



Insurance “Bad Faith” Law, Revisited

By Dean A. Sutherland

Insurance “bad faith” law¹ is codified in La. R.S. 22:1892 (formerly La. R.S. 22:658) and La. R.S. 22:1973 (formerly La. R.S. 22:1220).² While the statutes contain several similar provisions, differences between them can affect the imposition of bad faith statutory penalties.

Payment of Uncontested Amounts of Insured Losses — La. R.S. 22:1892A(1) and La. R.S. 22:1973B(5)

La. R.S. 22:1892A(1) requires an insurance company to pay its insured the uncontested amount of a covered loss within 30 days after receiving a satisfactory proof of loss from the insured or any party in interest. La. R.S. 22:1973B(5) requires an insurance company to pay the amount of any claim due any person insured by the contract within 60 days after receipt of satisfactory proof of loss from the claimant.

The prohibited conduct under La. R.S. 22:1892A(1)/R.S. 22:1892B(1) and La. R.S. 22:1973B(5) is virtually identical: “the failure to timely pay a claim after receiving satisfactory proof of loss when that failure to pay is arbitrary, capricious, or without probable cause.”³ The primary difference is that R.S. 22:1892A(1) requires the insurer to pay the claim within 30 days of receiving satisfactory proof of loss, rather than the longer 60-day period allowed under La. R.S. 22:1973B(5).⁴

Both provisions apply to claims by insureds, not to third-party claims. Statutory penalties may be imposed when the insurance company’s failure to comply with these statutory duties is “arbitrary, capricious or without probable cause.”⁵

What is “Arbitrary, Capricious or Without Probable Cause” Misconduct?

An insurer’s misconduct meets the “arbitrary, capricious or without probable cause” standard when the insurer’s actions are unjustified, lack a reasonable basis or are without probable cause or excuse.⁶ The court in *Riser v. Shelter Mut. Ins. Co.*,

43,617 (La. App. 2 Cir. 10/29/08), 997 So.2d 675, 679, explained:

The phrase “arbitrary, capricious, or without probable cause” is synonymous with “vexatious.” Both La. R.S. 22:658 and 22:1220 describe an insurer whose willful refusal of a claim is not based on a good faith defense. *Louisiana Maintenance Services, Inc. v. Certain Underwriters at Lloyd’s of London*, 616 So.2d 1250 (La.1993)

In *Louisiana Bag Co., Inc. v. Audubon Indem. Co.*, 08-0453 (La. 12/2/08), 999 So.2d 1104, 1121-1122, the Supreme Court held that proof of specific acts or proof of the insurer’s state of mind is not required to establish that insurer conduct is “arbitrary, capricious or without probable cause.”

Other Sections Requiring “Arbitrary, Capricious or Without Probable Cause” Conduct

Only La. R.S. 22:1892A(1), (2) and (4) [*because of R.S. 22:2892B(1)*] and La. R.S. 22:1973B(5) and (6) [*by their own terms*] require that the insurer’s statutory failure meet the “arbitrary, capricious or without probable cause” standard before statutory penalties can be imposed.

An insurance company’s violation of any other section(s) of these bad faith statutes may support the imposition of statutory penalties, even if the insurer was not “arbitrary, capricious or without probable cause.”⁷

Payment of Written Settlement Agreements — La. R.S. 22:1892A(2) and La. R.S. 22:1973B(2)

La. R.S. 22:1892A(2) and La. R.S. 22:1973B(2) obligate an insurance company to pay the amount of a settlement agreement within 30 days after the settlement agreement is reduced to writing. These provisions differ concerning: (1) the party to whom the duty is owed, and (2) the standard of misconduct required before

statutory penalties can be imposed against the insurance company.

La. R.S. 22:1892A(2) requires an insurer “to 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.” [By its terms, La. R.S. 22:1892A(2) only applies to written settlements with *third-party claimants*. An insurance company that fails to pay its insured property damages and reasonable medical expenses within 30 days of a written settlement agreement is not subject to the La. R.S. 22:1892 statutory penalties.]

La. R.S. 22:1973B(2) requires insurers to pay a settlement within 30 days after the agreement is reduced to writing. By its terms, La. R.S. 22:1973B(2) applies to *all* written settlement agreements (with first-party insureds and with third-party claimants).

Unlike La. R.S. 22:1892A(2), the La. R.S. 22:1973B(2) 30-day time period does not contain the “arbitrary, capricious or without probable cause” standard. If the insurer’s failure to pay the amount of any written settlement agreement within 30 days is “knowingly committed,” La. R.S. 22:1973B(2) is violated and R.S. 22:1973C statutory penalties may be imposed.⁸

Louisiana Citizens Property Insurance Corporation is not exempt from these statutes.⁹

Oral Settlement Agreements Dictated into the Court Record

Tension exists between the Civil Code articles on compromise (La. Civ.C. arts. 3071-3078) and La. R.S. 22:1892A(2) and La. R.S. 22:1973B(2).¹⁰ Are La. R.S. 22:1892A(2) and La. R.S. 22:1973B(2) violated when an insurance company fails to timely pay a settlement agreement that is dictated into the record in open court, but not reduced to a written settlement agreement?

The court in *Chateau Living Center, L.L.C. v. Hanover Ins. Co.*, Civ. No. 06-3211, 2008 WL 4432368 (E.D. La. 9/25/08), noted a split between Louisiana

courts on whether a settlement agreement, dictated into the record in open court pursuant to La. Civ.C. art. 3072, complies with the statutory “written” settlement requirement of La. R.S. 22:1892A(2) and La. R.S. 22:1973B(2). *Batson v. South. La. Medical Center*, 97-1382 (La. App. 1 Cir. 9/25/98), 724 So.2d 782, 789, *writ granted in part, judgment amended on other grounds*, 98-2709 (La. 1/8/99), 734 So.2d 649, held that a settlement agreement recited in open court was not “reduced to a writing” until the transcription was entered into the record. *Früge v. Classic Communications, Inc.*, 04-1348 (La. App. 3 Cir. 2/2/05), 893 So.2d 222, 226, *writ denied*, 05-0518 (La. 4/29/05), 901 So.2d 1068, held that a settlement agreement was reduced to writing when it was orally entered into the record in open court. Citing Revision Comment “B” to La. Civ.C. art. 3072,¹¹ *Chateau* followed *Batson*.

In *Yaukey v. Teachers Ins. Co.*, Civ. No. 07-291, 2009 WL 1211033 (E.D. La. 5/4/09), the filing of the transcription of a dictated settlement agreement into the court record triggered the La. R.S. 22:1973B(2) 30-day period.

The Louisiana Supreme Court denied writ applications in both *Batson*, *supra*, and *Früge*, *supra*. Whether the general provisions of La. Civ.C. art. 3072 regarding acceptable forms of compromises fulfill the specific requirement of a written settlement agreement contained in La. R.S. 22:1892A(2) and La. R.S. 22:1973B(2) remains an open question.

Written Settlement Offer — La. R.S. 22:1892A(4)

La. R.S. 22:1892A(4) obligates an insurance company to make a written offer to settle any property damage claim, including a third-party claim, within 30 days after receipt of satisfactory proofs of loss of that claim. A violation of La. R.S. 22:1892A(4) must meet the “arbitrary, capricious or without probable cause” standard of La. R.S. 22:1892B(1) before statutory penalties are imposed.

La. R.S. 22:1973 contains no obligation for an insurance company to make a written settlement offer to any claimant.

Initiate Loss Adjustment — La. R.S. 22:1892A(3)

La. R.S. 22:1892A(3) requires an insurance company to “initiate loss adjustment of a property damage claim and of a claim for reasonable medical expenses” within 14 days after notification of loss by the claimant in ordinary cases and within 30 days after notification of loss in the case of “catastrophic loss.”¹² The violation of La. R.S. 22:1892A(3) subjects the insurer to the penalties provided by La. R.S. 22:1973C.

La. R.S. 22:1892A(3) obligates the insurer to take “some substantive and affirmative step to accumulate the facts necessary to evaluate the claim.”¹³ Merely opening a file is insufficient.¹⁴

La. R.S. 22:1973 contains no similar statutory provision. However, in *Clark v. McNabb*, 04-0005 (La. App. 3 Cir. 5/19/04), 878 So.2d 677, 684, the 3rd Circuit concluded that La. R.S. 22:1973B(5) was broad enough to encompass a duty to initiate a loss adjustment and to timely complete the claims investigation.

Misrepresentations by Insurance Company — La. R.S. 22:1973B(1)

If a denial of coverage results from the insurance company “misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue,” La. R.S. 22:1973B(1) has been violated. The “arbitrary, capricious or without probable cause” standard does not apply to a misrepresentation claim. La. R.S. 22:1892 contains no similar provision.

Does the phrase “relating to any coverages at issue” modify only “insurance policy provisions” or also modify “pertinent facts?”

The court in *Strong v. Farm Bureau Ins. Co.*, 32,414 (La. App. 2 Cir. 10/29/99), 743 So.2d 949, 953, *writ denied*, 99-3362 (La. 2/4/00), 754 So.2d 229, limited the La. R.S. 22:1973B(1) provision to misrepresentations concerning pertinent facts concerning coverage issues.¹⁵

However, the courts in three other cases reached the opposite conclusion: *McGee v. Omni Ins. Co.*, 02-1012 (La. App. 3 Cir. 3/5/03), 840 So.2d 1248, *writ denied*,

03-1375, 03-1382 (La. 12/12/03), 860 So.2d 1149; *Arvie v. Safeway Ins. Co. of Louisiana*, 06-1266 (La. App. 3 Cir. 2/7/07), 951 So.2d 1284, *writ denied*, 957 So.2d 181, 07-0797 (La. 6/1/07); and *Dufrene v. Gautreau Family, L.L.C.*, 07-467 (La. App. 5 Cir. 2/22/08), 980 So.2d 68, 85, *writ denied*, 08-0629 (La. 5/9/08), 980 So.2d 694, and 08-0628 (La. 5/9/08), 980 So.2d 698. In these cases, misrepresentations of pertinent facts about issues other than insurance coverage issues were found to justify the imposition of La. R.S. 22:1973B(1) statutory penalties.

In *Arvie*, the court affirmed the imposition of the excess policy limits liability against the liability insurer, as well as \$2,000 in La. R.S. 22:1973C penalties. The insurer’s consistent failure to communicate important information concerning the claim to its insured violated La. R.S. 22:1973B(1).¹⁶

In *Dufrene*, the failure to produce two insurance policies in response to formal discovery constituted a La. R.S. 22:1973B(1) misrepresentation of coverage.¹⁷

What If an Insurance Company Violates More than One Statutory Provision?

Calogero addressed the insurance company’s untimely payment of claims in violation of La. R.S. 22:1892A(1) and La. R.S. 22:1973B(5). Unfortunately, the frequently quoted language from that decision did not identify these specific subsections:

[W]here La. R.S. 22:1220 provides the greater penalty, La. R.S. 22:1220 supersedes La. R.S. 22:658 such that Calogero cannot recover penalties under both statutes. 735 So.2d at 820. However, because La. R.S. 22:1220 does not provide for attorney fees, Calogero is entitled to recover attorney fees under La. R.S. 22:658 for Safeway’s arbitrary and capricious failure to pay his claim within 30 days of receiving satisfactory proof of loss.¹⁸

This partial citation has led to the incorrect conclusion that an insurance company can be liable for penalties under only one of

the two bad faith insurance statutes.¹⁹

Whether multiple penalties can be imposed from violations of different obligations contained in La. R.S. 22:1892 and La. R.S. 22:1973 was not decided in *Calogero*. Once it concluded that the insurance company did not misrepresent the policy provisions, the court specifically declined to address the validity of the lower court's award of multiple penalties pursuant to La. R.S. 22:1973C.²⁰

Other than situations in which the questioned conduct is prohibited by more than one subsection of La. R.S. 22:1892 and La. R.S. 22:1973 [as in *Calogero*], there appears to be no reason why multiple penalties should not be imposed against an insurance company which violates more than one provision of La. R.S. 22:1892 and/or La. R.S. 22:1973.

Differences Between Potential Penalties, Attorneys' Fees and Damages

The potential statutory penalties, damages and attorneys' fees are different under La. R.S. 22:1892 and La. R.S. 22:1973.

La. R.S. 22:1892 (formerly La. R.S. 22:658)

La. R.S. 22:1892 was amended in 2003 and 2006.²¹ Prior to the 2003 amendment, La. R.S. 22:1892 provided for a mandatory 10 percent penalty and the recovery of reasonable attorneys' fees for the prosecution and collection of the claim. The 2003 amendment to La. R.S. 22:1892 increased the statutory penalty from 10 percent to 25 percent but eliminated the recovery of attorneys' fees.

The 2006 amendment to La. R.S. 22:1892 increased the mandatory statutory penalty from 25 percent to 50 percent and reinstated the recovery of "reasonable attorneys' fees and costs." The pre-2003 limitation of reasonable attorneys' fees "for the prosecution and collection of the claim" was not retained.

La. R.S. 22:1892 has never authorized the recovery of general or specific damages that may result from the insurance company's breach of its statutory obligations. Violations of La. R.S. 22:1892 subject the



insurer to mandatory statutory penalties and, except for the time period when the 2003 amendment to La. R.S. 22:1892 was in effect, to an award of reasonable attorneys' fees.

In *Sher v. Lafayette Ins. Co.*, 07-2441 (La.4/8/08), 988 So.2d 186, 196-199, the Supreme Court declined to apply the current version of La. R.S. 22:1892, when the bad faith claim arose prior to the effective date of the 2006 amendment.

However, the court recognized that the current version of La. R.S. 22:1892 would apply to a Hurricane Katrina claim if the plaintiff first made a satisfactory proof of loss after the Aug. 15, 2006, effective date of the 2006 amendment to La. R.S. 22:658/22:1892 or if the plaintiff later discovered new damages and made a new satisfactory proof of loss, which the insurer failed to pay timely.²²

In the absence of one of these two exceptions, the 2003 version of La. R.S. 22:1892B(1) is applicable to Hurricane Katrina/Rita claims.²³

For all bad faith claims arising after Aug. 15, 2006, La. R.S. 22:1892 provides for a mandatory 50 percent statutory penalty and reasonable attorneys' fees and costs.

General damages for mental anguish pursuant to La. R.S. 22:1892 were rejected by the Supreme Court in *Sher*, pursuant to

La. Civ.C. art. 1998, which provides:

Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.

Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.

La. R.S. 22:1973 (formerly La. R.S. 22:1220)

Unlike La. R.S. 22:1892, La. R.S. 22:1973 authorizes the recovery of damages that may be sustained as a result of an insurer's breach of its obligations under that statute, in addition to statutory penalties.

La. R.S. 22:1973A provides in part: "Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach."

La. R.S. 22:1973C provides:

In addition to any general or special damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater. . . .

These two provisions authorize the recovery of compensatory damages (both general and special), and a discretionary statutory penalty with maximum limits of \$5,000 or two times the amount of the damages sustained, whichever is greater, from an insurance company that violates its La. R.S. 22:1973B obligations.

Attorneys' fees are not recoverable pursuant to La. R.S. 22:1973. Where the overlapping provisions of La. R.S. 22:1892A(1)

and La. R.S. 22:1973B(5) are both violated, the insured can recover the greater of the statutory penalties provided by La. R.S. 22:1892B(1) or by La. R.S. 22:1973C. The insured may also recover attorneys' fees pursuant to La. R.S. 22:1892B(1), even if La. R.S. 22:1973C provides a greater statutory penalty.²⁴

Are Mental Anguish Damages Recoverable Under R.S. 22:1973C?

The applicability of La. R.S. 22:1973 was not at issue in *Sher*. In *Dickerson v. Lexington Ins. Co.*, 556 F.3d 290, (5 Cir. 2009), the United States 5th Circuit Court of Appeals, after noting that the Louisiana Supreme Court did not address this issue in *Sher*, held:

We hold that Art. 1998 is, as a matter of law, inapplicable to § 22:1220 and does not bar the award of mental anguish damages under this statute: Damages for mental anguish may be awarded under § 22:1220 for breaches of the duty of good faith.²⁵

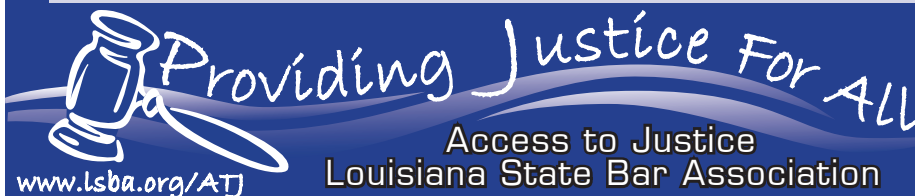
Scope of Damages Upon Which La. R.S. 22:1973C Statutory Penalties Are Calculated

Despite the seeming limitation on the scope of La. R.S. 22:1973 general and special damages upon which the La. R.S. 22:1973C penalties are calculated, *i.e.*, damages sustained as the result of the insurance company's breach of its La.

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FOOTNOTES

R.S.22:1973 obligations, a number of recent decisions have applied the La. R.S. 22:1892 and La. R.S. 22:1973 statutory “bad faith” penalties on the total amount of the insured’s damages, including the unpaid insured loss.

In *Louisiana Bag Co.*, the Supreme Court stated:

Moreover, we briefly note that an insurer need only fail to tender one undisputed portion of the claim to be subject to penalties on the difference between the amount paid or tendered and the amount found to be due. La. R.S. § 22:658. In the case *sub judice*, Audubon failed to tender timely payment of the undisputed portions of the stock, building, contents and EDP claims, any one of which would have been sufficient to render Audubon liable under La. R.S. § 22:658 for the difference between the amount paid, \$1,000,000, and the amount found to be due, \$3,266,309.²⁶

In *Neal Auction Co., Inc. v. Lafayette Ins. Co.*, 08-0574 (La. App. 4 Cir. 4/29/09), 13 So.3d 1135, *reh’g denied* (6/5/09), *writ denied*, 09-1499, 09-1606 (La. 11/6/09), 21 So.2d 313, the 4th Circuit majority increased La. R.S. 22:1973C penalties from \$5,000 to \$1,332,022. That amount is twice the amount of the total \$666,011 damages (including both covered and non-covered losses) awarded pursuant to La. R.S. 22:1973A.

In *Grilletta v. Lexington Ins. Co.*, 558 F.3d 359, 369-371 (5 Cir. 2009), the United States 5th Circuit Court of Appeals held that a homeowner’s insurer’s failure to timely tender the undisputed portion of claim for the loss of the insured’s house subjected it to a penalty as to entire claim, not just the undisputed portion.

French v. Allstate Indem. Co., C.A. 06-8251, 2009 WL 1668486, (E.D. La. 6/12/09), relying on *Grilletta*, rejected the insurer’s argument that *Louisiana Bag* required penalties to be applied only to the disputed amount and not the total claim.

1. For a general discussion of these two statutes (under their pre-2009 designations, La. R.S. 22:658 and La. R.S. 22:1220), see Sutherland, “Insurance ‘Bad Faith’ Law After the Hurricanes: Duties Owed by Insurance Companies and Potential Penalties for Violation of Those Duties,” 54 La. B.J. 2, 90-93 (August-September 2006).

2. Acts 2008, No. 415, § 1, effective Jan. 1, 2009, renumbered the entire Insurance Code, including these two provisions. No substantive changes were made by that 2008 Act.

3. Reed v. State Farm Mutual Ins. Co., 03-0107 (La. 10/21/03), 857 So.2d 1012, 1020, *citing* Calogero v. Safeway Ins. Co. of La., 99-1625 (La. 1/19/00), 753 So.2d 170, 174.

4. Calogero, 753 So.2d at 174.

5. Tabor v. Anco Insulations, Inc., 08-694 (La. App. 3 Cir. 12/10/08), 999 So.2d 258, *writ denied*, 09-0082 (La. 4/3/09), 6 So.3d 769 and 09-0145 (La. 4/3/09), 6 So.3d 770; Arceneaux v. Amstar Corp., 06-1592 (La. App. 4 Cir. 10/31/07), 969 So.2d 755, 782-784, *reh’g denied* (11/28/07), *writ denied*, 07-2486 (La. 3/24/08), 977 So.2d 952 and 08-0053 (La. 3/24/08), 977 So.2d 953.

6. Reed, 857 So.2d at 1020-1021.

7. See, *Sultana Corp. v. Jewelers Mut. Ins. Co.*, 03-0360 (La. 12/3/03), 860 So.2d 1112, 1119.

8. *Sultana*, 860 So.2d at 1119; *Esurance Ins. Co. v. Meade*, 08-1975 (La. App. 1 Cir. 5/8/09), not reported in So.3d, 2009 WL 1272386.

9. Reed v. Louisiana Citizens Property Insurance Corp., 07-1592 (La. App. 4 Cir. 3/5/08), 980 So.2d 754, *writs denied*, 08-744, 08-748 (La. 10/24/08), 25 So.3d 777.

10. La. Civ. Ct. art. 3072 provides: “A compromise shall be made in writing or recited in open court, in which case the recitation shall be susceptible of being transcribed from the record of the proceedings.”

11. This article preserves the requirement of Article 3071 of the Louisiana Civil Code of 1870 that a compromise must be reduced to writing. It is not intended to change the law. “When the parties reach a valid oral settlement in court, they may mutually compel each other to reduce the agreement to writing.”

12. Acts 2009, No. 448, amended this section to provide a mechanism to extend the time to respond to claims during an emergency or disaster. La. R.S. 22:1892A(3) now provides:

(3) Except in the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim and of a claim for reasonable medical expenses within fourteen days after notification of loss by the claimant. In the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim within thirty days after notification of loss by the claimant except that the commissioner may promulgate a rule for extending the time period for initiating a loss adjustment for damages arising from a presidentially declared emergency or disaster or a gubernatorially declared emergency or disaster up to an additional thirty days. Thereafter, only one additional extension of the period of time for initiating a loss adjustment may be allowed and must be approved by the Senate Committee

on Insurance and the House Committee on Insurance, voting separately. Failure to comply with the provisions of this Paragraph shall subject the insurer to the penalties provided in R.S. 22:1973.

13. McClendon v. Economy Fire & Cas. Ins. Co., 98-1537 (La. App. 3 Cir. 4/7/99), 732 So.2d 727, 730-731.

14. Hollier v. State Farm Mut. Auto. Ins. Co., 01-0592 (La. App. 3 Cir. 10/31/01), 799 So.2d 793, *writ denied*, 01-3163 (La. 2/22/02), 810 So.2d 1135.

15. Accord Moxley v. Cole, 97-1582 (La. App. 3 Cir. 2/3/99), 736 So.2d 249, 255, *writ denied*, 99-0632 (La. 5/7/99), 740 So.2d 1284; George v. Allstate Ins. Co., 32,899 (La. App. 2 Cir. 4/5/00), 758 So.2d 373.

16. Arvie, 951 So.2d at 1286.

17. Dufrene, 980 So.2d at 85.

18. Calogero, 753 So.2d at 174.

19. See, e.g., Neal Auction Co., Inc. v. Lafayette Ins. Co., 08-0574 (La. App. 4 Cir. 4/29/09), 13 So.3d 1135, *reh’g denied*, (6/5/09), *writ denied*, 2009-1499, 2009-1606 (La. 11/6/09), 21 So.2d 313.

20. Calogero, 753 So.2d at 174, n. 3.

21. Acts 2003, No. 790, § 1 and Acts 2006, No. 813, § 1.

22. Sher, 988 So.2d at 199.

23. Royal Cloud Nine, L.L.C. v. Lafayette Ins. Co., 08-0034 (La. App. 4 Cir. 6/11/08), 987 So.2d 355, *writ denied*, 08-1551 (La. 10/10/08), 993 So.2d 1286 and 08-1568 (La. 10/10/08), 993 So.2d 1287.

24. Calogero, 753 So.2d at 174.

25. Dickerson, 556 F.3d at 304.

26. Louisiana Bag Co., 999 So.2d at 122.

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