SUPREME COURT OF LOUISIANA

No. 95-C-2057

ODELIA LEGER SMITH ET AL

Versus

AUDUBON INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
THIRD CIRCUIT, PARISH OF ST. LANDRY

CALOGERO, Chief Justice, dissents.

Our principal reason for granting certiorari in this matter was the likelihood that the court of appeal erred in casting defendant for penalties and attorney's fees premised upon a supposed violation of La. R.S. 22:658. Since the majority permissibly looks beyond that issue to reject the plaintiff entirely, the issue of the availability of attorney's fees and penalties under La. R.S. 22:658 is of no moment to the majority and hence appropriately merits no discussion in the majority opinion. As to the chief holding, I disagree with the majority's complete rejection of the plaintiff. I would instead affirm, but give the insurer relief as to the penalties and attorney's fees assessed in the court of appeal.

On the chief finding, Audubon first refused to settle the claim for $14,665.20 in medical expenses, then later refused to settle for the $25,000 policy limits on a claim clearly worth much more, should liability be established. Audubon argues it had legitimate reason to believe that its insured had no liability based solely on one equivocal statement from the claimant Kenneth Smith, a statement made while claimant Smith was on medication the morning after the accident. But things turned worse for the defendants as trial neared: subsequent depositions from both the insured and the claimant conflicted with the claimant's earlier statement, and the insured became too ill to testify at trial, leaving only the badly burned and obviously sympathetic claimant to testify to the jury. It surely must have become apparent to it that its insured was substantially at risk of being cast in judgment for a sum in excess

of the $25,000 policy limit.

At this point, Audubon should have accepted plaintiff's repeated offer to settle within the fairly moderate policy limits. Yet it refused, without informing its insureds of the plaintiff's four offers of settlement, and without sending its insureds an excess letter informing them that they would be liable for any excess judgment. These factors, together with the potential extent of any excess judgment, weighed in favor of a finding that Audubon violated its fundamental obligation to protect the interests of its insured. Audubon should not have risked its insured's money in a case this close. Through its neglect to settle, its insured was put on the hook for an excess judgment of over $30,000 (as it turned out). The record contains ample evidence to support holding Audubon liable for that excess; the majority, in my opinion, errs in reversing that portion of the court of appeal's opinion.

Were my view to have prevailed, it would have been incumbent upon the Court to address the chief issue behind our granting the writ, which is whether attorney's fees are available to a plaintiff who has successfully shown that his insurer in bad faith failed to settle a claim against its insured. My views on this are as follows.

As a general proposition, attorney's fees are not allowed against an unsuccessful litigant. They may only be awarded when there is a provision for same in contract or by statute. *See Killebrew v. Abbott Laboratories,* 359 So. 2d 1275, 1278 (La. 1978); *Beier Radio, Inc. v. Black Gold Marine, Inc.,* 449 So. 2d 1014, 1015 (La. 1984); *Huddleston v. Bossier Bank and Trust Company*, 475 So. 2d 1082, 1085 (La. 1985). These same principles are applicable to unsuccessful litigants in litigation involving insurance companies.

There are statutes, however, which allow attorney's fees and/or penalties against insurance companies for proscribed conduct. For instance, La. R.S. 22:657, dealing with payments due on health and accident policies, recites that the failure of an insurer to pay a claim on a health or accident policy within thirty days will subject the insurer to a penalty of double the amount of benefits due, plus attorney's fees. Also, La. R.S. 22:656, regarding life insurance policies and death claims, allows for a penalty in the

form of interest if the insurer fails to settle without just cause within sixty days after the date of receipt of proof of loss. These statutes share "a common purpose of imposing some sort of penalty upon an insurer who arbitrarily and capriciously fails to pay a claim [due to an insured or her designee] within the delay specified in each instance." *Richert v. Continental Insurance Company,* 290 So. 2d 730, 735 (La. App. 1st Cir. 1974).

The legislature at La. R.S. 22:658 has also made provision for penalties and attorney's fees regarding all insurance policies other than life, health and accident and Worker's Compensation.[1] That statute provides for an assessment of penalties and/or attorney's fees against an insurer, in two instances: (1) if an insurer fails to pay a claim "within thirty days after receipt of satisfactory proof of loss from the insured" (R.S. 22:658(A)(1))[2] or (2) if an insurer fails to pay the amount of any third party claim and any reasonable medical expense claim due a bona fide third party claimant within 30 days "after written agreement of settlement of the claim from an third party claimant" (R.S. 22:658(A)(2)).[3] If an insurer's action falls into either one of these two categories, then that insurer is subject to the provisions of La. R.S. 22:658(B)(1), regarding penalties and attorney's fees. That statute states that:

> B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor, **as provided in R.S. 22:658(A)(1)**, or within thirty days after written agreement **or settlement as provided in R.S. 22:658(A)(2)** when such failure is found to be

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[1]La. R.S. 22:658 excludes worker's compensation claims (Chapter 10 of Title 23 of La. R.S. 1950) no doubt because Chapter 10 makes its own provisions for penalties and attorney fees in such cases.

[2]La. R.S. 22:658(A)(1) provides that:

> A. (1) All insurers issuing any type of contract, other than those specified in R.S. 22:656, R.S. 22:657, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, **shall pay the amount of any claim due any insured** within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest.

[3]La. R.S. 22:658(A)(2) provides that:

> (2) All insurers issuing any type of contract, other than those specified in R.S. 22:656, R.S. 22:657, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount of any third party property damage claim and of any reasonable medical expenses claim due any bona fide third party claimant **within thirty days after written agreement of settlement** of the claim from any third party claimant.

> arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of ten percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, or to any of said employees, together with all reasonable attorney fees for the prosecution and collection of such loss, or in the event a partial payment or tender has been made, ten percent of the difference between the amount paid or tendered and the amount found to be due and all reasonable attorney fees for the prosecution and collection of such amount. (emphasis added).

The case before us, however, is distinguishable from the situations recited in R.S. 22:658(B)(1). Here we have an insurer who negligently and in bad faith refused to settle a claim and protect its insured, as contractually required, from the risk of an excess judgment. That conduct is not governed by La. R.S. 22:658. The latter simply does not apply, for this is not an instance where an insurer has refused to pay an insured within thirty days following proof or loss, nor is it a case where more than thirty days have passed without payment following a written settlement with a third party claimant.

Some recent cases out of the courts of appeal have held penalties and attorney's fees proper in cases such as this one. *See Maryland Casualty Company v. Dixie Insurance Company*, 622 So. 2d 698 (La. App. 4th Cir. 1993); *Domangue, supra; Roy v. Glaude*, 494 So. 2d 1243 (La. App. 3d Cir. 1986); *Fertitta v. Allstate Insurance Company,* 439 So. 2d 531 (La. App. 1st Cir. 1983). None of these cases, however, cites a statutory or contractual basis supporting their award of attorney fees; nor do they cite a statutory basis supporting the imposition of penalties upon insurers for failing to settle with a third party. The cases relied upon by the court of appeal to support the award of penalties and attorney fees under La. R.S. 22:658, *Maryland Casualty Company, supra*; *Domangue, supra; Roy* and *Fertitta, supra*, are incorrect, in my view, insofar as they allow for the recovery of penalties and attorney fees under La. R.S. 22:658.

Plaintiff makes the additional argument that under La. R.S. 22:1220, penalties and attorney's fees are properly imposed in a case where an excess judgment is assessed against an insured as a consequence of an insurer's negligent or bad faith refusal to settle with a third party. Setting aside whether R.S. 22:1220, which imposes

an affirmative duty on the insurer to make a "reasonable effort to settle claims with the insured or the claimant, or both" applies to cases such as this, I note that the statute cannot be applied to this case. The enactment of R.S. 22:1220 created a substantive change in the law that was not made effective until after the events in question occurred. The statute cannot be given retroactive effect. *See Manuel v. Louisiana Sheriff's Risk Management Fund,* 95-0406, p. 9 (La. 11/27/95), 664 So. 2d 81, 86.

It is thus my view in dissent that the Court should have let the court of appeal opinion stand in its chief holding, then reject its errant assessment of attorney's fees and penalties.