landry*, the court considered the VPL statute's "opt-out" provision, which provided an exception to the statute's requirement of compensation at face value where "a different method of loss computation is set forth in the policy and policy application in type of equal size."[27] In addition to the loss settlement provisions in the policy itself, the policy application at issue, which was signed by the insured, contained a statement of acknowledgment providing that "in accordance with . . . La. R.S. 22:[1318]" the policy contained "the following provisions and method of loss computation," and then set forth the method to be used to value and settle covered property losses.[28] The Louisiana Supreme Court found that the insurance contract in dispute "validly set forth a different method of loss computation," thereby falling within the statutory exception.[29] In so holding, the Louisiana Supreme Court found that whether the statutory valuation provisions would require an insurer to pay the face value of the policy when a total loss is caused concurrently with a

22. Chauvin v. State Farm Fire & Cas. Co., 495 F.3d 232, 237 (5th Cir. 2007).

23. *Id.* at 238–39.

24. *Id.*

25. *Id.* at 239–40.

26. In the trial court, the Landrys identified the sole issue before the court on summary judgment as "whether Louisiana's Valued Policy Law requires the fire and wind insurance carrier to pay the full value of the insurance policy in the event of a total loss of a structure if the total loss is only caused partially by a non-covered peril (flood water)." Landry v. La. Citizens Prop. Ins. Co., 2007-1907, pp. 4–5 (La. 5/21/08); 983 So. 2d 66, 70.

27. *Id.* at p. 22; 983 So. 2d at 80.

28. *Id.* at pp. 17–19; 983 So. 2d at 77–78.

29. *Id.* at pp. 1–2; 983 So. 2d at 68.

covered and a non-covered loss was irrelevant because the provision no longer applies once a different method of loss computation is validly set forth in the insurance contract.[30]

With the one-two punch of the *Chauvin* and *Landry* decisions, the courts fully resolved the unanswered questions of application of Louisiana's valued policy statute to Katrina total loss claims, narrowing the coverage issues created by Katrina's combined wind and water destruction.

B. ENFORCEABILITY OF HOMEOWNERS' POLICIES' ANTI-CONCURRENT CAUSE PROVISIONS TO HURRICANE CLAIMS

Total loss claims from Katrina and Rita due to a combination of wind and water also presented Louisiana courts with questions regarding how to apply provisions in homeowners' policies referred to as anti-concurrent cause (ACC) provisions. An example of common anti-concurrent cause exclusionary language in a homeowner's policy is as follows:

> We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss.
>
> . . . .
>
> (1) [F]lood, surface water, waves, tidal waves, overflow of body of water, spray from these, whether or not driven by wind.[31]

"Insurers developed ACC clauses specifically in response to court decisions that applied the efficient proximate cause doctrine to resolve thorny issues of policy coverage for concurrently caused perils."[32] Under the common law causation rule of efficient proximate cause, "an insured may recover for damage caused jointly by a [covered] and excluded peril if the [covered] peril was the dominant and efficient cause of the loss," a doctrine which requires extensive litigation between the parties to determine the dominant cause of the loss.[33] The ACC provision is a means for

30. Landry v. La. Citizens Prop. Ins. Co., 2007-1907, p. 27 (La. 5/21/08); 983 So. 2d 66, 83.

31. *See* Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 430 (5th Cir. 2007). This sample policy language was the language at issue in Nationwide's homeowner's policy. *Id.*

32. *Id.* at 433 n.7.

33. Stewart Enters., Inc. v. RSUI Indem. Co., 614 F.3d 117, 126 (5th Cir. 2010).

insurers to avoid this type of dispute.[34]

Judge Patricia Minaldi of the Western District of Louisiana authored the first decision directly addressing the enforceability of the ACC provision to losses caused by wind and flood in *In re Cameron Parish Rita Litigation.*[35] The court found that to the extent State Farm's ACC purportedly excluded coverage for wind when it acted concurrently or in any sequence with water, the provision was ambiguous.[36] The court reasoned that because the policy undisputedly covered wind damage, coverage could not be provided with the right hand and then excluded by the left.[37] Applying this construction of the ACC provision, the court held, "the plaintiffs would be afforded coverage where they c[ould] prove that damage resulted from wind, regardless of whether there was concurrent or subsequent water damage" but that "where the damage would not have occurred but for water (and water alone), there [was] no coverage."[38]

This decision was a short-lived victory for insureds in Louisiana. Within the next year, Judge Minaldi was forced to re-examine her decision in light of two subsequent decisions by the United States Fifth Circuit.[39] The Fifth Circuit first issued the *Leonard* decision, which addressed the enforceability of the ACC provision to a home destroyed by storm surge pushed ashore by Katrina's winds.[40] The insurer, Nationwide, paid the insured for his roof damage, but denied coverage under the policy's ACC provision for damages caused by the wind-water action of the storm surge.[41] The district court struck down the ACC provision as ambiguous, ruling that where the insured property sustains damage from both wind (a covered loss) and water (an excluded loss), the insured may recover that portion of the loss which he can prove to have been caused by wind.[42] The Fifth Circuit rejected the district court's notion that an insured could parse out

34. Stewart Enters., Inc. v. RSUI Indem. Co., 614 F.3d 117, 126 (5th Cir. 2010).

35. *In re* Cameron Parish Rita Litig., No. 2:07-MD-01, 2007 WL 2066813 (W.D. La. July 13, 2007).

36. *Id.* at *5.

37. *Id.*

38. *Id.*

39. Cameron Parish Sch. Bd. v. RSUI Indem. Co., 620 F. Supp. 2d 772, 773–74 (W.D. La. 2008) (citing Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346 (5th Cir. 2007); Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419 (5th Cir. 2007)).

40. *Leonard*, 499 F.3d at 426.

41. *Id.*

42. *Id.*

the portion of concurrently caused damage attributable to wind and recover for such damage, instead finding the ACC provision unambiguously precluded this result: "The plain language of the policy leaves the district court no interpretive leeway to conclude that recovery can be obtained for wind damage that 'occurred concurrently or in sequence with the excluded water damage.'"[43] Accordingly, in *Leonard*, the insured was only able to recover payment for his wind damage to his roof, but no other claimed wind damage to the remaining structure because it was also destroyed by storm surge.[44]

On the heels of the *Leonard* decision, the Fifth Circuit again upheld the enforceability of the ACC provisions, this time in a case involving a house destroyed by wind and water to such an extent that all that remained was a slab.[45] In *Tuepker v. State Farm Fire & Casualty Co.*, the Fifth Circuit explained that the ACC provision and the water and flood exclusion "clearly provides that indivisible damage caused by both excluded perils and covered perils or other causes is not covered."[46] Although both the *Leonard* and *Tuepker* decisions were decided under Mississippi law, the Fifth Circuit's analysis proved to be influential under Louisiana law as well.

It was against this backdrop that Judge Minaldi reconsidered the insured's argument that the ACC provision was ambiguous with respect to coverage for properties damaged by wind and flood in *Cameron Parish School Board v. RSUI Indemnity Co.*[47] Finding no relevant distinctions between the laws of Mississippi and Louisiana with respect to insurance interpretation, the court followed the Fifth Circuit's holdings in *Leonard* and *Tuepker* to conclude that the ACC provision was unambiguous and enforceable and the ACC provision was not against Louisiana public policy.[48] Judge Minaldi also noted that she was persuaded her decision to follow *Leonard* and *Tuepker*

43. Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 430 (5th Cir. 2007) (quoting Leonard v. Nationwide Mut. Ins. Co., 438 F. Supp. 2d 684, 693 (S.D. Miss. 2006)).

44. *Id.* at 431.

45. Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346, 348 (5th Cir. 2007) (quoting Complaint Expedited Trial Setting Requested at 4, Tuepker v. State Farm Fire & Cas. Co., No. 1:05-CV-559 (S.D. Miss. May 24, 2006), 2005 WL 4147108).

46. *Id.* at 354.

47. Cameron Parish Sch. Bd. v. RSUI Indem. Co., 620 F. Supp. 2d 772, 780 (W.D. La. 2008).

48. *Id.* at 780–81.

was correct when considering another decision by the Fifth Circuit, *Bilbe v. Belsom*.[49] In *Bilbe*, the Fifth Circuit applied Louisiana law and cited *Leonard* for the notion that the ACC provision served to preclude recovery for any damage not caused by wind solely, regardless of the efficient proximate case doctrine.[50]

Judge Minaldi's prediction[51] that the Fifth Circuit would decide the enforceability of the ACC in the same manner under Louisiana law as it did under Mississippi law later proved correct. In *Arctic Slope Regional Corp. v. Affiliated FM Insurance Co.*, the Fifth Circuit had the opportunity to apply its previous interpretation of the ACC to a policy under Louisiana law and again refused to find any ambiguity in the provision.[52] However, the *Arctic Slope* decision involved an insured property that was damaged by three feet of floodwater from storm surge and there was no assertion of damages attributable separately and independently to the covered peril of wind.[53] Accordingly, while the case did not address the issue of a total loss alleged to be caused by both a covered peril (wind) and an excluded peril (flood) the decision at least reflected the Fifth Circuit's agreement that its analysis and rule of *Leonard* and *Tuepker* under Mississippi law was equally applicable under Louisiana law.

Under these decisions addressing application of the ACC to total loss claims caused by both a covered peril (wind) and an excluded peril (water) an insurer is entitled to rely on the ACC provision to deny coverage for a total loss, where a covered peril (wind) and an excluded peril (water) concurrently caused the damage, except the insurer would still owe coverage for any damages caused exclusively by wind. With these decisions upholding the enforceability of the ACC provisions, similar to the outcome of the VPL litigation, property insurers again were spared the possibility of having to pay for total loss claims where the total loss was not caused exclusively by a covered peril,

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49. Cameron Parish Sch. Bd. v. RSUI Indemn. Co., 620 F. Supp. 2d 772, 780 n.12 (W.D. La. 2008) (citing Bilbe v. Belsom, 530 F.3d 314, 317 n.3 (5th Cir. 2008)).

50. *Bilbe*, 530 F.3d at 317 n.3. In *Bilbe*, the insured had conceded that her property was struck by storm surge and that the force of the water would have been sufficient to destroy the dwelling even if it had been undamaged at the time the water impacted it. *Id.* at 316.

51. *Cameron Parish Sch. Bd.*, 620 F. Supp. 2d at 780 & n.12.

52. Arctic Slope Reg'l Corp. v. Affiliated FM Ins., 564 F.3d 707, 711 (5th Cir. 2009).

53. *Id.* at 709.

bringing more certainty to insurance coverage litigation in Louisiana in the wake of Hurricanes Katrina and Rita which involved so many total loss claims.

Although this litigation helped to clarify statutory language and policy language, it did not address the responsiveness of insurers to their policyholders post-loss, nor did it touch on the respective obligations of an insured and insurer to each other after a loss-causing hurricane. Post-Katrina litigation as well as the enactment of various statutes helped to establish and clarify an insurer's role after a loss as well as penalties for acting in bad faith.

II. HURRICANE KATRINA'S IMPACT ON THE INSURER'S OBLIGATIONS UNDER LOUISIANA'S BAD FAITH STATUTES

The two primary applicable statutes dealing with post-hurricane obligations are sections 1892[54] and 1973[55] of title 22 of the Louisiana Revised Statutes. Each section generally provides that in the instance of a loss and reported claim, an insurer is obligated to begin to fairly and promptly adjust the claim, make prompt payments to its insured for undisputed portions of losses, and resolve claims quickly.[56] The statutes also impose certain penalties on insurers for violating specific obligations as well as for failing to act with good faith and fair dealing towards their insureds.[57]

When Katrina made landfall in August 2005, section 1892 provided that an insurer must pay the undisputed amount due to an insured within thirty days of receiving satisfactory proof of loss from the insured.[58] The insurer's failure to comply "when such failure is found to be arbitrary, capricious, or without probable cause" subjected the insurer to "a penalty, in addition to the amount of the loss, of twenty-five percent damages on the amount found to be due from the insurer to the insured, or one

54. LA. STAT. ANN. § 22:1892 (Supp. 2016); *see also* Act of June 21, 2008, No. 415, § 1, 2008 La. Acts 1846, 1905 (renumbering the statute from LA. STAT. ANN. § 22:658).

55. LA. STAT. ANN. § 22:1973 (Supp. 2016); *see also* Act of June 21, 2008, No. 415, § 1, 2008 La. Acts 1846, 1908 (renumbering the statute from LA. STAT. ANN. § 22:1220).

56. *See* LA. STAT. ANN. § 22:1892(A), (C) (Supp. 2016); *id.* § 22:1973(A)–(B).

57. *See id.* § 22:1892(B); *id.* § 22:1973(C).

58. Act of July 7, 1989, No. 638, sec. 1, § 658(A)(1), 1989 La. Acts 1830, 1831 (amended and recodified at LA. STAT. ANN. § 22:1892).

thousand dollars**,** whichever is greater."[59]

Section 1973 provided plaintiffs a separate avenue for recovery based on an insurer's alleged failure to make payment within sixty days of receiving satisfactory proof of loss.[60] An insurer that breached its duties under the statute was "liable for any damages sustained as a result of the breach."[61] In addition, the statute allowed a discretionary award of penalties of twice the amount of damage incurred as a result of the breach "or five thousand dollars, whichever is greater."[62]

A. LEGISLATIVE CHANGES TO THE BAD FAITH STATUTES

Post-Katrina, section 1892 was amended in two significant respects. First, effective August 15, 2006, the statute was amended to provide for the recovery of attorney's fees and increase the penalty provision from twenty-five percent to fifty percent.[63] This amendment came too late to benefit Katrina litigants, however, as Louisiana courts repeatedly held that the version in effect when the claim arose applied.[64] These decisions adopted the general rule, codified in the Louisiana Revised Statutes, that "[n]o Section of the Revised Statutes is retroactive

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59. Act of July 27, 2003, No. 790, sec. 1, § 658(B)(1), 2003 La. Acts 2593, 2594 (emphasis added) (amended and recodified at LA. STAT. ANN. § 22:1892).

60. LA. STAT. ANN. § 22:1973(B)(5) (Supp. 2016). The statute in force at the time of Katrina was not substantively different. *See* Act of June 24, 1990, No. 308, § 1, 1990 La. Acts 787, 788.

61. LA. STAT. ANN. § 22:1973(A) (Supp. 2016).

62. *Id.* § 22:1973(C).

63. Act of June 30, 2006, No. 813, sec. 1, § 658(B)(1), 2006 La. Acts 2825, 2825 (amended and recodified at LA. STAT. ANN. § 22:1892(B)(1)). The version in effect from 2003 until August 2006 did not provide for an award of attorney's fees as the legislature had specifically deleted that provision from the statute. *See* Act of July 27, 2003, No. 790, sec. 1, § 658(B)(1), 2003 La. Acts 2593, 2594.

64. *See* Lewis v. State Farm Ins. Co., No. 41,527, p. 31 (La. App. 2 Cir. 12/27/06); 946 So. 2d 708, 729 (holding that the version of section 1892 in effect at the time the cause of action arose applied despite subsequent amendment to the statutes); *accord* Geraci v. Byrne, 06-58, pp. 6–7 (La. App. 5 Cir. 6/28/06); 934 So. 2d 263, 267 (same). These decisions found support in pre-Katrina jurisprudence considering the effect of pre-Katrina amendments to the statute. *See* Funk v. La. Underwriters Ins. Co., 613 So. 2d 1018, 1022 (La. App. 3 Cir. 1993) (holding that a change in the penalty from 12% to 10% was substantive change that did not apply retroactively and hence that the version in effect at the time of the alleged bad faith applied); Francis v. Travelers Ins. Co., 581 So. 2d 1036, 1044 (La. App. 1 Cir. 1991) (same); Gulf Wide Towing, Inc. v. F.E. Wright (U.K.) Ltd., 554 So. 2d 1347, 1354 (La. App. 1 Cir. 1989) (holding that a change in the penalty percentage "was substantive and cannot be applied retroactively"); Fuqua v. Aetna Cas. & Sur. Co., 542 So. 2d 1129, 1133 (La. App. 3 Cir. 1989) (same).

unless it is expressly so stated."[65]

Section 1892 requires an insurer to initiate loss adjustment of a property claim within fourteen days after notification of loss by the claimant and extends the time for initiation to thirty days after notification in event of "catastrophic loss."[66] Importantly, though, a 2009 amendment provided that in the case of catastrophic loss the Commissioner of Insurance may promulgate a rule extending the time period for initiating loss adjustment arising from a presidentially declared emergency or disaster or a gubernatorially declared emergency or disaster up to an additional thirty days.[67] "Thereafter, only one additional extension of the period of time for initiation of loss adjustment [is permitted] and must be approved by the Senate committee on insurance and the House committee on insurance, voting separately."[68]

Section 1973 also was amended post-Katrina to add an additional basis for recovery when the insured "fail[s] to pay claims pursuant to R.S. 22:[1893] when such failure is arbitrary, capricious, or without probable cause."[69]

In addition to these changes to the existing bad faith statutes, the legislature enacted a series of statutes after Katrina relating to the filing of various claims and the adjustment of such claims.[70] For example, section 1893 provides, *inter alia*, that "[n]o insurer shall use the floodwater mark on a covered structure without considering other evidence, when determining whether a loss is covered or not covered under a homeowners' insurance policy."[71] This change was designed to prevent insurers from relying exclusively on floodwater marks when determining whether damage would be covered.[72] The statute also provides that an insurer is not permitted to use the fact that a home is removed or displaced from its foundation without considering

65. LA. STAT. ANN. § 1:2 (2003); *see* Anderson v. Avondale Indus., Inc., 2000-2799, pp. 3–8 (La. 10/16/01); 798 So. 2d 93, 97–100 (La. 2001) (discussing Louisiana's prohibition against applying substantive changes in the law retroactively).

66. LA. STAT. ANN. § 22:1892(A)(3) (Supp. 2016).

67. Act of July 10, 2009, No. 488, sec. 1, § 1892(A)(3), 2009 La. Acts 3003, 3003.

68. LA. STAT. ANN. § 22:1892(A)(3) (Supp. 2016).

69. Act of Feb. 23, 2006, No. 12, sec. 1, § 1220(B)(6), 2006 La. Acts 3050, 3051–52 (recodified as amended at LA. STAT. ANN. § 22:1973).

70. *See* LA. STAT. ANN. §§ 22:1893–1896 (2009).

71. *Id.* § 22:1893(A)(1).

72. *Id.*

other evidence, when considering whether a loss is covered under a homeowner's policy.[73]

Another 2009 amendment recognized the challenges many homeowners faced in making timely claims following Katrina. Section 1894 provides that any person with a homeowner's, personal property, tenant homeowners, condo owners, or commercial property insurance policy claim resulting from Hurricane Katrina would have through September 1, 2007 to file a claim with their insurance company for damages.[74] Similarly, such claims resulting from Hurricane Rita were permitted to be made through October 1, 2007.[75]

Section 1895 was enacted to provide that "[n]o payment of a claim on a homeowner's insurance policy sh[ould] be considered a final settlement if the insurer fail[s to] . . . provide . . . a statement . . . reflect[ing] the amount paid under each category of coverage under the policy."[76] The statute provides additional requirements as to what the statement should list regarding provisions of coverage under the policy.[77]

Finally, section 1896, touching on the "right to transparency and integrity in adjustment of property claims," provides that "[a]n insurer of a[ny] residential or commercial property shall respond to all inquiries or requests from the insured within fourteen days, unless such time to respond was extended by the commissioner of insurance because of a disaster or emergency . . . ."[78] The statute also provides that "[a]n insurer of a residential or commercial property shall provide prompt adjustment by a qualified adjuster pursuant to the . . . Louisiana Claims Adjuster Act," and that "[a]ny violations of this Section . . . committed . . . with such frequency as to indicate a general business practice" would subject the insurer to liability under the unfair trade practices act.[79]

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73. LA. STAT. ANN. § 22:1893(A)(2) (2009).
74. *Id.* § 22:1894(A).
75. *Id.* § 22:1894(B).
76. *Id.* § 22:1895.
77. *Id.*
78. *Id.* § 22:1896(A).
79. LA. STAT. ANN. § 22:1896(B) (2009).

B. "SATISFACTORY PROOF OF LOSS" FOR PENALTIES UNDER SECTIONS 1892 AND 1973

Post-Katrina litigation also heavily centered around when the insurers' duties were triggered. The "trigger" is and was the presentation of enough information (a "satisfactory proof of loss") to put the insured on notice.[80] Extensive litigation helped to clarify *what* an insured must present to its insurer as well as what kind of information and documentation the insurer is required to obtain once a claim has been made.[81] Ultimately, this also resulted in a vast amount of additional litigation involving motor vehicle accident claims adjustment involving property (vehicle) damage, bodily injury, and loss of use.[82]

Under Louisiana law, insurers must respond to customer claims within a limited amount of time.[83] This time period starts when the insurer receives "satisfactory proof of loss," making the question of whether the proof of loss was "satisfactory" a crucial issue in resolving insurance bad faith claims.[84] Because the complexity and size of insurance claims vary widely, it would be nearly impossible to create an exact definition of the phrase. However, courts agree that a satisfactory proof of loss must advise an insurer of the particular facts of the claim and show "the extent of damages."[85]

If an insured files a bad faith claim against their insurance company, the insured has the burden of proving the insurer

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80. LA. STAT. ANN. § 22:1892(A)(1) (Supp. 2016).

81. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Norcold, Inc., 2011-1355, p. 15 (La. App. 3 Cir. 4/4/12); 88 So. 3d 1245, 1256 (holding that the trial court did not commit manifest error by finding that photographs of vehicles damaged and documentation of other losses were sufficient proof of loss); *see also* La. Bag Co. v. Audubon Indem. Co., 2008-0453 (La. 12/2/08); 999 So. 2d 1104, 1119 ("[P]roof of loss is a 'flexible requirement to advise an insurer of the facts of the claim,' and . . . it need not 'be in any formal style.'" (quoting Sevier v. U.S. Fid. & Guar. Co., 497 So. 2d 1380, 1384 (La. 1986))).

82. *See, e.g.*, *Norcold*, 2011-1355; 88 So. 3d 1245.

83. LA. STAT. ANN. § 22:1892(A)(1) (Supp. 2016).

84. *Compare* Grilletta v. Lexington Ins. Co., 558 F.3d 359, 369, 371 (5th Cir. 2009) (per curiam) (finding that the insurer was in bad faith because a report that "wind caused destruction of the house" was satisfactory proof of loss) *with* Reed v. State Farm Mut. Auto. Ins. Co., 2003-0107, p. 16 (La. 10/21/03); 857 So. 2d 1012, 1022–23 (finding that the insurer was not in bad faith because it paid an undisputed portion of the coverage and the evidence it possessed at the time did not show that more expensive treatment was required by the insured's accident (citing McDill v. Utica Mut. Ins. Co., 475 So. 2d 1085, 1089 (La. 1985))).

85. Korbel v. Lexington Ins. Co., 308 F. App'x 800, 803 (5th Cir. 2009); *La. Bag*, 2008-0453, p. 23; 999 So. 2d at 1119.

received satisfactory proof of loss.[86] If a homeowner has satisfactory proof of loss, but fails to provide that information to the insurance company, the insured has not satisfied this requirement.[87] However, an insurance company cannot withhold payment because it has not received specific proof of loss forms; so long as it has enough information to act on the claim, the manner of notification is "immaterial."[88]

After Katrina, courts clarified that an insurer has satisfactory proof of loss once it has sent an adjuster to inspect the property, for at this point the insurer has sufficient information to act on the claim.[89] The Louisiana Fourth Circuit Court of Appeal held that even if the adjuster provides an incomplete report to the insurer, the adjuster's initial inspection satisfies the proof of loss requirement.[90] In *Aghighi v. Louisiana Citizens*, an adjuster went to a home damaged in Hurricane Gustav to investigate a claim and took photos of the property damage, including cracks in the foundation.[91] Despite suggesting that the homeowner get an estimate to repair these cracks, the adjuster did not include this damage in his report.[92] The homeowner sought an estimate and submitted those costs to the insurer, who sent a second adjuster to conduct an additional inspection.[93] The court reasoned that because the damages included in the second inspection should have been included in the "woefully inadequate" initial report, the insurer had satisfactory proof of loss at the time of the first inspection.[94] Because the insurance company had the opportunity to discover the extent of the damages, it had received satisfactory proof of

86. Dickerson v. Lexington Ins. Co., 556 F.3d 290, 297–98 (5th Cir. 2009).

87. Sher v. Lafayette Ins. Co., 2007-2441, pp. 26–27 (La. 4/8/08); 988 So.2d 186, 206.

88. La. Bag Co. v. Audubon Indem. Co., 2008-0453 (La. 12/2/08); 999 So.2d 1104, 1119 (quoting Sevier v. U.S. Fid. & Guar. Co., 497 So. 2d 1380, 1384 (La. 1986)); *see also* WILLIAM SHELBY MCKENZIE & H. ALSTON JOHNSON III, INSURANCE LAW AND PRACTICE, 15 LOUISIANA CIVIL LAW TREATISE § 11:5 (4th ed. 2012) ("[T]his element does not impose a duty on the insured to complete the insurer's proof of claim form or to submit the claim in any formal style.").

89. *See, e.g.*, J.R.A. Inc. v. Essex Ins. Co., 2010-0797, pp. 32–33 (La. App. 4 Cir. 5/27/11); 72 So. 3d 862, 881 (citing Paul v. Nat. Am. Ins. Co., 361 So. 2d 1281, 1285 (La. App. 1 Cir. 1978)).

90. Aghighi v. La. Citizens Prop. Ins. Corp., 2012-1096, pp. 5–6 (La. App. 4 Cir. 6/19/13); 119 So. 3d 930, 934.

91. *Id.* at p. 5; 119 So. 3d at 934.

92. *Id.*

93. *Id.*

94. *Id.* at p. 6; 119 So. 3d at 934.

loss—even though its adjuster failed to submit an adequate report.[95]

Inspections are not the only method to fulfill the satisfactory proof of loss requirement, and an inspection is not necessary if the extent of the damage can be determined another way.[96] For example, the Louisiana Third Circuit Court of Appeal held that a third party insurer had satisfactory proof of loss even though it did not inspect the damaged property.[97] After a faulty refrigerator started a fire that destroyed a storage building filled with old cars and other collectibles and the owners' insurers had paid the claim, the insurers filed a subrogration claim against the refrigerator manufacturer and its liability insurer.[98] Addressing each element of the claim separately, the court held that proof of insurance and ownership, photographs, and salvage information was satisfactory proof of loss in regards to the vehicles destroyed in the fire because the "information was sufficient to fully apprise" the insurer.[99] Similarly, detailed estimates for replacing the building provided satisfactory proof of loss when photographs submitted to the insurer proved the building was a total loss.[100] Finally, even a handwritten, itemized list of the collectibles destroyed in the fire was sufficient proof of loss because it "apprised the defendants of exactly what [the insureds] claimed to be lost."[101] The court noted the list was particularly thorough, as it included detailed descriptions, the purchase price of each item, and some photographs.[102] Proof of loss is generally sufficiently evidenced if the insurer is able to determine the extent of the damage.[103]

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95. *See* Aghighi v. La. Citizens Prop. Ins. Corp., 2012-1096, p. 6 (La. App. 4 Cir. 6/19/13); 119 So. 3d 930, 934.

96. *See* State Farm Mut. Auto. Ins. Co. v. Norcold, Inc., 2011-1355, p. 15 (La. App. 3 Cir. 4/4/12); 88 So. 3d 1245, 1256 (holding that the trial court did not commit manifest error in finding that photographs of damage constituted satisfactory proof of loss).

97. *Id.*

98. *Id.* at p. 1; 88 So. 3d at 1247–48.

99. *Id.* at p. 15; 88 So. 3d at 1256.

100. *Id.* at p. 16; 88 So. 3d at 1257.

101. *Id.* at p. 17; 88 So. 3d at 1257. Generally, detailed documents satisfy proof of loss. *See* Marketfare Annunciation, LLC v. United Fire & Cas. Co., No. 06-7232, 2007 WL 4144944, at *5–6 (E.D. La. Nov. 20, 2007) (holding documents describing structural damages and inventory were sufficient to prove business losses).

102. State Farm Mut. Auto. Ins. Co. v. Norcold, Inc., 2011-1355, p. 17 (La. App. 3 Cir. 4/4/12); 88 So. 3d 1245, 1257.

103. *Id.* at p. 14; 88 So. 3d at 1255–56.

However, proof of loss is unsatisfactory when it does not adequately inform the insurer of the damage. Courts have found that some tax returns, vague billing statements, settlement agreements, and even some inspections do not qualify as satisfactory proof of loss.[104] In each of these cases, the court noted that the "proof" did not sufficiently show the extent of the damages—either because the documentation was vague or because the damage was too extensive to be adequately appraised in one inspection. For example, in *Lemoine v. Mike Munna, L.L.C.*, the insured submitted her tax return as proof of lost earnings due to her injuries in a car accident.[105] However, because the insured was self-employed and her compensation varied year-to-year, the tax returns alone were not satisfactory proof of her lost wages.[106]

In general, courts look to see if the proof of loss provided the insurer enough factual information to address the claim in a meaningful way.[107] For example, settlement agreements are not satisfactory proof of loss, as they represent a compromise between the parties, rather than "any factual determination of what the insured is owed."[108] In rare cases when a good-faith inspection would not reveal the extent of the damage, courts have held that an insurance adjuster's inspection is not satisfactory proof of loss.[109]

In *Maloney Cinque, L.L.C. v. Pacific Insurance Company*, the insurer assessed damages on two truck stops that were severely damaged in Hurricane Katrina.[110] After the insured filed a claim,

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104. *See* Katie Realty, Ltd. v. La. Citizens Prop. Ins. Corp., 2012-0588, p. 2 (La. 10/16/12); 100 So. 3d 324, 326 (settlement agreement); Iteld v. Four Corners Const., L.P., 2013-0692, pp. 17–18 (La. App. 4 Cir. 1/30/14); 133 So. 3d 312, 322–23 (billing statements); Lemoine v. Mike Munna, L.L.C., 2013-2187, pp. 14–15 (La. App. 1 Cir. 6/6/14); 148 So. 3d 205, 216 (tax returns for self-employed earner); Maloney Cinque, L.L.C. v. Pac. Ins. Co., 2011-0787, pp. 5–6, 8 (La. App. 4 Cir. 1/25/12); 89 So. 3d 12, 18–20 (estimates).

105. *Lemoine*, 2013-2187, pp. 14–15; 148 So. 3d at 216.

106. *Id.* at p. 15; 148 So. 3d at 216.

107. *See Katie Realty*, 2012-0588, p. 9; 100 So. 3d at 330 (rejecting a settlement agreement as a satisfactory proof of loss because "[a] settlement agreement . . . is not based on any factual determination of what the insured is owed").

108. *Id.* at p. 9; 100 So. 3d at 330.

109. *Maloney Cinque*, 2011-0787, pp. 8, 14–15; 89 So. 3d at 20, 23. *But cf.* Aghighi v. La. Citizens Prop. Ins. Corp., 2012-1096, p. 6 (La. App. 4 Cir. 6/19/13); 119 So. 3d 930, 934 (finding that a "woefully inadequate" inspection could nevertheless constitute satisfactory proof of loss).

110. Maloney Cinque, L.L.C. v. Pac. Ins. Co., 2011-0787, pp. 1–2 (La. App. 4 Cir. 1/25/12); 89 So. 3d 12, 16. The truck stops included underground fuel pumps,

the insurer hired a construction engineer to inspect the property and estimate the cost of repairs.[111] While these reports were submitted to the insurance company shortly after the claim was filed, the court held the reports and estimates did not amount to a satisfactory proof of loss.[112] In particular, because of the "enormity and scope of the damage," it would be unreasonable to think these reports adequately informed the insurer about the extent of the loss; the insurer should have time to review the flood insurer's estimates before paying the insured.[113] While the majority of claims do not involve losses as large as those in *Maloney*, the court's decision emphasizes that the most important factor in determining satisfactory proof of loss is when the insurer knew, or should have known, the extent of the damage.

C. "ARBITRARY AND CAPRICIOUS" CONDUCT UNDER SECTIONS 1892 AND 1973

After Hurricane Katrina, statutes already in place to provide requirements of prompt and fair claims adjusting were tightened to place additional requirements on insurers.[114] Some viewed this as a necessary change to ensure that there were hard and fast guidelines in place should another massive storm approach.[115] Others deemed them simply too restrictive and technical, as well as unintentionally expanding tort litigation that tacked on additional contractual and "extra-contractual" claims, potentially providing a windfall to a claimant should the insurer violate the statutory requirements.[116] The legislature safeguarded against the strict application of these requirements, however, by including the additional element requiring "arbitrary and capricious" conduct necessary for an insurer to be determined to

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convenience stores, and video poker machines. *Id.* In addition to wind damage, both properties were submerged under at least four feet of water. *Id.*

111. Maloney Cinque, L.L.C. v. Pac. Ins. Co., 2011-0787, pp. 5–6 & n.7 (La. App. 4 Cir. 1/25/12); 89 So. 3d 12, 18 & n.7.

112. *Id.* at p. 14; 89 So. 3d at 23.

113. *Id.*

114. *See* Act of June 30, 2006, No. 813, sec. 1, § 658(B)(1), 2006 La. Acts 2825, 2825 (recodified as amended at LA. STAT. ANN. § 22:1892(B)(1)); Act of Feb. 23, 2006, No. 12, sec. 1, § 1220(B)(6), 2006 La. Act. 3050, 3051–52 (recodified at LA. STAT. ANN. § 22:1973(B)(6)).

115. *See, e.g.*, Melinda Deslatte, *La. House Committee Rejects Two Insurance Bills; Another Moves Forward*, INS. J. (June 2, 2006), http://www.insurancejournal.com/news/southcentral/2006/06/02/69096.htm.

116. *See, e.g.*, Jeffrey D. Sadow, *Committee Action, May 31, SB 732, SB 620, SB 707, SB 693*, LA. LEGISLATURE LOG (May 31, 2006), http://laleglog.blogspot.com/2006/05/committee-action-may-31-sb-732-sb-620.html.

have acted in bad faith so as to subject it to penalties and attorney's fees in addition to damages paid out under the applicable insurance policy.[117]

To succeed on a bad faith claim, an insured must show the insurer acted in a manner "arbitrary, capricious, or without probable cause" in refusing to pay within the statutory time period.[118] If an insurer reasonably questions the extent of damages, causation, or whether the policy covers an incident, then the insurer's actions are not considered arbitrary and capricious.[119] An insurer's actions are only arbitrary and capricious when its "willful refusal" to pay is "not based on a good-faith defense."[120] However, an insurer's failure to submit payment on an undisputed matter within the statutory period is "by definition, arbitrary, capricious, or without probable cause."[121]

After Katrina, the Louisiana Supreme Court clarified that attempting to avoid payment by misleading insureds about the cause of damage or the validity of the policy is arbitrary and capricious.[122] In *Sher v. Lafayette Insurance*, the insurer claimed that damage to a home after Hurricane Katrina was due to lack of maintenance and therefore not covered by the insurance policy.[123] However, evidence presented at trial revealed that when the insurer inspected the property on four previous occasions the building had been well maintained.[124] Additionally,

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117. *See* LA. STAT. ANN. § 22:1892(B)(1) (Supp. 2016); *id.* § 22:1973(B)(6).

118. *Id.* § 22:1892(B)(1); *id.* § 22:1973(B)(6); *see* Reed v. State Farm Mut. Auto. Ins. Co., 2003-0107, p. 13 & n.8 (La. 10/21/03); 857 So. 2d 1012, 1021 & n.8 (noting that both statutes as well as the worker's compensation statute use the same language).

119. *Reed*, 2003-0107, p. 13; 857 So. 2d at 1021.

120. *Id.*; *see also* Dickerson v. Lexington Ins. Co., 556 F.3d 290, 297–98 (5th Cir. 2009) (withholding payment on a good faith dispute over the "amount of a loss or the applicability of coverage" is not arbitrary and capricious); Kodrin v. State Farm Fire & Cas. Co., 314 F. App'x 671, 679 (5th Cir. 2009) (insurer is not arbitrary and capricious when it refuses to pay because of a "genuine dispute over coverage or the amount of loss").

121. La. Bag Co. v. Audubon Indem. Co., 2008-0453, pp. 18–19 (La. 12/2/08); 999 So. 2d 1104, 1117; s*ee also* Jones v. Johnson, 45,847, p. 14 (La. App. 2 Cir. 12/15/10); 56 So. 3d 1016, 1023 (explaining that the law requires an insurer to make a payment within the statutory period and that failure to do so is arbitrary, capricious, and without probable cause); Richardson v. GEICO Indem. Co., 2010-0208, p. 15 (La. App. 1 Cir. 9/10/10); 48 So. 3d 307, 316 ("[T]he failure to pay an undisputed amount is a per se violation of the statute.").

122. *See* Sher v. Lafayette Ins. Co., 2007-2441, p. 28 (La. 4/8/08); 988 So. 2d 186, 207.

123. *Id.*

124. *Id.*

the insurer's own engineer did not believe the building was neglected, but the insurer misrepresented this fact to the property owner when explaining why the policy did not cover the damages.[125] Because the insurer attempted to mislead the insured about the results of the inspection, the court upheld the jury's finding that the insurer's actions were "arbitrary, capricious, and without probable cause."[126]

However, the post-Katrina decisions also demonstrate that an insurer's refusal to pay can be arbitrary and capricious even if the insurer is not concealing information or deliberately deceiving its customers. In *Louisiana Bag Co. v. Audubon Indemnity Co.*, the Louisiana Supreme Court held that an insurer was arbitrary and capricious for refusing to pay undisputed portions of a claim.[127] After a fire at the company's manufacturing plant and storage warehouse, the insurer conducted a four-month investigation to determine the extent of the damage.[128] Initially, there were legitimate questions about coverage and the extent of the damage that required investigation, but the insurer refused to make payments long after it knew the property was a total loss.[129] Once the insurer knew its policy covered the loss and learned the extent of the damages, its failure to pay within the statutory time limits was arbitrary and capricious.[130]

Louisiana law allows insurance companies time to investigate claims and contest coverage when appropriate, but once a claim is verified an insurer must either dispute coverage or issue a payment.[131] For example, in *Dickerson v. Lexington Insurance Co.*, a homeowner filed a claim for damages to his home shortly after Hurricane Katrina.[132] The insurer inspected

125. Sher v. Lafayette Ins. Co., 2007-2441, p. 28 (La. 4/8/08); 988 So. 2d 186, 207.

126. *Id.*

127. La. Bag Co. v. Audubon Indem. Co., 2008-0453, pp. 18–19 (La. 12/2/08); 999 So. 2d 1104, 1117.

128. *Id.* at pp. 2, 17; 999 So. 2d at 1107, 1116.

129. *See id.* at pp. 17–18; 999 So. 2d at 1116.

130. *Id.* at pp. 18–19; 999 So. 2d at 1117; *see also id.* at p. 15; 999 So. 2d at 1114 ("'[T]here can *be no good reason*'—or no probable cause—for withholding an undisputed amount" (quoting Hammet v. Fire Ass'n of Phila., 160 So. 302, 305 (La. 1935))). Because there were legitimate questions about coverage and damages at the beginning of the investigation, the statutory time period did not begin tolling until the insurer's questions had been answered, nearly four months after the claim was filed. *See id*. at pp. 25, 28; 999 So. 2d at 1120, 1122.

131. *See* Dickerson v. Lexington Ins. Co., 556 F.3d 290, 297–98, 300 (5th Cir. 2009).

132. *Id.* at 293.

the property within thirty days, and the adjuster sent a report to the insurance company within the sixty-day window.[133] However, the insured did not receive any payments until March 2006, five months after the damaged property was inspected.[134] The insurer gave no explanation for the delay and never told the homeowner it was disputing coverage of the claim.[135] Because the insurer had no proper basis for the "delayed payments and subsequent stalling," the court held the insurer was arbitrary and capricious in making such belated payments.[136]

Nonetheless, refusing to pay a claim is not arbitrary and capricious if legitimate questions exist concerning causation or the extent of damages.[137] Similarly, an insurer is not necessarily acting in bad faith when it denies coverage but is later found to be wrong about the cause of damages and the application of the policy.[138] In *Kodrin v. State Farm Fire & Casualty Co.*, a homeowner filed a claim with his insurer after his house was destroyed in Katrina.[139] The home was located near a levee that completely overflowed, and most of the homes in the neighborhood were flooded.[140] Because the policy excluded damages from floodwater, the insurer denied coverage.[141] After a trial, the jury found that wind destroyed the home; therefore, the damage was covered under the insurance policy.[142] As a result, the court ordered the insurer to pay the insureds up to the policy limits and fined the insurer for its arbitrary and capricious refusal to pay the claim.[143] On appeal, the Fifth Circuit held the insurer was not liable for bad faith fines because it had a legitimate reason for denying coverage.[144] Notably, the court explained "[a]n insurer cannot be held to have acted in bad faith

133. Dickerson v. Lexington Ins. Co., 556 F.3d 290, 293 (5th Cir. 2009).

134. *Id.* at 299. This initial payment was followed by a lawsuit, which resulted in two additional inspections and payments, the last of which was made on the eve of trial after the insurer "all of a sudden decided or realized" it owed more than $45,000 in additional payments to the insured. *Id.* at 300.

135. *Id.* at 300.

136. *Id.*

137. Gaspard v. S. Farm Bureau Cas. Ins. Co., 2013-0800, p. 18 (La. App. 1 Cir. 9/24/14); 155 So. 3d 24, 38.

138. Kodrin v. State Farm Fire & Cas. Co., 314 F. App'x 671, 679 (5th Cir. 2009).

139. *Id.* at 672.

140. *Id.* at 672–73.

141. *Id.* at 673.

142. *Id.*

143. *Id.*

144. Kodrin v. State Farm Fire & Cas. Co., 314 F. App'x 671, 679–80 (5th Cir. 2009).

simply because it eventually turned out to be wrong about the cause of the damage."[145] Without more, an insurer that denies coverage based on a reasonable belief that the damage was excluded from coverage is not acting in bad faith.[146]

Finally, the courts confirmed after Katrina that an insurer could defend coverage without acting in bad faith even if the denial of coverage was based on the insurer's good-faith misinterpretation of its own policy.[147] As long as the insurer has a reasonable basis for challenging the extent of damage, causation, or coverage issues it is not arbitrary and capricious to deny coverage or refuse to pay within the statutory time limit.[148]

D. "INITIATION OF LOSS ADJUSTMENT" UNDER SECTION 1892

One important jurisprudential clarification in the wake of Hurricane Katrina revolves around what constitutes the "initiation of loss adjustment." Before Katrina, an insurer had to "take some substantive and affirmative step to accumulate the facts that are necessary to evaluate the claim" in order to satisfy section 1892's[149] initiation of loss adjustment requirement.[150] But courts had not formulated a specific test or set of criteria to determine if an insurer had met this standard; rather they generally held that an insurer had a duty to investigate the claim, not just coverage issues.[151] Opening a claim file was

145. Kodrin v. State Farm Fire & Cas. Co., 314 F. App'x 671, 679 (5th Cir. 2009).

146. *See id.*

147. *See* Berk-Cohen Assocs., L.L.C. v. Landmark Am. Ins. Co., 433 F. App'x 268, 271 (5th Cir. 2011) ("refusing to assess statutory penalties where an insurer makes a good-faith error in interpreting its policy"); Cash v. UNOCAL Corp., No. 04-1648, 2013 WL 4097143, at *5 (W.D. La. Aug. 13, 2013) (finding that an insurer is not arbitrary, capricious, or without probable cause when a denial of coverage is "made in good faith on [a] question of contract interpretation which, even this Court has noted is a 'close call'"), *rev'd on other grounds*, 624 F. App'x 854 (5th Cir. 2015).

148. *See* La. Bag Co. v. Audubon Indem. Co., 2008-0453, pp. 14–15 (La. 12/2/08); 999 So. 2d 1104, 1114 (noting that bad faith should not be inferred from failure to pay within the statutory time limits when legitimate questions exist as to the extent and causation of damages).

149. LA. STAT. ANN. § 22:1892 (Supp. 2016).

150. McClendon v. Econ. Fire & Cas. Ins. Co., 98-1537, p. 7 (La. App. 3 Cir. 4/7/99); 732 So. 2d 727, 731.

151. *See* Joubert v. Broussard, 2002-911, p. 2 (La. App. 3 Cir. 12/11/02); 832 So. 2d 1182, 1184 (reviewing files to determine coverage and sending letter was insufficient because insurer "did not evaluate claim" (citing Roberts v. Commercial Union Ins. Co., 2001-443, p. 8 (La. App. 3 Cir. 10/3/01); 796 So. 2d 862, 868)); Deimel v. Dewhirst, 99-465, p. 5 (La. App. 5 Cir. 11/10/99); 750 So. 2d 1055, 1058 (sending a check months after claim was filed and vehicle inspected was insufficient).

insufficient to satisfy the initiation of loss requirement, but an insurer was not required to completely resolve the claim to satisfy the statutory requirement.[152]

However, as courts began to decide cases regarding Hurricane Katrina claims, they had to clarify what actions satisfied the initiation of loss adjustment requirement, particularly in regards to the logistical challenges that exist after a hurricane. For example, in *Talton v. USAA Casualty Insurance Co.*, a homeowner called his insurance company a few days after Katrina and explained that while he had not yet returned to the city, his home had likely been damaged.[153] On September 6, 2005, the insurance company received an actual damage claim and by mid-September called the homeowner to schedule an inspection.[154] The inspection was initially cancelled due to evacuations for Hurricane Rita, but on September 29, 2005 an insurance adjuster inspected and photographed the property.[155] After a second adjuster inspected the residence and multiple conversations about payment with his insurance company, the homeowner filed a lawsuit on December 2, 2005.[156] USAA issued a check to the homeowners on December 19, 2005.[157]

During trial, the jury found that USAA timely initiated loss adjustment of the homeowner's claim, as the insurance company inspected the property within in thirty day window provided in section 1892.[158] On appeal, the Louisiana Fourth Circuit Court of Appeal upheld this decision, noting that the adjuster called the homeowner, scheduled an appointment, and inspected and

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152. *Compare* Hollier v. State Farm Mut. Auto. Ins. Co., 2001-0592, p. 5 (La. App. 3 Cir. 10/31/01), 799 So.2d 793, 797 (opening claims file insufficient) *with* Toerner v. Henry, 2000-2934, p. 4 (La. App. 1 Cir. 2/15/02); 812 So. 2d 755, 757 (receiving proof of claim, speaking to repair shop, reviewing file, and determining that claim was actually for faulty repairs was sufficient initiation of loss adjustment).

153. Talton v. USAA Cas. Ins. Co., 2006-1513, p. 14 (La. App. 4 Cir. 3/19/08); 981 So. 2d 696, 706, *overruled on other grounds by* Kelly v. State Farm Fire & Cas. Co., 2014-1921 (La. 5/5/15); 169 So. 3d 328.

154. *Id.*

155. *Id.* at p. 14; 981 So. 2d at 706–07.

156. *Id.* at pp. 4–5; 981 So. 2d at 701.

157. *Id.* at p. 5; 981 So. 2d at 701. The parties disagreed as to the exact amount of the damage, and USAA eventually issued supplemental checks, based on additional investigation. *Id.* at p. 5; 981 So. 2d at 702. However, the court determined the initial payment was a reasonable amount based on the information the parties had at the time. *See id.* at p. 17; 981 So. 2d at 708.

158. *Id.* at p. 6; 981 So. 2d at 702.

photographed the property within the statutory time limit.[159] While the entire investigation was not completed for some time, *Talton* established that starting an investigation—even if it is not finished within thirty days—is a satisfactory initiation of loss adjustment.[160]

Federal courts in Louisiana have also interpreted what it means to initiate loss adjustment. In *Weiser v. Horace Mann Insurance Co.*, a homeowner filed suit against his insurer because it did not inspect his property within thirty days of the notification of loss.[161] Citing *Talton*, the court held that an "insurer need not conduct an inspection within thirty days of notice," as long as it takes "substantive and affirmative steps" to evaluate the claim.[162] Because the insurer opened a file, assigned an adjuster, and contacted the insured to schedule an appointment within thirty days, it satisfied the initiation of loss requirements.[163] Similarly, in *Kimble v. State Farm Fire & Casualty Co.*, a homeowner claimed the insurance company failed to initiate loss adjustment because the insurer did not inspect the property within thirty days from the notification of loss.[164] The insurer argued that by calling the homeowner, discussing the claim, and scheduling an inspection, it initiated the loss adjustment.[165] Although the court declined to "articulate a bright line rule," it reasoned that contacting an insured to schedule an inspection "would seem to qualify as an 'initiation' of the process."[166]

Finally, in *Oubre v. Louisiana Citizens Fair Plan*, the Louisiana Supreme Court upheld the trial court's decision that to initiate loss adjustment, an insurer must either inspect the damaged property or schedule an inspection appointment.[167]

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159. Talton v. USAA Cas. Ins. Co., 2006-1513, p. 14 (La. App. 4 Cir. 3/19/08); 981 So. 2d 696, 706–07, *overruled on other grounds by* Kelly v. State Farm Fire & Cas. Co., 2014-1921 (La. 5/5/15); 169 So. 3d 328.

160. *Id.* at p. 14; 981 So. 2d at 707.

161. Weiser v. Horace Mann Ins. Co., No. 06-9080, 2009 WL 5194970, at *13 (E.D. La. Apr. 6, 2009).

162. *Id.*

163. *Id.* The court also pointed out that the inspection was scheduled for October 12, 2005—just outside of the thirty-day window from the September 8, 2005 notification of loss. *Id.*

164. Kimble v. State Farm Fire & Cas. Co., No. 09-1798, 2011 WL 1637142, at *4 (W.D. La. Apr. 29, 2011).

165. *Id.* at *6.

166. *Id.*

167. Oubre v. La. Citizens Fair Plan, 2011-0097, pp. 21–22, 27 (La. 12/16/11); 79

Notably, the court rejected the insurer's argument that it initiated loss adjustment by issuing advance checks for the claimant's expenses.[168] Citizens argued that these checks were issued based on "an 'en masse' type of evaluation—flyovers and aerial surveillance of flooded areas."[169] However, the court disagreed, reasoning that these mass flyovers and subsequent checks were not affirmative or substantive steps to *evaluate* the claims and therefore did not constitute initiation of loss adjustment.[170] To satisfy the initiation of loss adjustment requirement, the insurer must take a substantial step towards evaluating the claim, such as inspecting the property or contacting the insured to schedule an inspection; investigating coverage or issuing a payment without investigation is insufficient.[171]

E. CALCULATION OF PENALTIES UNDER SECTIONS 1892 AND 1973

1. RECOVERY UNDER BOTH STATUTES?

The post-Katrina jurisprudence has also confirmed that sections 1892 and 1973 provide for different penalties. Under section 1892, the available penalty is fifty percent of the amount due *under the policy*.[172] In contrast, section 1973 provides for a penalty of double the damages sustained *as a result of the insurer's breach* or $5,000, whichever is greater.[173] Thus, the available penalty under section 1973 is not based on the amount the insurer owes under the contract.[174]

Given the different penalties available under the statutes, a question arose concerning whether insureds can recover penalties under *both* statutes.[175] The Louisiana courts have responded that

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So. 3d 987, 1003, 1006.

168. Oubre v. La. Citizens Fair Plan, 2011-0097, pp. 24–25 (La. 12/16/11); 79 So. 3d 987, 1005.

169. *Id.* at p. 24; 79 So. 3d at 1005.

170. *Id.* at p. 26; 79 So. 3d at 1006.

171. *See id.* at pp. 25–26; 79 So. 3d at 1005–06.

172. LA. STAT. ANN. § 22:1892(B)(1) (Supp. 2016); *see* Grilletta v. Lexington Ins. Co., 558 F.3d 359, 371 (5th Cir. 2009) (per curiam).

173. LA. STAT. ANN. § 22:1973(C) (Supp. 2016); Durio v. Horace Mann Ins. Co, 2011-0084, p. 22 (La. 10/25/11); 74 So. 3d 1159, 1173.

174. *See Durio*, 2011-0084, p. 22; 74 So. 3d at 1173 ("[T]he lower courts erred in calculating La. R.S. 22:[1973] penalties based on contractual amounts due under the insurance contract.").

175. *See, e.g.*, Calogero v. Safeway Ins. Co., 99-1625, p. 4 (La. 1/19/00); 753 So. 2d

an insured *cannot* recover penalties under both sections, but *may* recover penalties under section 1973 and attorneys' fees under section 1892.[176] In *Calogero v. Safeway Insurance Co.*, Louisiana's highest court declared that "where La. R.S. [22:1973] provides the greater penalty, La. R.S. [22:1973] supersedes La. R.S. [22:1892] such that [an Insured] cannot recover penalties under both statutes."[177] The *Calogero* court's holding was reaffirmed by several courts after Katrina, and thus insureds were limited to a single penalty under either section 1892 or section 1973.[178]

2. CALCULATION OF AMOUNT DUE FOR PENALTY UNDER SECTION 1892—FULL PENALTIES FOR ONE LATE PAYMENT: *GRILLETTA* AND *FRENCH*

In *Grilletta v. Lexington Insurance Co.*, the U.S. Fifth Circuit confronted whether to award penalties against an insurer that had reasonably disputed part of an insured's claim but failed to pay timely the undisputed portion.[179] The insureds' house, located on the shores of Lake Pontchartrain, was completely destroyed by Hurricane Katrina, but the parties disputed whether the house was destroyed by flood or wind.[180] The insurer paid what it considered to be an undisputed amount—$311,000 out of a policy limit of $400,000—more than thirty days after it received satisfactory proof of loss.[181] The insureds ultimately recovered the $400,000 policy limits, but the district court awarded penalties for only the $311,000 "undisputed" amount that the insurer failed to pay timely.[182]

In *Grilletta*, the Fifth Circuit reversed the district court, ruling that the insureds were entitled to penalties on the entire

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170, 172.

176. Calogero v. Safeway Ins. Co., 99-1625, p. 7 (La. 1/19/00); 753 So. 2d 170, 174.

177. *Id.* However, the *Calogero* court also noted that when an insurer acted arbitrarily and capriciously in failing to timely pay a claim, an insured could recover attorney's fees under section 1892 even when damages were awarded under section 1973. *Id.*

178. *See* Dickerson v. Lafayette Ins. Co., 556 F.3d 290, 297 (5th Cir. 2009) ("A plaintiff may be awarded penalties under only one of the two provisions . . . , whichever amount is greater."); Dixon v. First Premium Ins. Grp., 2005-0988, p. 11 (La. App. 1 Cir. 3/29/06); 934 So. 2d 134, 143 (same); Ibrahim v. Hawkins, 2002-0350, p. 6 (La. App. 1 Cir. 2/14/03); 845 So. 2d 471, 478 (same).

179. Grilletta v. Lexington Ins. Co., 558 F.3d 359, 369 (5th Cir. 2009) (per curiam).

180. *Id.* at 362.

181. *Id.* at 363.

182. *Id.* at 364.

$400,000 policy limits.[183] Despite the *Grilletta* panel's finding that "there were two permissible views of the evidence" regarding whether flood or wind was the cause of damage to the insured's house, it disagreed with the district court's decision to award penalties only on the amount found to be "indisputably due" and untimely.[184]

In *French v. Allstate Indemnity Co.*, the Fifth Circuit affirmed the rule delineated in *Grilletta*.[185] In *French*, the parties disputed the amount of damages caused to the insured's house by Hurricane Katrina.[186] The insurer made its first payment of an undisputed amount thirty-seven days after it had received adequate proof of loss.[187] Each time the insured permitted the insurer to return and inspect the property thereafter, the insurer made payment of any additional damages within thirty days.[188] Despite the insurer's compliance with the law each time it received satisfactory proof of loss *after* the first time, it was held liable for failure to pay the initial undisputed amount within thirty days of receipt of proof of loss.[189] Ultimately, the court awarded the insured penalties on the entire amount found to be due—the limits of the homeowner's policy.[190]

3. ACTUAL DAMAGES

Another significant issue the courts confronted after Katrina is whether an insured was required to prove actual damage caused by the insurer's breach to recover a penalty under section 1973. In *Oubre v. Louisiana Citizens Fair Plan*, the Louisiana Supreme Court held that a plaintiff does *not* have to prove actual damages to recover penalty damages under the statute.[191] However, in the absence of proof of actual damages caused by the breach, the maximum recoverable penalty is $5,000.[192] The court

183. Grilletta v. Lexington Ins. Co., 558 F.3d 359, 371 (5th Cir. 2009) (per curiam).

184. *Id.* at 366, 371 (internal quotation marks omitted) (citing Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985)).

185. French v. Allstate Indem. Co., 637 F.3d 571, 590 (5th Cir. 2011).

186. *Id.* at 575.

187. *See id.* at 585.

188. *See, e.g.*, *id.* at 590–91.

189. *Id.* at 587, 590.

190. *Id.* at 590, 592. The court did, however, reduce the penalty award slightly since an advance payment made to the insured was timely and so was not "due" and thus did not count against the insurer. *See id.* at 587.

191. Oubre v. La. Citizens Fair Plan, 2011-0097, p. 27 (La. 12/16/11); 79 So. 3d 987, 1006.

192. *Id.*

explained:

> In resolving this issue of statutory construction, we are once again bound in our interpretation by the plain and explicit language of the statute. However, we are also guided in our resolution of this particular issue by our previous interpretation of the relevant provision.
>
> Significantly, in *Sultana Corporation v. Jewelers Mutual Ins. Co.,* 03–0360 at p. 9, 860 So.2d at 1119, we held an insured is ***not required*** "to prove that it suffered damages as a prerequisite for the discretionary award of penalties under Section (C) of La. Rev. Stat. § 22:[1973]." We reached this conclusion by examining the relevant provision and reasoning that "[r]equiring the insured or claimant to prove general or special damages as a prerequisite to the award of penalties . . . interjects a requirement not provided in the statute," which specifically allows for penalties "[i]n addition to any general or special damages to which a claimant is entitled . . . ." *Id.,* at p. 8, 860 So.2d at 1119.[193] Thus, in accord with this holding and the reasoning adopted therein, actual damages need not be proven to recover the penalty set forth in La. Rev. Stat. § 22:[1973](C), nor is such proof required by the explicit language of La. Rev. Stat. § 22:[1892](A)(3).
>
> It follows, therefore, when damages are not proven, the greater of the two enumerated amounts, *i.e.*, two times the damages sustained or five thousand dollars, is five thousand dollars, and the award for breach of the insurer's duty to timely initiate loss adjustment should be assessed within such an amount, meaning anywhere up to five thousand dollars. Thus, when damages are not proven, penalties shall be "assessed against an insurer in an amount not to exceed . . . five thousand dollars." This is so because in grammatical terms, "not to exceed two times the damages sustained or five thousand dollars" is an infinitive phrase in which *two times the damages sustained or five thousand dollars* serves as the compound direct object of the infinitive

193. *See* Sultana Corp. v. Jewelers Mut. Ins. Co., 2003-0360, p. 3 n.5 (La. 12/3/03); 860 So. 2d 1112, 1115 n.5. The Louisiana Supreme Court pretermitted the issue that it later faced in *Oubre* because the trial court did not award penalties and so did not need to address whether subsection (C) of section 1973 imposed a minimum penalty. *Id.*

expression *not to exceed*.[194]

III. CONCLUSION

In conclusion, the massive destruction caused by Hurricanes Katrina and Rita prompted legislative and judicial actors to clarify Louisiana law and redefine how it applies to insurers. The developing body of law regarding interpretation of statutes and policy provisions served as a guide to insurers and their insureds to demonstrate how each party could do its part to work cooperatively to resolve an individual claim. Notably, the bad faith law in Louisiana is now broader than it was pre-Katrina, and plaintiffs have seized on the new, expanded obligations of insurers to add to their bodily injury and property damage claims (even when the property damage is a motor vehicle as opposed to a home). This expansion of the law has served to generate a great deal of extra-contractual claims and additional allegations in what previously were routine car accident cases or fire cases. Accordingly, Katrina's impact on insurance law in Louisiana extends far beyond its context of homeowners' claims.[195] It has broadened coverage in many instances, given the benefit of the doubt to insureds, and has held insurers to a higher burden when adjusting claims and working with its insureds more than ever before.

194. Oubre v. La. Citizens Fair Plan, 2011-0097, pp. 18–19 (La. 12/16/11); 79 So. 3d 987, 1001–02 (footnote omitted); *see also* Leland v. Lafayette Ins. Co., 2011-475, p. 19 (La. App. 3 Cir. 11/9/11); 77 So. 3d 1078, 1090 (reducing the penalty award to $356,000 to reflect only non-contractual damages sustained as a result of a breach because the trial court award impermissibly included the amount found due under the policy); Audubon Orthopedic & Sports Med., APMC v. Lafayette Ins. Co., 2009-0007, p. 20 (La. App. 4 Cir. 4/21/10); 38 So. 3d 963, 977 ("When there are no damages sustained by the breach, the trial court may award a maximum of $5,000.00 in penalties under [section 1973]. However, in the instant case the greater penalty would be that assessed pursuant to R.S. 22:[1892].").

195. Indeed, this Article cannot even begin to address the additional laws stemming from Katrina such as those affecting business interruption claims.