THE STATUS AND EVOLUTION OF FIRST-PARTY PROPERTY INSURANCE BAD FAITH CLAIMS AFTER HURRICANE KATRINA

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I. INTRODUCTION

In nearly every respect, Hurricane Katrina represents a watershed for the Louisiana Gulf Coast region, the marker by which the people here divide time. For the body of case law establishing the rights of policyholders and obligations of insurers, including bad-faith insurance litigation, Katrina was especially transformative. As a result of the myriad of insurance claims related to Hurricanes Katrina and Rita[1] there were a large number of cases litigated in both state and federal courts regarding almost every issue,[2] especially in the area of the

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1. The exact number of claims may never be known, but it is certainly enormous. *Compare* Stephanie K. Jones, *Hurricane Katrina: The Numbers Tell Their Own Story*, INS. J. (Aug. 26, 2015), http://www.insurancejournal.com/news/southcentral/2015/08/26/379650.htm ("A total of 930,000 claims were filed in the state resulting from the two storms—725,000 from Katrina and 205,000 from Rita.") *with Hurricane Katrina Fact File*, INS. INFO. INST. (Mar. 2010) (reporting 975,000 Katrina claims in Louisiana and 1,743,800 overall in the six affected states (Louisiana, Mississippi, Alabama, Florida, Tennessee, and Georgia)).

2. The number of plaintiffs was also staggering. *See, e.g.*, Becky Gillette, *Katrina Insurance Lawsuits Delayed: Some May Be Consolidated*, MISS. BUS. J. (Nov.

obligation of insurers to adjust claims.

Property policy owners whose property sustained damage from Hurricanes Katrina or Rita have relied primarily on two statutes to state their bad faith claims.[3] Title 22, section 1892 of the Louisiana Revised Statutes, formerly section 658,[4] obligates insurers to pay claims within thirty days of receiving "satisfactory proof of loss" from the insured.[5] If an insurer fails to pay upon receiving such proof and has engaged in behavior that is "arbitrary, capricious or without probable cause," the insurer may incur a penalty of $1,000 or fifty percent of the undisputed amount owed to the insured, whichever is greater, and may pay reasonable attorney's fees and costs.[6] Title 22, section 1973 of the Louisiana Revised Statutes (formerly section 1220),[7] meanwhile, imposes an "affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both."[8] Failing to fulfill this responsibility may compel insurers to pay the greater of $5,000 or up to 200

27, 2006), http://msbusiness.com/2006/11/katrina-insurance-lawsuits-delayed-some-may-be-consolidated/ (reporting that one law firm working in the Southern District of Mississippi represented over 1,200 individual policyholders against three insurers); Bruce Hamilton, *Insurers Hit with Flood of Katrina Lawsuits*, TIMES-PICAYUNE (New Orleans) (Sept. 12, 2006), http://www.nola.com/weather/t-p/index.ssf?/base/news-1/115804182669180.xml (noting that the "overwhelming majority" of the 647 lawsuits filed in St. Tammany Parish in the week before the original deadline to bring suits were insurance lawsuits); Mark A. Hofmann, *Insurers Face Wave of Katrina Lawsuits*, BUS. INS. (Sept. 2, 2007, 12:01 AM), http://www.businessinsurance.com/article/20070902/ISSUE01/100022820/insurers-face-wave-of-katrina-lawsuits (reporting 2,489 filings in Orleans Parish Civil District Court and 892 in the Eastern District of Louisiana in one week shortly before Louisiana claims related to Katrina would prescribe); *Louisiana Citizens Property Insurance Pays $61 Million to Settle 2005 Storm Claims*, NOLA.COM (Sept. 13, 2012, 11:15 PM), http://www.nola.com/business/index.ssf/2012/09/louisiana_citizens_property_in_8.html (describing three lawsuits against the state-run insurer of last resort with over 38,000 plaintiffs among them).

3. *See, e.g.*, Maloney Cinque, L.L.C. v. Pac. Ins. Co., 2011-0787 (La. App. 4 Cir. 3/8/12); 89 So. 3d 12 (applying LA. STAT. ANN. § 22:658 (recodified at *id.* § 22:1892); *id.* § 22:1220 (recodified at *id.* § 22:1973)), *amended in part on reh'g*, 2011-0787 (La. App. 4 Cir. 3/28/12); 89 So. 3d 12, 34–35.

4. The statute was renumbered in 2008. Act of June 21, 2008, No. 415, § 1, 2008 La. Acts 1846, 1905. Henceforth, this Article will refer to it as "1892" for simplicity's sake.

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

6. *Id.* § 22:1892(B)(1).

7. The statute was renumbered in 2008. Act of June 21, 2008, No. 415, § 1, 2008 La. Acts 1846, 1908. Henceforth, this Article will refer to it as "1973" for simplicity's sake.

8. LA. STAT. ANN. § 22:1973(A)(1) (Supp. 2016).

percent of the damages sustained by its action.[9]

Other than a 2006 amendment[10] to the predecessor of section 1892(B)(1), which elevated the potential penalty from twenty-five to fifty percent of the payment owed and inserted a right for the insured to recoup its attorney fees and costs, the operative language of these statutes predates Katrina.

This Article traces the development of first-party bad-faith insurance law after Hurricane Katrina. Part II examines issues in section 1892, including interpretations of the meanings of "satisfactory proof of loss" and "arbitrary, capricious and without probable cause." Part III focuses on section 1973 and how the phrase "damages sustained" has been interpreted, including its interplay with claims for "mental anguish." The post-Katrina bad-faith cases further developed and defined the law regarding bad faith and provide a primer for insurers and insureds alike on the rights and obligations of parties to first-party property insurance policies in Louisiana.

II. SECTION 22:1892

The Louisiana Supreme Court has distilled the evaluation of penalties pursuant to section 1892(B)(1) into a three-element test.[11] To collect bad-faith penalties on a cause of action under section 1892, the insured must prove that the insurer (1) received satisfactory proof of loss, (2) failed to pay for the loss within thirty days of receiving such proof, and (3) acted arbitrarily, capriciously, or without probable cause.[12] Assessing these elements typically consists of factual determinations not to be disturbed on appeal absent manifest error.[13] The objective thirty-day time element has proven the least litigated issue, while the other two elements have engendered disputes. In the wake of Katrina, varying factual scenarios allowed courts to more fully

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

10. Act of June 30, 2006, No. 813, sec. 1, § 658, 2006 La. Acts 2825, 2825 (amended and recodified at LA. STAT. ANN. § 22:1892).

11. *See* La. Bag Co. v. Audubon Indem. Co., 2008-0453, pp. 11–12 (La. 12/2/08); 999 So. 2d 1104, 1112–13.

12. *Id.*

13. Reed v. State Farm Mut. Auto. Ins. Co., 2003-0107, p. 14 (La. 10/21/03); 857 So. 2d 1012, 1021 (citing Scott v. Ins. Co. of N. Am., 485 So. 2d 50, 52 (La. 1986)); *see also* Willwoods Cmty. v. Essex Ins. Co., 09-651, p. 12 (La. App. 5 Cir. 4/12/10); 33 So. 3d 1102, 1111 (citing *Reed*, 2003-0107, p. 14; 857 So. 2d at 1021) ("Whether or not a refusal to pay is arbitrary, capricious, or without probable cause depends on the facts known to the insurer at the time of its action.").

develop the meaning of "satisfactory proof of loss" and "arbitrary, capricious and without probable cause."

A. SATISFACTORY PROOF OF LOSS

After Katrina, many adjusters and property insurers approached the issue of satisfactory proof of loss from what some may consider a hyper-technical perspective, requiring that specific forms be completed under oath. Rejecting this formalistic approach, most Louisiana courts since 2005 have asked variations of the same question: Did the insurer know that the insured really suffered the damage claimed?

As an initial matter, the insured must provide the insurer with satisfactory proof of loss. The Louisiana Supreme Court in *Sher v. Lafayette Insurance Co.* reiterated the burden on the policy holder to prove the insurer received satisfactory proof of loss,[14] signifying that in the realm of section 1892 statutory interpretation, the term "satisfactory" implies "satisfactorily delivered," *i.e.*, that it was received by the insurer.

As long as the proof is adequately relayed, however, courts have largely employed a pliant standard in reviewing its form. Ironically, the seminal post-Katrina case in this respect concerned an incident that occurred more than two years before the hurricane made landfall.[15] On April 20, 2003, flames engulfed a manufacturing plant and multiple warehouse facilities owned by Louisiana Bag Company, Inc. (Louisiana Bag).[16] Louisiana Bag had a first-party property policy for the buildings, the contents within, and lost stock value with Audubon Indemnity Company (Audubon), which quickly deployed an adjuster to assess the damage.[17] In late August 2003, after a cavalcade of reports, evaluations, and revisions, the adjuster submitted a detailed formal recommendation to Audubon that it tender more than $3.2 million to Louisiana Bag for its losses.[18] More than two months later, on October 30, 2003 Louisiana Bag received the full payout.[19] The company filed a section 1892

14. *See* Sher v. Lafayette Ins. Co., 2007-2441, p. 26 (La. 4/18/08); 988 So. 2d 186, 206; Reed v. State Farm Mut. Auto. Ins. Co., 2003-0107, p. 13 (La. 10/21/03); 857 So. 2d 1012, 1020. *See also infra* text accompanying notes 177–81, 138–47.

15. La. Bag Co. v. Audubon Indem. Co., 2008-0453, p. 2 (La. 12/2/08); 999 So. 2d 1104, 1107.

16. *Id.*

17. *Id.* at pp. 1–3; 999 So. 2d at 1107–08.

18. *Id.* at pp. 1–9; 999 So. 2d at 1107–11.

19. *Id.* at p. 10; 999 So. 2d at 1111.

complaint against Audubon the same day.[20]

Audubon asserted that, in addition to harboring legitimate concerns about the extent of coverage owed, it justifiably withheld payment while awaiting the specific "proof of loss" forms it required claimants to complete.[21] This argument swayed the trial court, which denied bad-faith damages on the basis that Audubon had never received proof of loss in the form it requested.[22]

Less than a year later, the Louisiana Third Circuit Court of Appeal reversed and rendered, imposing section 1892 damages.[23] Soon thereafter the Louisiana Supreme Court unanimously affirmed.[24] Citing a string of cases from the 1980s,[25] Justice Kimball's majority opinion held that that satisfactory proof of loss could not depend on Audubon's particular form requirements.[26] In other words, Audubon could not change the objective "satisfactory" proof of loss standard in section 1892 into a subjective "satisfactory" standard.[27] "To allow an insurer to do so," Justice Kimball opined, "would frustrate the intent and purpose of La. R.S. § [22:1892] as it would allow the insurer to be solely in control of when proof of loss is received."[28] The Louisiana Supreme Court per Justice Kimball therefore held that "an insurer's requirement that it receive its form of proof of loss before payment is insufficient to create probable cause to delay payment."[29]

The holding in *Louisiana Bag* established a standard for satisfactory proof of loss under section 1892 that looks to the actual information conveyed to the insurer rather than any

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20. La. Bag Co. v. Audubon Indem. Co., 2008-0453, p. 10 (La. 12/2/08); 999 So. 2d 1104, 1112.

21. *Id.* at pp. 10, 13; 999 So. 2d at 1112–13.

22. *Id.* at p. 10; 999 So. 2d at 1112; *see also* Levy Gardens Partners 2007, L.P. v. Commonwealth Land Title Ins. Co., 706 F.3d 622, 635–36 (5th Cir. 2013) (referencing a claimant's poor communication of losses to insurer in refusing to overturn a dismissal of a section 1892 claim).

23. Louisiana Bag Co., Inc. v. Audubon Indem. Co, 2007-1103 (La. App. 3 Cir. 1/30/08); 975 So. 2d 187, *aff'd*, 2008-0453 (La. 12/2/08); 999 So. 2d 1104.

24. *La. Bag*, 2008-0453, pp. 1, 29; 999 So. 2d at 1107, 1127.

25. *See, e.g.*, Sevier v. U.S. Fid. & Guar. Co., 497 So. 2d 1380, 1384 (La. 1986) (characterizing the proof of loss requirement as a "flexible requirement" not confined to "any formal style").

26. *See* La. Bag Co. v. Audubon Indem. Co., 2008-0453, p. 23 (La. 12/2/08); 999 So. 2d 1104, 1119.

27. *Id.* at pp. 23–24; 999 So. 2d at 1119–20.

28. *Id.* at p. 24; 999 So. 2d at 1120.

29. *Id.* at p. 24; 999 So. 2d at 1119–20.

technical formalities.[30] Within two months after the Louisiana Supreme Court's decision, the U.S. Fifth Circuit Court of Appeals issued two opinions citing *Louisiana Bag* and holding satisfactory proofs of Hurricane-Katrina related losses were provided to the insurer.[31]

In *Grilletta v. Lexington Insurance Co.*, the United States Court of Appeals for the Fifth Circuit found that the insurer improperly delayed paying a Katrina claim.[32] There, a report from insurer Lexington's own adjuster recommending the company pay the homeowners the full policy limit was found to be a satisfactory proof of loss that triggered the time delay for section 1892 damages.[33]

In *Korbel v. Lexington Insurance Co.*, the Fifth Circuit similarly held that photos from an adjuster could satisfy the satisfactory proof of loss element even though the insurance contract itself stipulated that the insured transmit a sworn proof of loss statement to collect on a claim.[34]

The U.S. District Court for the Eastern District of Louisiana reached a similar result in *Kiln Underwriting Ltd. v. Jesuit High School of New Orleans*.[35] In *Kiln*, the court stated that the Louisiana Supreme Court has interpreted the phrase, "satisfactory proof of loss" as "that which is sufficient to fully apprise the insurer of the insured's claim."[36] Further, the court stated that the proof of loss was "not required to be in any formal style"[37] as long as the "insurer receives sufficient facts to fully apprise him of the nature, basis, and extent of the insured's claim."[38] Significantly, the court found that "the insured need not establish the precise amount of the loss; so long as he has 'made a showing that the insurer will be liable for some general damages,'

30. *See* La. Bag Co. v. Audubon Indem. Co., 2008-0453, pp. 23–24 (La. 12/2/08); 999 So. 2d 1104, 1119–20.

31. *See* Korbel v. Lexington Ins. Co., 308 F. App'x 800, 803–04 (5th Cir. 2009); Grilletta v. Lexington Ins. Co., 558 F.3d 359, 369 (5th Cir. 2009) (per curiam).

32. *Grilletta*, 558 F.3d at 369.

33. *Id.* at 368.

34. *See Korbel*, 308 F. App'x at 802, 804–05.

35. Kiln Underwriting Ltd. v. Jesuit High Sch. of New Orleans, No. 06-4350, 2008 WL 4724390 (E.D. La. Oct. 24, 2008).

36. *Id.* at *6 (citing Hart v. Allstate Ins. Co., 437 So. 2d 823, 828 (La. 1983)).

37. *Id.* (citing Nguyen v. St. Paul Travelers Ins. Co., No. 06-4130, 2007 WL 1672404, at *4 (E.D. La. Nov. 5, 2007)).

38. *Id.* (citing McDill v. Utica Mut. Ins. Co., 475 So. 2d 1085, 1089 (La. 1985)).

the satisfactory proof of loss requirement is satisfied."[39]

The court also rejected the insurer's argument that the insured Jesuit High School's partial proof of loss was unsatisfactory because it did not comply with a provision in the policy requiring all submitted proofs of loss to be sworn, stating:

> As the Louisiana courts have interpreted the proof of loss provision, an insurer need only be "fully apprise[d]" of the insured's claim. As this standard was designed to be flexible, it does not incorporate the more exacting proof of loss requirements of the underlying insurance policy. To the extent that an insured's failure to comply with a "proof of loss" clause is relevant at all, it is to the question of arbitrary or capricious behavior. That is, if the noncompliance gives the insurer a reason to believe that the claim can be denied, its failure to pay the insured's claim within the statutory period may be excusable.[40]

Jesuit High School (Jesuit) submitted an initial partial proof of loss describing its relocation expenses, including an itemized report estimating rent payments by month.[41] Jesuit then submitted a supplemental proof of loss detailing additional expenses.[42] The court reasoned that the insurer was not prejudiced by Jesuit's failure to comply with the contractual proof of loss provision and the unsworn nature of the proof of loss did not cause any prejudice to the insurer.[43] The court therefore held that the satisfactory proof of loss requirement had been met.[44]

More than four years later, a state appellate court followed suit in *Montgomery v. State Farm Fire & Casualty Co.*, with the Louisiana Third Circuit Court of Appeal holding that an insurance company owed a good-faith duty to pay upon learning from one of its engineers that Hurricane Rita had caused at least some of the damage claimed.[45]

Although highly formal requirements for satisfactory proof of

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39. Kiln Underwriting Ltd. v. Jesuit High Sch. of New Orleans, No. 06-4350, 2008 WL 4724390, at *6 (E.D. La. Oct. 24, 2008) (citing McDill v. Utica Mut. Ins. Co., 475 So. 2d 1085, 1091 (La. 1985)).

40. *Id.* (quoting Hart v. Allstate Ins. Co., 437 So. 2d 823, 828 (La. 1983)).

41. *Id.*

42. *Id.*

43. *Id.* at *7.

44. *Id.* at *6.

45. *See* Montgomery v. State Farm Fire & Cas. Co., 2012-320, pp. 10–13 (La. App. 3 Cir. 11/14/12); 103 So. 3d 1222, 1229–31.

loss have been rejected, post-Katrina courts have made clear that some specificity of proof is required.[46] For instance, the federal appellate court in *French v. Allstate Indemnity Co.* barred section 1892 recovery for the contents of a hurricane-damaged home when the plaintiffs declared only "general damage" to the contents without submitting an inventory until well after the onset of litigation.[47]

In 2012, the Louisiana Supreme Court refused to impose section 1892 damages on the insurer in *Katie Realty, Ltd. v. Louisiana Citizens Property Insurance Corp.*[48] Although the insurer had failed to timely pay a settlement agreement, the court held a settlement agreement is "not sufficient to establish proof of a claim" under section 1892.[49] Instead, the claim was assessed under section 1973, which specifically addresses an insurer's failure to timely pay settlement funds, and the court imposed the $5,000 penalty under that statute.[50]

In *Yount v. Lafayette Insurance Co.,* the Louisiana Fourth Circuit Court of Appeal addressed the requirement of specifying damages adequately.[51] Although the second-floor office suite where policy-holder Yount maintained a medical practice sustained substantial damage from Hurricane Katrina, insurer Lafayette refused to honor her business interruption insurance claim because the insurer contended that the bulk of Yount's financial losses resulted from flooding on the first floor, an excluded "peril" under the policy.[52] The court of appeal found that Yount established by a preponderance of the evidence that her damages were storm- and wind-related rather than flood-related.[53] Yount's and her office manager's painstaking recollections of encountering mold and water in the second-floor suite, as well as Lafayette's own independent adjuster acknowledging "visible wind and storm damage to the suite" in

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46. *See, e.g.*, French v. Allstate Indem. Co., 637 F.3d 571, 590–91 (5th Cir. 2011); Katie Realty, Ltd. v. La. Citizens Prop. Ins. Corp., 2012-0588, pp. 10–11 (La. 10/16/12); 100 So. 3d 324, 331; Yount v. Lafayette Ins. Co., 2008-0380, pp. 15–17 (La. App. 4 Cir. 1/28/09); 4 So. 3d 162, 171–72.

47. *French*, 637 F.3d at 590–91.

48. *Katie Realty*, 2012-0588, p. 11; 100 So. 3d at 331.

49. *Id.*

50. *Id.* at pp. 11–12; 100 So. 3d at 331–32.

51. *See Yount*, 2008-0380, pp. 15–17; 4 So. 3d at 171–72.

52. Yount v. Lafayette Ins. Co., 2008-0380, pp. 2, 4 (La. App. 4 Cir. 1/28/09); 4 So. 3d 162, 165–66.

53. *Id.* at p. 11; 4 So. 3d at 169.

his report, established adequate proof of covered damages.[54] However, Yount did little to document the claim to Lafayette in the month after the loss.[55] For this reason, the court of appeal affirmed the trial court's finding that there was not adequate proof of loss such as to establish section 1892 damages.[56]

B. ARBITRARY AND CAPRICIOUS

The next question under section 1892 is whether an insurer acted arbitrarily and capriciously.[57] Before Hurricane Katrina, the Louisiana Supreme Court in *Reed v. State Farm Mutual Automobile Insurance Co.* relied on the New Oxford English American Dictionary to define "arbitrary and capricious."[58] Using that dictionary's definition of "arbitrary" as "based on random choice or personal whim, rather than any reason or system" and "capricious" as "given to sudden and unaccountable changes of behavior," the *Reed* court distilled the arbitrary and capricious determination into asking whether an insurer ignored known facts.[59] After Katrina, this standard was further refined.

The *Louisiana Bag* court, quoting *Reed,* mandated that insurers pay all amounts to which they could not attach a "substantial, reasonable and legitimate dispute."[60] The court equated an arbitrary and capricious failure to pay with a "vexatious" failure to pay.[61] The court further held that refusing to pay a claim is not justified by a dispute regarding coverage.[62] The insurer in *Louisiana Bag* argued that it could not be liable for penalties because neither the court of appeal nor the insured plaintiff had identified a "specific incident[] of conduct that [was] arbitrary and capricious."[63] The insured, on the other hand,

54. Yount v. Lafayette Ins. Co., 2008-0380, pp. 11–14 (La. App. 4 Cir. 1/28/09); 4 So. 3d 162, 169–71.

55. *Id.* at pp. 16–17; 4 So. 3d at 172.

56. *Id.* at p. 17; 4 So. 3d at 173.

57. *See* La. Bag Co. v. Audubon Indem. Co., 2008-0453, pp. 11–12 (La. 12/2/08); 999 So. 2d 1104, 1113.

58. Reed v. State Farm Mut. Auto. Ins. Co., 2003-0107, p. 12 n.7 (La. 10/21/2003); 857 So. 2d 1012, 1020 n.7.

59. *See id.*; *see also* Calogero v. Safeway Ins. Co. of La., 99-1625, p. 5 (La. 1/19/00); 753 So. 2d 170, 173 ("[W]here the insurer has legitimate doubts about coverage, the insurer has the right to litigate these questionable claims without being subjected to damages and penalties.").

60. *La. Bag*, 2008-0453, p. 15; 999 So. 2d at 1114–15.

61. *Id.* at p. 14; 999 So. 2d at 1114.

62. *Id.* at p. 15; 999 So. 2d at 1114–15.

63. La. Bag Co. v. Audubon Indem. Co., 2008-0453, p. 12 (La. 12/2/08); 999 So. 2d 1104, 1113.

argued that the record was full of evidence establishing the insurer's arbitrary and capricious conduct.[64]

The *Louisiana Bag* court, in determining the meaning of "arbitrary, capricious, or without probable cause," found:

> [A]n insurer need not pay a disputed amount in a claim for which there are substantial, reasonable, and legitimate questions as to the extent of the insurer's liability or of the insured's loss. However, an insurer must pay any undisputed amount over which reasonable minds could not differ. Any insurer who fails to pay said undisputed amount has acted in a manner that is, by definition, arbitrary, capricious or without probable cause and will be subject to penalties therefore on "the difference between the amount paid or tendered and the amount found to be due."[65]

The court held that the facts in the record established that the insurer conducted a significant investigation that consistently revealed that the insured suffered a total loss.[66] According to the court, by late August 2003, the insurer had received satisfactory proof of loss and its own adjuster had recommended paying policy limits.[67] The insurer argued that there was a reasonable dispute as to the extent of the insured's loss which was sufficient to justify denying payment, but the court found that the insurer's reasons for non-payment were insufficient to relieve the insurer of its duty to pay the undisputed portions of the claim.[68] The court explained that the insurer's actions appeared to be "'based on random choice or personal whim,' and were thus 'unjustified and without reasonable or probable cause or excuse.'"[69]

In addressing the insurer's argument that there was no evidence of a specific act that was arbitrary, capricious, or without probable cause, the court stated, "[a] review of the applicable jurisprudence illustrates that it is 'sufficient that the vexatious character of the insurer's refusal to pay can reasonably be found from a general survey of all the facts in evidence,

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64. La. Bag Co. v. Audubon Indem. Co., 2008-0453, p. 13 (La. 12/2/08); 999 So. 2d 1104, 1113.

65. *Id.* pp. 16–17; 999 So. 2d at 1116 (citations omitted) (quoting LA. STAT. ANN. § 22:658 (recodified at *id.* § 22:1892)).

66. *Id.* at p. 17; 999 So. 2d at 1116.

67. *Id.*

68. *Id.* at pp. 17–18; 999 So. 2d at 1116.

69. *Id.* at p. 26; 999 So. 2d at 1121 (quoting Reed v. State Farm Mut. Auto. Ins. Co., 2003-0107, p. 12 n.7 (La. 10/21/03); 857 So. 2d 1012, 1020 n.7).

specific evidence thereof not being necessary.'"[70] Thus, "direct and positive evidence of vexatious refusal is not necessary to impose the statutory penalty."[71]

In this case, the court reasoned that there was "significant proof in a general survey of the record of the vexatious character of Audubon's refusal to pay."[72] Specifically, the insurer failed to respond to the adjuster's notifications that the insured suffered a total loss and that the insured was demanding payment.[73] Even though the insurer may have been justified in withholding payment early in the investigation, the insurer was not justified in continuing to withhold payment after its own experts tendered reports showing damage in excess of the policy limits.[74] Based on the significant information presented to the insurer by its adjusters, the uncontested nature of the adjuster's calculations, and the lack of a reasonable basis for failing to tender any of the undisputed portions of the claim, the court affirmed the circuit court's ruling that the insurer's failure to timely tender payment was arbitrary, capricious, or without probable cause.[75]

Thus, *Louisiana Bag* stands for the proposition that "proof of specific acts or proof of the insurer's state of mind is generally not required to establish conduct that is arbitrary, capricious or without probable cause."[76]

In an important post-Katrina case, *Sher v. Lafayette Insurance Co.*, the Louisiana Supreme Court reaffirmed the standards established in *Reed* regarding under what circumstances a party may obtain damages under sections 1892 and 1973.[77] In *Sher*, the court held that, to obtain damages under the bad faith statutes, the insured must provide proof that the insurer's refusal to tender payment was "arbitrary, capricious, or without probable cause," a standard which the court equated with a "vexatious" refusal to tender payment.[78] The court also noted

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70. La. Bag Co. v. Audubon Indem. Co., 2008-0453, p. 27 (La. 12/2/08); 999 So. 2d 1104, 1121 (quoting 14 STEVEN PLITT ET AL., COUCH ON INSURANCE § 204:108 (3d ed. 1995)).

71. *Id.* (quoting 14 PLITT ET AL., *supra* note 70, § 204:108).

72. *Id.*

73. *Id.* at p. 27; 999 So. 2d at 1122.

74. *Id.* at pp. 27–28; 999 So. 2d at 1122.

75. *Id.* at p. 28; 999 So. 2d at 1122.

76. La. Bag Co. v. Audubon Indem. Co., 2008-0453, p. 28 (La. 12/2/08); 999 So. 2d 1104, 1121.

77. Sher v. Lafayette Ins. Co., 2007-2441 (La. 04/08/08); 988 So. 2d 186.

78. *Id.* at p. 27; 988 So. 2d at 206 (quoting Reed v. State Farm Mut. Auto. Ins.

that it had previously defined a "vexatious refusal to pay" as "unjustified, without reasonable or probable cause or excuse."[79] It "describe[s] an insurer whose willful refusal of a claim is not based on a good-faith defense."[80]

> Whether or not a refusal to pay is arbitrary, capricious, or without probable cause depends on the facts known to the insurer at the time of its action. . . . Because the question is essentially a factual issue, the trial court's finding should not be disturbed on appeal absent manifest error. However, when the record does not support the trial court's determination on this issue, the trial court's decision will be reversed.[81]

Other post-Katrina decisions reflect that courts have been willing to find insurers in bad faith even without evidence of nefarious intent.[82] In *Willwoods Community v. Essex Insurance Co.*, the insured plaintiff Willwoods sustained almost $25 million in total damages.[83] R.S.U.I. Indemnity Company (RSUI), Willwoods's second excess insurer, first sent a "competent and impartial" appraiser long after Willwoods had already instituted litigation against it.[84] Although the appraiser recommended that RSUI tender $4.735 million to Willwoods, RSUI paid the plaintiff an amount $27,000 less than the appraised amount more than two months later.[85] The Louisiana Fifth Circuit Court of Appeal held that it was unnecessary to find malice underlying RSUI's delay for the court to affirm that RSUI's conduct was arbitrary and capricious.[86] The absence of a "good faith defense or reason" for not timely paying the full amount after the appraiser's recommendation sufficed to subject RSUI to statutory penalties.[87]

Co., 2003-0107, p. 13 (La. 10/21/03); 857 So. 2d 1012, 1021).

79. Sher v. Lafayette Ins. Co., 2007-2441, p. 27 (La. 04/08/08); 988 So. 2d 186, 206 (quoting Reed v. State Farm Mut. Auto. Ins. Co., 03-0107, p. 14 (La. 10/21/2003); 857 So. 2d 1012, 1021).

80. *Id.* at p. 27; 988 So. 2d at 206–07 (quoting *Reed*, 2003-0107, p. 14; 857 So. 2d at 1021).

81. *Id.* at p. 27; 988 So. 2d at 207 (quoting *Reed*, 2003-0107, p. 14; 857 So. 2d at 1020–21).

82. *See, e.g.*, La. Bag Co. v. Audubon Indem. Co., 2008-0453, p. 27 (La. 12/2/08); 999 So. 2d 1104, 1121; Willwoods Cmty. v. Essex Ins. Co., 09-651, pp. 12–13 (La. App. 5 Cir. 4/13/10); 33 So. 3d 1102, 1111.

83. *Willwoods Cmty.*, 09-651, pp. 2–3; 33 So. 3d at 1105.

84. *Id.* at p. 3; 33 So. 3d at 1105.

85. *Id.* at p. 4; 33 So. 3d at 1106.

86. *See id.* at pp. 11–14; 33 So. 3d at 1110–12.

87. *Id.* at p. 13; 33 So. 3d at 1111.

By contrast, the insurer in *Long v. American Security Insurance Co.* was able to justify its delay by asserting a reasonable dispute, despite ultimately erring in its position.[88] The insured reported his claim to his insurer, American Security, and the insurer timely tendered over $31,000 for dwelling damages and $17,300 for damage to another structure.[89] However, the insured disputed the damage estimate and eventually invoked the appraisal process in the contract.[90] The appraisal process provided that each party was to choose an appraiser and, if the two appraisers could not agree, an impartial umpire would settle the dispute.[91] While American Security's appraiser valued the damage at a little over $116,000—below the policy limits of approximately $141,000—Long's appraiser estimated the damage at over half a million dollars.[92] Several months later, the umpire appraised the damage at a little under $400,000, whereupon American Security tendered payment totaling the policy limit within thirty days.[93]

The Louisiana circuit court refused to impose a section 1892 penalty on American Security for failing to pay within thirty days of the Long appraiser's estimate.[94] Even though American Security's appraisal significantly undershot the neutral umpire's, its compliance with the appraisal process created a presumption of reasonable dispute that the court held the plaintiff needed to overcome by proving some sort of vexatious behavior.[95]

Despite the stated rule that a failure to pay any undisputed amount without good reason is arbitrary, the U.S. Fifth Circuit Court of Appeals has been more prone to exonerate insurers who pay a significant portion of the claim.[96] In *Seacor Holdings, Inc.*

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88. *See* Long v. Am. Sec. Ins. Co., 2010-0026, pp. 5–6 (La. App. 4 Cir. 11/17/10); 52 So. 3d 260, 264.

89. *Id.* at p. 1; 52 So. 3d at 261.

90. *Id.* at pp. 1–2; 52 So. 3d at 261–62.

91. *Id.*

92. *Id.* at p. 2; 52 So. 3d at 262.

93. *Id.*

94. Long v. Am. Sec. Ins. Co., 2010-0026, pp. 3–6 (La. App. 4 Cir. 11/17/10); 52 So. 3d 260, 262–64.

95. *See id.* at pp. 5–6; 52 So. 3d at 264.

96. *See, e.g.*, First Am. Bank v. First Am. Transp. Title Ins. Co., 759 F.3d 427, 436–37 (5th Cir. 2014) (noting that the insurer timely paid "most" of its obligations); Berk-Cohen Assocs., L.L.C. v. Landmark Am. Ins. Co., 433 F. App'x 268, 271 (5th Cir. 2011) (noting that the insurer timely paid $20 million); Seacor Holdings, Inc. v. Commonwealth Ins. Co., 635 F.3d 675, 685 (5th Cir. 2011) (noting that the insurer timely paid $4 million).

v. Commonwealth Insurance Co., a case relating to damage caused by Hurricanes Katrina and Rita, the court distinguished the defendant-insurer from the insurer in *Louisiana Bag*.[97] The court noted that the defendant-insurer made a payment of $4 million in undisputed damages while it contested other damages.[98] The same court followed a similar pattern of reasoning in *Berk-Cohen Associates, L.L.C. v. Landmark American Insurance Co.*, declaring that Landmark had "distanced itself" from the insurer in *Louisiana Bag* by paying the plaintiff over $20 million in undisputed claims.[99]

The Louisiana Supreme Court's decision in another Katrina case, *Oubre v. Louisiana Citizens Fair Plan*, further addressed what constitutes timely initiation of loss adjustment under section 1892.[100] In this class-action pitting thousands of Louisiana residents against the state insurance company, the plaintiffs alleged that Citizens violated section 1892(A)(3) by failing to initiate loss adjustment within thirty days of the "catastrophic loss" wrought by the Hurricanes Katrina and Rita.[101] Although the district court agreed, the Louisiana Fifth Circuit Court of Appeal reversed, holding that Citizens could face penalties only if it failed to initiate the loss adjustments in bad faith.[102] The appellate court reasoned that a bad faith determination had to precede a finding that an insurer had violated section 1892(A)(3).[103]

Such an interpretation, the Louisiana Supreme Court held on review, contravened a proper construction of the statutory text.[104] The section in question stipulates that insurers *shall* initiate loss adjustment within thirty days and lacks any mention of arbitrariness or capriciousness, casting aspersion on any sensible tethering of the section to bad faith.[105] The court underscored the potential ramifications of forcing plaintiffs to

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97. *See* Seacor Holdings, Inc. v. Commonwealth Ins. Co., 635 F.3d 675, 684–85 (5th Cir. 2011).

98. *Id.*

99. Berk-Cohen Assocs., L.L.C. v. Landmark Am. Ins. Co., 433 F. App'x 268, 271 (5th Cir. 2011).

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

101. *Id.* at p. 2; 79 So. 3d at 991.

102. *Id.* at pp. 8–9; 79 So. 3d at 995.

103. Oubre v. La. Citizens Fair Plan, 09-620, p. 22 (La. App. 5 Cir. 11/19/10); 53 So. 3d 492, 505, *rev'd*, 2011-0097 (La. 12/16/11); 79 So. 3d 987.

104. *Oubre*, 2011-0097, pp. 14–15; 79 So. 3d at 999.

105. *See id.* at pp. 15–16; 79 So. 3d at 999 (citing LA. STAT. ANN. § 22:658 (recodified at *id.* § 22:1892)).

prove bad faith in dilatory initiation of loss adjustments:

> If this requirement [that insurers adjust within fourteen days] was not so, the statute's purpose to prevent untimely initiation of loss adjustment more often than not would be thwarted because claimants may very well decide not to file claims against insurers for the proscribed conduct if the insurers are allowed to advance whatever reasons for their untimely delay. As an end result, the misconduct, which the Legislature explicitly intended to curb or deter, would thrive.[106]

The *Oubre* holding ensured that, for insurers adjusting losses after future hurricanes or other catastrophic losses, any reason for delay in initiating adjustment beyond thirty days is unacceptable.

Oubre, like the other post-Katrina and Rita cases that preceded it, enabled the courts to further develop the meaning of the statutory language on bad faith claims. The large number of insurance claims precipitated by Hurricanes Katrina and Rita gave the courts an opportunity to reassess the interpretation of bad-faith statutes. The post-Katrina and Rita litigation indicates a trend toward making it easier for plaintiffs to recover against insurance companies in bad faith claims. This pro-insured trend is shown through the interpretation that an insurer may not require a hyper-technical proof of loss. Similarly, the case law shows a development in the way the courts determine what qualifies as "arbitrary and capricious" conduct by the insurer as more favorable to a plaintiff—a plaintiff is not required to prove subjective ill intent on the part of the insurer, but rather, need only show the insurer failed to timely pay an objective, undisputed amount owed. Thus, the post-Katrina and Rita litigation shows a trend by the courts to interpret section 1892 more favorably to the insured plaintiffs.

III. SECTION 22:1973

The most discernible difference between sections 1892 and 1973 manifests in numbers, not words. Section 1892(A) gives insurers thirty days to pay the amount due on a claim from satisfactory proof of loss, while section 1973(B)(5) gives the insurer sixty days from the same to pay to avoid its penalty

106. *See* Oubre v. La. Citizens Fair Plan, 2011-0097, p. 17 (La. 12/16/11); 79 So. 3d 987, 1000–01.

provisions.[107] Section 1973 also gives insurers thirty days to pay in accordance with a settlement agreement.[108] Both statutes stipulate that for an insured to benefit from these penalty provisions, the insurer's failure to pay must be "arbitrary, capricious, or without probable cause."[109]

While section 1892 provides specific examples of bad faith actions, section 1973 covers an insurer's general duty to act in good faith.[110] As a result, the terms around which section 1973-related cases have revolved are mostly broader than the specific terminology at the forefront in section 1892 battles.

A. DAMAGES SUSTAINED FROM BREACH OF DUTY

Section 1973(C) provides for bad faith penalties in an amount "not to exceed two times the damages sustained or five thousand dollars, whichever is greater."[111] The damages generated by an insurer's failure to adhere to a generalized duty of good faith lack clear contours. Specifically, there has been a great deal of litigation concerning what comprises the "damages sustained" by an insurer's bad faith under section 1973.[112]

In *Durio v. Horace Mann Insurance Co.*, the plaintiff asserted that those damages used to calculate the penalty under section 1973 should include the contractual amount due from the breach.[113] After months of squabbling with insurer Horace Mann about the nature and extent of the damages caused to her home as a result of Hurricane Rita, Ms. Durio mailed satisfactory proof of loss to the insurance company.[114] Horace Mann, however, continued to withhold portions of the claim due well after Durio initiated litigation.[115] At the trial and appellate court levels, Horace Mann was ordered to pay section 1973 damages amounting to 200 percent of the amount Durio would have

107. *Compare* LA. STAT. ANN. § 22:1973(B)(5) (Supp. 2016) *with id.* § 22:1892(A)(1).

108. *Id.* § 22:1973(B)(2).

109. *Id.* § 22:1973(B)(5); *id.* § 22:1892(B)(1).

110. *Compare id.* § 22:1892(A)(1) ("All insurers . . . *shall pay* the amount of any claim due . . . ." (emphasis added)) *with id.* § 22:1973(A) ("An insurer . . . owes his insured a duty of good faith and fair dealing.").

111. *Id.* § 22:1973(C).

112. *Id.* § 22:1973(A).

113. Durio v. Horace Mann Ins. Co., 2011-0084, p. 15 (La. 10/25/11); 74 So. 3d 1159, 1168.

114. *Id.* at pp. 3–5; 74 So. 3d at 1162–63. The Louisiana Supreme Court did not analyze the trial court's satisfactory proof of loss determination and award of section 1892 damages. *Id.* at p. 7; 74 So. 3d at 1164.

115. *See id.* at pp. 7–8; 74 So. 3d at 1164.

collected under each of her coverage plans had Horace Mann acted in good faith.[116] The lower courts found that Durio was owed over $200,000 under the insurance contract for coverage and therefore the penalty amount was $400,000.[117] A trio of Louisiana circuit court cases supported this method of doubling the contractual damages as the proper metric under the statute.[118]

The Louisiana Supreme Court disagreed, overruling the three circuit court cases and settling a long-standing question swirling around section 1973.[119] Evaluating the issue *res nova*, a unanimous court[120] held that section 1973 punishes "a breach of the duty of good faith and fair dealing, not a breach of the insurance contract."[121] Given the need to strictly construe penal statutes,[122] the court per Justice Johnson concluded that it could not allow a doubling of contractual payments under section 1973 when the statutory language alludes more to bad faith itself than to the insurer's contractual responsibilities.[123] Thus, Durio's compensation under section 1973 was limited to 200 percent of the damages she suffered as a result of the breach and not 200 percent of the amounts owed under the policy.[124] Therefore, the court held the proper measure of penalties in this case was to multiply Durio's general and special damages of $167,333 by two

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116. Durio v. Horace Mann Ins. Co., 2011-0084, pp. 10–11 (La. 10/25/11); 74 So. 3d 1159, 1166.

117. *Id.* at pp. 11–12; 74 So. 3d at 1166–67.

118. *See* Buffman, Inc. v. Lafayette Ins. Co., 2009-0870, p. 35 (La. App. 4 Cir. 4/14/10); 36 So. 3d 1004, 1028; Wegener v. Lafayette Ins. Co., 2009-0072, p. 7 (La. App. 4 Cir. 3/10/10); 34 So. 3d 932, 937; Neal Auction Co. v. Lafayette Ins. Co., 2008-0574, p. 18 (La. App. 4 Cir. 4/29/09); 13 So. 3d 1135, 1147.

119. *Durio*, 2011-0084, p. 22; 74 So. 3d at 1173.

120. Justice Victory concurred in part in the decision, asserting that he would have addressed additional assignments of error. *See id.* at p. 1; 74 So. 3d at 1173 (Victory, J., concurring in part). Justice Knoll dissented because she believed the elevated penalties of 50% of the amount due in § 1892 should apply. *Id.* at p. 1; 74 So. 3d at 1173 (Knoll, J., concurring in part and dissenting in part). On the issue of measuring section 1973 damages, however, all seven justices harmonized. *Id.* at pp. 19, 22; 74 So. 3d at 1171, 1173 (majority opinion).

121. *Id.* at p. 18; 74 So. 3d at 1170.

122. *See, e.g.*, Theriot v. Midland Risk Ins. Co., 95-2895, p. 4 (La. 5/20/97); 694 So. 2d 184, 186.

123. *See* Durio v. Horace Mann Ins. Co., 2011-0084, pp. 18–19 (La. 10/25/11); 74 So. 3d 1159, 1170–71.

124. *Id.* at p. 19; 74 So. 3d at 1171; *see also* Manuel v. La. Sheriff's Risk Mgmt. Fund, 95-0406, p. 4 (La. 11/27/95); 664 So. 2d 81, 84 ("The duties that [section 1973] does impose upon insurers are separate and distinct from the duties mentioned in the contract of insurance.").

to calculate the amount of penalties as $334,666.[125]

This statutory construction of the section 1973 penalty has not always militated against the plaintiffs' extent of recovery. For example, in *Maloney Cinque, L.L.C. v. Pacific Insurance Co.*, the plaintiff, a truck stop company, alleged that the insurer's failure to timely honor its claim for damages resulting from Hurricane Katrina resulted in consequential damages by delaying the reopening of two of its truck stops.[126] The court of appeal awarded the plaintiff damages for loss of business income resulting directly from the delay.[127] However, the court also applied the policy's coinsurance provision[128] to reduce the damages recoverable from the insurer.[129]

Upon rehearing, however, the circuit court exclusively reassessed the coinsurance issue.[130] Although some business income loss would have resulted in any scenario, the court reasoned, the amount of business income loss the plaintiffs suffered directly resulted from Pacific Life's failure to timely pay its undisputed claim.[131] As in *Durio*, the breach of the insurer's duty of good faith—not the breach of the insurance contract—caused the plaintiffs' section 1973 consequential damages.[132] The court therefore recognized that it "erroneously treated the statutory penalties for consequential damages under La. R.S. [22:1973] in the same fashion as those penalties award[ed] under La. R.S. [22:1892]."[133] Thus, the correct method to determine the statutory penalties was to take the amount of consequential damages, in this case around $780,000, and multiply that amount

125. Durio v. Horace Mann Ins. Co., 2011-0084, p. 19 (La. 10/25/11); 74 So. 3d 1159, 1171.

126. 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, *amended in part on reh'g*, 2011-0787 (La. App. 4 Cir. 3/28/12); 89 So. 3d 12, 34–35.

127. *Id.* at p. 28; 89 So. 3d at 31.

128. Coinsurance is a "clause in property insurance requiring that the property be insured for a minimum percentage of its total value and making the insured a 'coinsurer' to the extent that the coverage falls below the specified minimum." *Id.* at p. 12; 89 So. 3d at 22 (quoting 1 PLITT ET AL., *supra* note 70, § 1:3). The reduction in available damages from the insurer for the insured's failure to maintain specified minimum coverage is commonly referred to as the "coinsurance penalty."

129. *See id.* at pp. 29–30; 89 So. 3d at 31.

130. *See* Maloney Cinque, L.L.C. v. Pac. Ins. Co., 2011-0787, p. 1 (La. App. 4 Cir. 3/28/12); 89 So. 3d 12, 34.

131. *Id.*

132. *See id.* at pp. 1–2; 89 So. 3d at 34.

133. *Id.* at p. 2; 89 So. 3d at 34.

by 1.5 to obtain the penalty, in this case a total of $1.17 million.[134] Note that in this case the court determined the section 1973 penalty should be one and a half times the consequential damages, below the statutory cap of two times the consequential damages.[135]

In other cases, courts have resorted to the alternative provision of a $5,000 penalty in assessing bad-faith damages under section 1973.[136] The Louisiana Supreme Court in *Oubre v. Louisiana Citizens Fair Plan* stipulated that, in the absence of established damages resulting from the breach itself, the $5,000 statutory provision acted as a "ceiling" on a section 1973 penalty for untimely loss adjustment.[137] Thus, absent proof of particular damages related to the breach of duty, such as loss of investment opportunities or general and special damages as in *Durio*, the insurer is likely to argue that the section 1973 penalty is limited to $5,000.

B. MENTAL ANGUISH

Mental anguish damages have also been the subject of much litigation after Hurricane Katrina. A question quickly emerged as to whether those damages fell under the purview of section 1973, and, if so, how to accurately assess them. In *Sher*, the plaintiff attempted to recover mental anguish damages pursuant to Louisiana Civil Code Article 1998, which provides emotional harm damages for breaches of contracts "intended to gratify a nonpecuniary interest," or for any breach in which the obligor "intended to aggrieve the feelings of the obligee."[138] Plaintiff Joseph Sher[139] testified to his "love and pride in his

134. Maloney Cinque, L.L.C. v. Pac. Ins. Co., 2011-0787, p. 3 (La. App. 4 Cir. 3/28/12); 89 So. 3d 12, 35; *see* LA. STAT. ANN. § 22:1973(C) (Supp. 2016).

135. *Maloney Cinque*, 2011-0787, p. 3; 89 So. 3d at 35; Maloney Cinque, L.L.C. v. Pac. Ins. Co., 2011-0787, p. 29 (La. App. 4 Cir. 1/25/12), 89 So. 3d 12, 31, *amended in part on reh'g*, 2011-0787 (La. App. 4 Cir. 3/28/12); 89 So. 3d 12, 34–35; *see* LA. STAT. ANN. § 22:1973(C) (Supp. 2016).

136. *See* LA. STAT. ANN. § 22:1973(C) (Supp. 2016); Oubre v. La. Citizens Fair Plan, 2011-0097, p. 20 (La. 12/16/11); 79 So. 3d 987, 1002; *see also* Katie Realty, Ltd. v. La. Citizens Prop. Ins. Corp., 2012-0588, p. 12 (La. 10/16/12); 100 So. 3d 324, 331–32 (holding that a section 1973 violation subjects insurers to $5,000 penalty in absence of damages).

137. *Oubre*, 2011-0097, p. 20; 79 So. 3d at 1002.

138. Sher v. Lafayette Ins. Co., 2007-2441, pp. 19–20 (La. 4/18/08); 988 So. 2d 186, 202 (quoting LA. CIV. CODE ANN. art. 1998).

139. The authors note in full disclosure that their law firm represented the plaintiff, who is a Holocaust survivor and the father of the first named partner in the firm.

home, that the property was the only property plaintiff purchased in this country, and that the home was located in a very beautiful neighborhood."[140] Although it heeded Sher's evidence concerning his emotional attachment to the apartment building he owned which was severely damaged by Katrina, the court ultimately concluded that a commercial insurance contract typically gratifies pecuniary interests.[141] Without any direct evidence that Lafayette had intended to aggrieve Sher through its conduct, the court declined to impose damages under Article 1998.[142]

The majority opinion in *Sher* failed to address the interplay between Article 1998 and section 1973, which left lingering questions about the interplay of the emotional distress Civil Code article and the statute which covered damages inflicted by insurers' bad faith. The U.S. Fifth Circuit acknowledged their coexistence in *Dickerson v. Lexington Insurance Co*.[143] In that case, Lexington claimed that the opinion in *Sher* barred a homeowner from collecting mental anguish damages for a failure to timely render recovery.[144] Emphasizing the distinction between section 1973's bad faith-grounded language and the language characteristic of contract breaches, the *Dickerson* court reasoned that section 1973 directly targeted mental anguish damages that stem from an insurer's bad faith and not a breach of the insurance contract.[145] As a result, the Fifth Circuit held that Article 1998 is "inapplicable to § [22:1973] and does not bar the award of mental anguish damages under this statute."[146] In 2011, the Louisiana Supreme Court followed the Fifth Circuit's lead in *Wegener v. Lafayette Insurance Co.*, holding that damages for mental anguish are available without meeting the requirements of Civil Code Article 1998.[147]

The practical result in Louisiana of *Dickerson* and *Wegener* is that a plaintiff need not prove that the insurer intended to "aggrieve the feelings" of the insured or that the insurance contract was intended to gratify a nonpecuniary interest in order to obtain mental anguish damages. Rather, a party may recover

140. Sher v. Lafayette Ins. Co., 2007-2441, p. 19 (La. 4/18/08); 988 So. 2d 186, 202.
141. *See id.* at p. 20; 988 So. 2d at 202.
142. *Id.* at p. 21; 988 So. 2d at 203.
143. Dickerson v. Lexington Ins. Co., 556 F.3d 290 (5th Cir. 2009).
144. *Id.* at 301.
145. *See id.* at 303–04.
146. *Id.* at 304.
147. *See* Wegener v. Lafayette Ins. Co., 2010-0810, p. 14 (La. 3/15/11); 60 So. 3d 1220, 1230.

mental anguish damages if he can show that he suffered mental anguish as a result of the insurer's breach of its duty of good faith under section 1973, including its failure to timely and fairly adjust his claim.[148]

Courts also faced issues regarding the proper method to measure emotional distress damages. The *Dickerson* court characterized the analysis as a mixed question of law or fact in which plaintiffs would have to prove the insurer's bad faith conduct caused a "real mental injury that a person can expect a person in such a position to suffer."[149] While medical records evidencing mental distress are not necessary, the court explained, plaintiffs could not recover damages for minor inconveniences.[150] Applying this admittedly unclear standard to its own facts, the court in *Dickerson* held that evidence that Dickerson suffered a stress-induced rash and testimony from his daughter that he had become temperamental sufficed as a matter of law for the court to uphold the trial court's credibility determinations.[151]

Louisiana appellate courts have deferred to trial courts' factual findings concerning mental anguish. The court in *Durio* upheld the portion of the section 1973 penalty applying to Durio's claimed mental anguish injuries.[152] Durio was on medication and seeking treatment for an array of stress-related maladies.[153] Similarly, in *Leland v. Lafayette Insurance Co.*, the circuit court upheld a $45,000 mental anguish award for a plaintiff whose distress case rested on testimony that he experienced stress, had trouble sleeping, and "no longer golfed or fished as he once had."[154] Upon deeming an insurer's payment delayed in bad faith, then, courts have employed elastic interpretations of what constitutes anguish in the post-Katrina world.

As with section 1892, the litigation that arose out of Hurricanes Katrina and Rita provided the courts with an

148. *See* Wegener v. Lafayette Ins. Co., 2010-0810, p. 14 (La. 3/15/11); 60 So. 3d 1220, 1230.

149. Dickerson v. Lexington Ins. Co., 556 F. 3d 290, 305 (5th Cir. 2009) (quoting Kim v. Kim, 07-318, p. 12 (La. App. 5 Cir. 10/30/07); 970 So. 2d 1158, 1165).

150. *Id.* (quoting Lacombe v. Carter, 2007-1063, p. 4 (La. App. 3 Cir. 2008); 975 So. 2d 687, 690).

151. *Id.* at 306.

152. Durio v. Horace Mann Ins. Co., 2011-0084, pp. 11, 22 (La. 10/25/11); 74 So. 3d 1159, 1166, 1173.

153. *Id.* at p. 12; 74 So. 3d at 1167.

154. Leland v. Lafayette Ins. Co., 2011-475, p. 18 (La. App. 3 Cir. 11/9/11); 77 So. 3d 1078, 1089.

opportunity to clarify the meaning of section 1973. In the post-Katrina and Rita cases, the courts came to an overarching interpretation that the purpose of section 1973 is to compensate the insured for the damages resulting from the insurer's breach of its duty of good faith and not from the insurer's breach of the insurance contract. This conclusion is supported by the courts' interpretation that the damages used to determine the penalty are not the damages that should have been covered by the insurance contract, but rather the damages resulting from the insurer's breach of its duty of good faith. Likewise, the holding that a party does not have to establish the criteria set out in Louisiana Civil Code Article 1998 to receive mental anguish damages under section 1973 shows that the courts believe section 1973 compensates for mental anguish resulting from the insurer's bad faith and not from its breach of the insurance contract. Thus, when litigating what damages an insured may be entitled to under section 1973, the practitioner should focus on proving what damages resulted from the insured's breach of its duty of good faith and not the damages from the breach of the insurance contract. It is those damages which may be doubled under section 1973 as a penalty or alternatively the minimum $5,000 penalty may be imposed.

IV. CONCLUSION

One positive result of the vast amount of insurance litigation after the storm is that insurers now have a clearer road map of what is and is not permitted in adjustment of losses and of the potential damages and penalties that they could face due to improper adjustment.

The tide of cases decided after Hurricanes Katrina and Rita have indicated that Louisiana courts will not allow insurers to avoid first-party property payments due under their policies solely through loss form technicalities. The courts' interpretations of the concepts of satisfactory proof of loss and arbitrary and capricious failure to pay have protected the insureds from overreaching tactics.