

Insurance - Insurer's Liability Above Policy Limits

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the policy even though there was only a fractional ownership of the insured property.²⁴ Following this change in the jurisprudence R.S. 22:695 was amended by the addition of subsection *E*. It appears that since this amendment followed this change in the jurisprudence, R.S. 22:695(E) relates not to the value of the property but to the totality or percentage of ownership of the insured. This view was affirmed by the Third Circuit in a case decided shortly after the amendment became effective.²⁵

It should be noted in conclusion that the court left itself a possible method of applying the Standard Fire Policy pro rata clause in some factual situations despite the Valued Policy Statute. The court suggested that it might be in order to apply the pro rata clause where there were two separate policies and at least one of the policies was sufficient to pay the entire loss. The writer submits that this approach should be taken only when the amount of insurance is so greatly in excess of the actual valuation of the property that the court could reasonably find constructive fraud.²⁶

Kenneth Barnette

INSURANCE—INSURER'S LIABILITY ABOVE POLICY LIMITS

The defendant in a personal injury suit was cast in judgment for \$7,000 above the \$20,000 policy limits of his automobile liability insurance policy.¹ The policy provided that the insurer would have the exclusive right to litigate or settle any claim

24. *Southern Prod. Co. v. The American Ins. Co.*, 166 So.2d 59 (La. App. 4th Cir. 1964), *writ refused*, 246 La. 863, 167 So.2d 675 (1964); *The Forge v. Peerless Cas. Co.*, 131 So.2d 838 (La. App. 2d Cir. 1961).

25. *Roberts v. Houston Fire & Cas. Co.*, 168 So.2d 457 (La. App. 3d Cir. 1964). Roberts was a lessee with an option to renew with all construction to become the property of the lessor without reimbursement upon termination of the lease. Roberts effected a credit sale of his interest and bought insurance on the building and contents which were later destroyed by fire. The court held that as regards the building the value policy applied and that the 1964 amendment changed the law but since the policy was issued and the loss occurred in 1960 the insurable interest in that case was not open to question.

26. Both statutes could also be given effect by the simple method of interpreting the phrase "the total amount for which the property is insured . . . in the policy of such insurer" as meaning the face amount of the policy when there is only one policy of insurance written on the property. Where there are two or more policies written by different companies this phrase could be interpreted as meaning the pro rata amount, under the pro rata clause in the policy, of the whole insurance written. However, the writer believes that this would be a strained construction of the statute which would lead to less desirable results.

1. *Pitre v. Roberie*, 117 So.2d 74 (La. App. 1st Cir. 1959).

against the insured. Before judgment, plaintiffs offered to settle for \$20,000, the policy limit for each accident. The insurance company, without informing the insured defendant of this offer, refused it. After final judgment, the insured brought action against his insurer for bad faith or negligent breach of its obligation under the contract of insurance. The trial court rendered judgment for the insured, holding that the insurer's refusal to settle constituted bad faith. On appeal, the court affirmed, but on the theory that failure to inform the insured of the compromise offer was negligence.² The Supreme Court affirmed, holding that the insurer's decision to litigate was made in good faith but that the failure to inform the insured of the settlement offer was bad faith. *Roberie v. Southern Farm Bureau Cas. Ins. Co.*, 250 La. 105, 194 So.2d 713 (1967).

This is the first reported Louisiana case holding an insurer liable for an amount above the policy limits. Only five other Louisiana cases have been reported which deal in any way with the insurer's liability above the policy limits.³ Other jurisdictions have produced a rather large number of cases dealing with the issue. There are several possible reasons for the paucity of Louisiana cases. The Supreme Court, in its first decision involving this issue, placed such a heavy burden of proof on the insured that few found themselves in the possession of sufficient facts to attempt the task.⁴ Also, because of the established Louisiana practice of considering a defendant's ability to pay in adjudging damages, judgments in excess of the policy limits are not as prevalent as in other jurisdictions.⁵ Despite these factors,

2. *Roberie v. Southern Farm Bureau Cas. Ins. Co.*, 185 So.2d 619 (La. App. 1st Cir. 1966).

3. *New Orleans & C. R.R. v. Maryland Cas. Co.*, 114 La. 153, 38 So. 89 (1905); *Younger v. Lumbermen's Mut. Cas. Co.*, 174 So.2d 672 (La. App. 3d Cir. 1965); *Wooten v. Central Mut. Ins. Co.*, 166 So.2d 747 (La. App. 3d Cir. 1964); *Stewart v. Wood*, 153 So.2d 497 (La. App. 1st Cir. 1963); *Davis v. Maryland Cas. Co.*, 133 So. 769 (La. App. 2d Cir. 1931).

4. *New Orleans & C. R.R. v. Maryland Cas. Co.*, 114 La. 153, 38 So. 89 (1905). In that case the court recognized liability based upon bad faith breach of the insurance contract but indicated that as long as the insurer had a "fighting chance" of succeeding in litigation no bad faith could be found.

5. *Urk v. Southern Farm Bureau Cas. Ins. Co.*, 181 So.2d 69, 70 (La. App. 2d Cir. 1965): "The legal principle generally followed by the courts of other states is that one who sustains damages by reason of the tortious act[s] of another . . . is entitled to a verdict for the amount of damages which he is able to prove, regardless of the ability of the defendant to pay . . . The courts of Louisiana, however, have uniformly held that the ability of the defendant to respond in damages will be taken into consideration in determining the amount of the judgment."

there has been an increase in litigation of this issue in the last five years.⁶

The problem stems from a provision found in all liability insurance policies, giving the insurer, in the event of a claim, the exclusive right to litigate or settle the matter as it deems expedient.⁷ When there is a possibility of judgment in excess of the policy limits and there is an offer by the injured plaintiff to settle at or near the limits of the policy, the insurer has little to lose if it refuses to settle and litigates. The insured, however, stands to lose the amount of any judgment in excess of the policy limits.

If such a judgment is rendered, the insured may seek recovery from his insurer for the excess amount, if he can prove a bad faith breach of the insurance contract or a negligent refusal to settle. Some jurisdictions allow recovery only for negligence,⁸ others only on a showing of bad faith,⁹ and still others, on either basis.¹⁰ Louisiana is apparently of the latter persuasion.¹¹

Louisiana and some other jurisdictions have long recognized an action against an insurer for a bad faith breach of contract because of its refusal to settle.¹² The obligation to compromise a claim in an appropriate case is not expressed in the insurance contract. It arises from an implied duty to manage in good faith the interests of the insured if a settlement is offered. The reasoning seems to be that since the insured has given up the right to settle or litigate to the insurer, there arises a corollary duty to exercise that right in good faith.¹³

Some jurisdictions hold bad faith to be an intentional disregard of the insured's interest by the insurer in the hope of es-

6. Of the six cases reported, dating back to 1905, four have been litigated since 1963.

7. The typical policy provision reads as follows: "[T]he company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient."

8. *Carne v. Maryland Cas. Co.*, 208 Tenn. 403, 346 S.W.2d 259 (1961).

9. *State Farm Mut. Auto. Ins. Co. v. White*, 248 Md. 324, 236 A.2d 269 (Md. App. 1967).

10. *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958).

11. *Wooten v. Central Mut. Ins. Co.*, 166 So.2d 747 (La. App. 3d Cir. 1964); *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Insurance*, 26 LA. L. REV. 566 (1966).

12. *New Orleans & C. R.R. v. Maryland Cas. Co.*, 114 La. 153, 38 So. 89 (1905).

13. *Wooten v. Central Mut. Ins. Co.*, 166 So.2d 747 (La. App. 3d Cir. 1964).

caping its full obligation under the policy.¹⁴ Other jurisdictions hold bad faith to be a breach of duty, which does not require an element of wrongful intent.¹⁵ The Louisiana courts have been somewhat mystical in their interpretation of the meaning of bad faith. One Louisiana appeal court defined it as an "unwarranted refusal to settle."¹⁶ Such a definition does not seem to require an element of wrongful intent. Neither has the Louisiana Supreme Court required such a showing of wrongful intent to find bad faith.¹⁷ Under this interpretation, the method of analysis used to test the negligent character of an act is also used to test the bad faith character of the insurer's conduct.

The test used by the court in the *Roberie* case in imposing liability is a significant departure from the test previously employed by Louisiana courts. The bad faith conduct was not, in the court's opinion the mere refusal to settle, as in the usual case, but was other conduct deviating from the proper relationship of the parties as established by the insurance policy. The Supreme Court felt that the insurer was *Roberie's* representative and found a duty to inform the insured of any settlement offer, the breach of which amounted to bad faith conduct. The decision of the court may seem confusing unless the distinction between these two tests of bad faith conduct is realized, for there are cases which interpret a failure to inform the insured of a settlement offer as being evidence that a settlement was refused in bad faith.¹⁸

The rationale and scope of the decision are questionable. First, the court's decision could have been more explicit on what relationship arises under the insurance contract. One Louisiana writer has suggested that all litigation in this area should be handled under the mandate articles of the Louisiana Civil Code.¹⁹

14. *State Farm Mut. Auto. Ins. Co. v. Jackson*, 346 F.2d 484 (8th Cir. 1965); *Slater v. Motorists Mut. Ins. Co.*, 174 Ohio St. 148, 185 N.E.2d 45 (1962).

15. *Cernocky v. Indemnity Ins. Co. of North America*, 216 N.E. 198 (Ill. App. 2d Dist. 1966); *State Farm Mut. Auto. Ins. Co. v. White*, 248 Md. 324, 236 A.2d 269 (Md. App. 1967).

16. *Wooten v. Central Mut. Ins. Co.*, 166 So.2d 747, 751 (La. App. 3d Cir. 1964).

17. In the instant case, the court of appeal said explicitly that they found liability based upon negligence, as there was no showing of fraud or bad faith within the meaning of the Louisiana Civil Code. The Supreme Court, in reviewing the question, said the conduct in question was bad faith in that it was done in "utter disregard" of the insured's desire to protect himself. No attempt was made to reconcile this holding with the Civil Code's statement of bad faith.

18. *Younger v. Lumbermen's Mut. Cas. Co.*, 174 So.2d 672 (La. App. 3d Cir. 1965); 7A J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4712 (1942); Annot., 40 A.L.R.2d 216 § 17 (1955).

19. LA. CIV. CODE arts. 2985-3034; Note, 39 TUL. L. REV. 368 (1965).

It seems clear that such an approach would be correct and similar results would be obtained.²⁰ However, it is unlikely that the court would examine the relationship of the parties created by the insurance contract when the only question is whether a settlement was refused in bad faith. However, in cases such as the instant one, where there is a good faith refusal to settle, but a failure to inform, it would be highly desirable for the courts to define the relationship created between the insured and insurer, so that the parties could look to the Civil Code and the jurisprudence to regulate their future conduct. There is clear authority in Louisiana that a mandatary is under a duty to inform his principal of matters pertinent to the agency relationship.²¹ Had the insurer known that he would be held to the duties of a mandatary, this litigation might have been avoided.

Second, the court's finding of bad faith, based upon a failure to inform the insured, has blurred the distinction between negligent conduct and bad faith conduct.²² The conduct in question could have been more appropriately characterized as neglect under Article 3003 of the Civil Code than bad faith. The failure to inform alone is not necessarily indicative of bad faith. Possibly, the insurer thought it had such a sound defense that there was no need to tell the insured of the offer. If this belief proved unreasonable, it might be grounds for an action based on negligence. However, as the soundness of the insurer's defense becomes less certain, a point is reached where mere negligence becomes bad faith. Whether that point was reached in the instant case is questionable, for nowhere in the written opinion did the court infer that the failure to notify was a designed breach motivated by interest or ill will which is an element of bad faith under the Louisiana Civil Code.²³

The third objection to the case is the court's failure to show that the breach caused the loss. Where there is a negligent or

20. LA. CIV. CODE art. 3003: "The attorney is responsible not only for unfaithfulness in his management, but also for his fault or neglect."

21. *Robinson v. Thomson*, 212 La. 186, 31 So. 2d 734 (1947); *Dauzat v. Simmesport State Bank*, 167 So.2d 681 (La. App. 3d Cir. 1964).

22. Whether the litigation sounds in tort or contract may have a decisive effect upon the ultimate outcome. Consider the following examples. Prescription on tort actions runs in one year as opposed to ten years for contract actions. LA. CIV. CODE arts. 3536, 3544. Damages are measured by different standards. *Id.* arts. 1934, 2315. Venue may be affected depending upon whether the action is in tort or contract. LA. CODE CIV. P. arts. 76, 74. See *Wooten v. Central Mut. Ins. Co.*, 166 So.2d 747 (La. App. 3d Cir. 1964).

23. LA. CIV. CODE art. 1934: ". . . By *bad faith* in this and the next rule, is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill will."

bad faith failure to settle a claim, the entire judgment in excess of the policy limits is usually awarded in damages.²⁴ This is not objectionable in that this is the amount the insured would not have had to pay but for the conduct of the insurer. The same measure of damages applied to the *Roberie* case seems inappropriate. Even assuming the court was correct in finding that the insurer was in bad faith, the measure of damages is limited by the Louisiana Civil Code to only what was contemplated by the parties at the time of making and those damages which are the immediate and direct consequence of the breach.²⁵ Applying this measure to the *Roberie* case could be difficult, since it is not apparent that Roberie would have done anything to protect himself had he been informed. The Court said Roberie needed to know of the offer to protect himself, as though some affirmative response by him could have cleared up the matter. Such is not the case. Roberie could not have settled on his own without losing the benefit of his insurance.²⁶ He could have used moral suasion to induce an acceptance of the offer, but whether the insurer would have been persuaded seems speculative at best. He could have offered to contribute to the settlement offer, thus reducing the payout by the insurer, but this also seems too speculative. In the words of the Louisiana Supreme Court, "remote and uncertain damages are not recoverable even though the contract was breached through bad faith because they cannot be attributable with any degree of certainty to the breach. . . ."²⁷ From this point of view it appears the court has imposed a penalty on the insurer rather than remunerated the insured.

Finally, the court's finding that the refusal to settle was made in good faith because the conduct was not arbitrary is likely to prove confusing not only to the members of the bar but also to the insurance industry which must conform to the standard announced. Is this a continuation of the principle set down in the first Louisiana case which indicated that bad faith could be shown only if it is proved that the insurer did not have a fighting chance in litigating?²⁸ Or, is the test now whether

24. *Wooten v. Central Mut. Ins. Co.*, 182 So.2d 146 (La. App. 3d Cir. 1964); *Comunale v. Traders & General Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958).

25. LA. CIV. CODE art. 1934.

26. 7A J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4714 (1942): "If the insured effects a settlement with the injured person, without the previous consent of the insurer as required by the policy, the insurer is thereby released, and the insured is not entitled to reimbursement of such sum from the company."

27. *Spencer v. Luckenbach Gulf S.S. Co.*, 197 La. 652, 659, 2 So.2d 53, 56 (1941).

28. See text at note 4 *supra*.

the conduct is arbitrary? Did the court intend to use a different test to indicate a different position, or do the two tests mean the same thing? After fifty-two years of silence on this issue by the Supreme Court, a more thorough analysis would have been helpful. It would seem desirable for the Supreme Court to re-evaluate its stand on this entire issue and establish a workable standard reflecting present day attitudes toward insurers.²⁹

Larry J. Gunn

LABOR LAW—EMPLOYER INTERROGATION

Upon learning that a union campaign was under way in his business establishment the employer inquired of an employee whether or not she had signed a union card. After receiving a negative reply the employer stated that he knew that union cards had been passed around the day before. Later that day the employer questioned a second employee as to how many cards she had in her possession. He then proceeded to inform her that if the employees' complaint was the need for more money they had a raise coming anyway, and, that having a union does not necessarily guarantee higher wages. The trial examiner for the National Labor Relations Board concluded that, as there was no reasonable justification for such interrogation, it was a violation of Section 8(a) (1) of the National Labor Relations Act.¹ The court of appeals refused to enforce the trial examiner's order, holding that in order to violate the Act the "interrogation must rise to the level of coercion or restraint." Furthermore, the burden of proof rests upon the General Counsel. The employer need not "justify each innocuous inquiry about a union cam-

29. The judicial attitude toward insurance contracts has changed greatly over the years because of the realization that these contracts are written by the insurer and that the insured has no real bargaining position.

1. National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), as amended by Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), and Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act), 73 Stat. 519 (1959), 29 U.S.C. §§ 141-187 (1964). NLRA § 8(a) (1), 29 U.S.C. § 158(a) (1) (1964) provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." NLRA § 7, 29 U.S.C. § 157 (1964) states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all or such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3)."