

From The Bench

legal news of interest

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Q. In a case of clear liability and excess exposure, was a liability insurer in bad faith when it refused a limits plus interest demand and further told the insured that *any judgment over policy limits or interest owed will be the insured's responsibility?*

a. Yes. This was a breach of the duty of good faith and a bad faith representation.

INTERESTED IN AVOIDING INSURER BAD FAITH? PAY ATTENTION AND PAY INTEREST

by Matthew D. McConnell

Louisiana law provides an insurer “owes to his insured a duty of good faith and fair dealing.”¹ It further provides, “[t]he insurer has 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.”²

In defining what constitutes a breach of the duty of good faith and fair dealing, *LSA-R.S. 22:1220 (B)* provides:

Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer’s duties imposed in Subsection A:

- (1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.
- (2) Failing to pay a settlement within 30 days after an agreement is reduced to writing.
- (3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.
- (4) Misleading a claimant as to the applicable prescriptive period.
- (5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.

The Louisiana Third Circuit Court of Appeal recently addressed the issue of what constitutes bad faith in the case *McGee v. Omni Insurance Co.*³ The case arose out of a motor vehicle accident which occurred when a vehicle driven by Jessica Bellard struck a vehicle driven by Angel Sonnier McGee. McGee filed suit against Bellard and Omni, her liability insurer. Omni’s policy had limits of \$25,000 per person and \$50,000.00 per accident.

Pre-trial settlement negotiations failed due to Omni’s refusal to pay policy limits plus interest. Omni then deposited its policy limits of \$25,000.00 into the registry of the court. McGee proceeded to trial against Bellard and obtained an excess judgment in the amount of \$50,000.00, plus interest and costs. Thereafter, Omni paid the accumulated interest on the \$25,000.00 deposit, plus costs.



There remained an excess judgment against Bellard who then assigned McGee her rights against Omni for failure to provide her with a good faith defense. Using this assignment of rights, McGee then filed suit against Omni. The case was tried.

The Court rendered judgment against Omni, awarding McGee damages of \$25,000.00, (the amount of the excess judgment), legal interest from the date of the filing of McGee's original suit against Bellard, *penalties of twice the amount of damages awarded*, legal interest from the date of judicial demand on the bad faith claim, attorney's fees and specific expenses.

The trial court found Omni misrepresented its policy terms when Omni told Bellard that "any judgment over your policy limits or interest owed will be your responsibility." Additionally, the court found Omni consistently failed to communicate the status of the claim to Bellard on a regular basis and, when it did communicate, failed to communicate the pertinent facts for the insured to consider in determining what was in her personal interest. Omni was told by its legal counsel and an attorney from whom it obtained a second opinion that failure to tender its policy limits and accrued interest violated its good faith obligation. Omni had ignored this advice. The trial court concluded Omni's refusal to settle by payment of its policy limits, plus legal interest, was arbitrary, capricious, in bad faith, and in total disregard of the interest of its insured.

The Louisiana Third Circuit Court of Appeal affirmed the trial court's ruling observing, "the insurer is the champion of its insured's interests and . . . the insurer may not gamble with the funds and resources of its policyholders."

¹ LSA-R.S.22:1220

² *Id.* (Emphasis added)

³ 2002-1012 (La. App. 3 Cir. 3/5/03); 840 So.2d 1248



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HOURS-OF-SERVICE RULE Changes for Commercial Drivers

The Federal Motor Carrier Safety Administration (FMCSA), addressing the issue of commercial motor vehicle driver fatigue, announced the first substantial change to the *hours-of-service* rule since 1939. The new rules allow drivers to drive 11 hours after 10 consecutive hours off-duty. Also, drivers may not drive beyond the 14th hour after coming on-duty, following 10 hours off-duty. (The current rule allows 10 hours of driving within a 15 hour on-duty period after 8 hours of off-duty time.) Similar to existing rules, drivers may not drive after being on-duty for 60 hours in a 7 consecutive day period or 70 hours in an 8 consecutive day period. This on-duty cycle may be restarted whenever a driver takes at least 34 consecutive hours off-duty. Short-haul truck drivers may have an increased on-duty period of 16 hours once during any 7 consecutive-day period. The FMCSA estimates the new rule will save up to 75 lives and prevent as many as 1,326 fatigue-related crashes annually. There were an estimated 4,902 truck-related fatalities in traffic crashes in 2002. **Enforcement of the new rule begins January 4, 2004.**

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