

**New Developments in
Hurricane Litigation and
Areas of Potential Dispute**

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**4 Basic Areas of Homeowners'
Insurance Coverage:**

1. Dwelling
2. Other Structures
3. Personal Property/Contents
4. Additional Living Expenses/Loss of Use



Flood vs. Wind

In *Sher vs. Lafayette Ins. Co., et al.*, 988.So.2d 186 (La. 2008), the Louisiana Supreme Court held that an insurer's flood exclusion was not ambiguous and that coverage could be denied for water damage sustained to an insured's property on the basis of this exclusion.

The flood exclusion language for the policy in question reads in pertinent part:

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

g. Water

- Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not.

The court noted that even if the flood exclusion only referred to natural, rather than man-made floods, the flood at issue was caused by Hurricane Katrina, not by man. It stated, "[t]he levees did not cause the flood, they, whether through faulty design, faulty construction, or some other reason, failed to prevent the flood." *Id.* at 195.



Valued Policy Law

Landry vs. LA Citizens Property Ins. Co., 983 So.2d 66 (La. 2008), the plaintiff claimed that the insurer was required, pursuant to R.S. 22:695, to pay the face value of the policy for a total loss caused, in part, by a covered peril (wind), and in part by a non-covered peril (flood).

The Louisiana Supreme Court held that an insurer is not obligated to pay the total loss of an insured's property when damages are caused concurrently by covered and non-covered perils if the policy explicitly contains a loss computation method that differs from that set forth in La. R.S. 22:695(A).



Valued Policy Law Continued

"Although the statute provides a valuation for the settlement of a claim in the case of total loss, it also allows the insurer to set forth a different method for settling covered property losses, which clearly indicates that only covered losses are to be settled. This method of loss computation applies to covered losses that are both total and impartial." *Id.* at 83.

"Thus, losses, including total losses, are computed and compensated according to the policy provisions, not the statutory provisions. 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 covered and a non-covered losses is irrelevant because those provisions no longer apply once a different method of loss computation is validly set forth." *Id.*



Prescription

Pitts vs. Louisiana Citizens Property Ins. Co., 4 So. 3d 107 (La. App. 4 Cir. 2009), the plaintiff initially pursued compensation for her Katrina related damages through two class action lawsuits, both filed in August 2006. Class certification was denied in the first class action in August 2007. In January 2008, the plaintiffs were excluded in the second class action, and the court ordered that notices be provided to putative plaintiffs on April 24, 2008.



Prescription continued

The plaintiff individually filed suit against her insurer on February 20, 2008 since she was precluded from both class actions. The Louisiana Legislature had extended prescription for claims regarding Hurricane Katrina to August 30, 2007. The defendant's Exception of Prescription was granted by the trial court.

The Fourth Circuit found that prescription was interrupted on August 25, 2006 as to the putative class members in their representative capacity. Prescription did not begin to run again until April 24, 2008 when notice was given to plaintiffs in the second class action regarding the class certification definition. The plaintiff had filed her individual petition for damages before that deadline.



Bad Faith

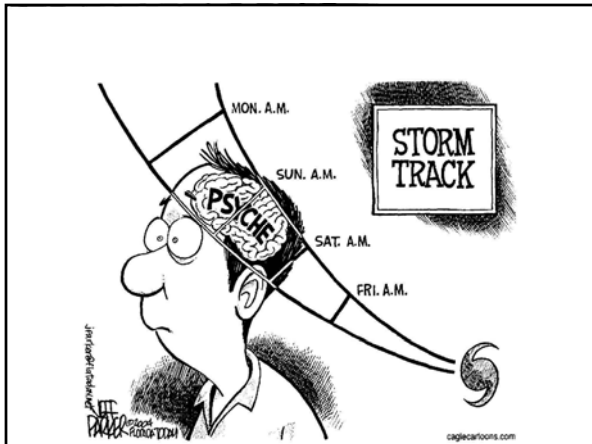
R.S. 22:1220 penalties (2 x damages)
R.S. 22:658 penalties (25% on 8/29/07; amended later in 2006 to 50% and to add attorneys' fees)

Under La. R.S. 22:1220, an insurer owes its policy holders a duty of good faith in settling claims. R.S. 22:1220(B)(5) & (6) requires an insurer to pay a claim within 60 days following satisfactory proof of loss if that failure is "arbitrary, capricious, or without probable cause."

La. R.S. 22:658 subjects the insurer to penalties and attorneys' fees for its arbitrary and capricious failure to pay a claim within 30 days.

A plaintiff may be awarded penalties under only one of the two provisions, whichever amount is greater. Although, a plaintiff may seek attorneys' fees under 22:658 while seeking damages and penalties under 22:1220.





Mental Anguish Award

The U.S. Fifth Circuit Court of Appeals held that damages for mental anguish may be awarded R.S. 22: 1220 for breach of the duty of good faith in *Dickerson vs. Lexington Ins. Co.*, 556 F.3d 290 (U.S. 5th Cir. 2009).

The court affirmed a \$25,000 award for mental anguish to an insured who satisfactorily proved that the insurer was arbitrary and capricious in withholding payments owed for wind damages related to Hurricane Katrina.

The court noted that “[m]ental anguish which gives rise to a claim for damages must be a real one that one can reasonably expect a person to suffer. It does not require proof that medical or psychiatric care was required as a result of the incident, but minimal worry and inconvenience should not be compensated. Neither is expert testimony mandatory.” *Id.* at 22.



Attorneys’ Fees

The Louisiana Legislature amended R.S. 22:658 in the 2006 session in the following manner:

- (1) Penalties were doubled from 25 percent to 50 percent of any amounts, in addition to the payment for the claim, determined to be due from the insurer; and
- (2) An insured was allowed to recover attorneys’ fees.

The amendments went into effect on **August 15, 2006**.



At what point in the timeline does an insurer’s refusal to pay trigger the new penalty provisions under 22:658?

In the *Sher* case, the Supreme Court clarified that, as a general rule, the relevant event for triggering the attorneys’ fees provision in 22:658 is the submission of satisfactory proof of loss. *Id.* at 199.

The district court in *Dickerson* had awarded attorneys’ fees and costs under 22:658 in the amount of \$53,105 in reliance on the “continuing breach” rationale, or the continued refusal to pay that extended past August 15, 2006.

The Fifth Circuit rejected this rationale and reversed the award of attorney’s fees in *Dickerson* because plaintiff’s claim was filed in the fall of 2005, prior to the effective date of the amendment. It remanded this portion of the case back to the district court to make the determination if any new damage was discovered and satisfactory proof of loss was submitted to defendant *after* August 15, 2006.



**Kodrin vs. State Farm Fire
& Casualty Co., No. 08-30092
(U.S. 5th Cir. March 11, 2009)**

The plaintiffs brought suit against State Farm after the denial of payment to plaintiffs for wind damage claims under a homeowner's policy. State Farm contended that flooding was the proximate cause of the Katrina-related damages. At trial, the jury awarded plaintiffs policy limits plus \$25,000 to each plaintiff for defendant's arbitrary and capricious failure to pay within 60 days, as well as \$50,000 each as penalties for that failure, finding State Farm liable under both R.S. 22:658 and 22:1220. The district court also entered judgment in favor of plaintiffs for attorneys' fees and costs in the amount of \$139,234 pursuant to R.S. 22:658.

The Fifth Circuit vacated the awards for penalties and attorneys fees, stating that even though the jury rejected State Farm's rationale for non-payment, the decision to deny the claim was made with reason. Therefore, defendant did not act in bad faith. The appellate court stated that plaintiffs "essentially ask this court to find bad faith any time an insurer denies coverage and a jury disagrees. This would unduly pressure insurers to pay out claims that they have reason to believe lie outside the scope of coverage, solely to avoid penalties later."



**What are some of
the problem areas?**

1. Insureds do not really know nor understand their coverages.
2. Disagreement with the adjuster's estimate & not understanding their right to get an additional estimate.
3. Insured receives a check without an estimate or explanation.
4. Civil Authority payments under ALE.
5. Poorly documented claims files.
6. "Drive-Bys".
7. Insureds not understanding (or remembering) hurricane deductibles.



8. Insureds not understanding differences in HO3 (all risks) vs. HO2 (names perils) policies.
9. Scope Issues.
10. Disputes regarding unit costs.
11. Actual Cash Value (ACV) vs. Replacement Costs Value (RCV)
12. Variations in depreciation based on age, wear, & condition.
13. Software variations to estimate & calculate damages.
14. Additional living expenses.

