

--- So.3d ----, 2010 WL 3517022 (La.App. 1 Cir.), 2010-0208 (La.App. 1 Cir. 9/10/10)
(Cite as: **2010 WL 3517022 (La.App. 1 Cir.)**)

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AL.

Court of Appeal of Louisiana,
First Circuit.

Steven W. RICHARDSON
v.

GEICO INDEMNITY COMPANY.

No. 2010 CA 0208.

Sept. 10, 2010.


Background: Insured brought action against personal automobile insurer, seeking to recover underinsured motorist (UIM) benefits. The 19th Judicial District Court, Parish of East Baton Rouge, No. 559,997, [Wilson E. Fields, J.](#), granted insurer's summary judgment motion.

Holding: The Court of Appeal, [Carter, C.J.](#), held that insured's claim was undisputed, and thus insurer's failure to pay claim within statutory time limit was arbitrary, capricious, and without probable cause.

Reversed and remanded.

[Welch, J.](#), concurred without assigning reasons.

West Headnotes

[1] Insurance 217  **3335**

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(C) Settlement Duties; Bad Faith

217k3334 In General

217k3335 k. In General. [Most Cited](#)

[Cases](#)

Statutes 361  **241(2)**

361 Statutes


361VI Construction and Operation

361VI(B) Particular Classes of Statutes

361k241 Penal Statutes

361k241(2) k. Nature and Subject-Matter of Statute. [Most Cited Cases](#)

The statute requiring insurers to pay the amount of any claim due to any insured within 30 days of receipt of satisfactory proofs of loss must be strictly construed because it is penal in nature. Louisiana Revised Statutes 22:658A(1).

[2] Insurance 217  **3343**

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(C) Settlement Duties; Bad Faith

217k3341 Prerequisites for Claim of Breach or Bad Faith

217k3343 k. Notice, Proof, and Demand by Insured. [Most Cited Cases](#)

An insured who claims penalties and attorney fees under the statute requiring insurers to pay the amount of any claim due to any insured within 30 days of receipt of satisfactory proofs of loss has the burden of proving that the insurer received a satisfactory proof of loss as a necessary predicate to a showing that the insurer's failure to pay the claim was arbitrary, capricious, or without probable cause. Louisiana Revised Statutes 22:658A(1).

[3] Insurance 217  **3343**

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(C) Settlement Duties; Bad Faith

217k3341 Prerequisites for Claim of Breach or Bad Faith

217k3343 k. Notice, Proof, and Demand by Insured. [Most Cited Cases](#)

In order to provide a satisfactory proof of loss of an underinsured motorist (UIM) claim, within the

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meaning of the statute requiring insurers to pay the amount of any claim due to any insured within 30 days of receipt of satisfactory proofs of loss, the insured must establish that the insurer received sufficient facts to fully apprise the insurer that the owner or operator of the other vehicle involved in the accident was uninsured or underinsured, that he was at fault, that such fault gave rise to damages, and establish the extent of those damages. Louisiana Revised Statutes 22:658A(1).

[4] Insurance 217  **3343**

217 Insurance


217XXVII Claims and Settlement Practices

217XXVII(C) Settlement Duties; Bad Faith

217k3341 Prerequisites for Claim of Breach or Bad Faith

217k3343 k. Notice, Proof, and Demand by Insured. [Most Cited Cases](#)

As long as the insurer obtains sufficient information to act on the claim, in the context of the statute requiring insurers to pay the amount of any claim due to any insured within 30 days of receipt of satisfactory proofs of loss, the manner in which it obtains the information is immaterial. LSA-R.S. 22:658B(1).

[5] Insurance 217  **3382**

217 Insurance

217XXVII Claims and Settlement Practices


217XXVII(C) Settlement Duties; Bad Faith

217k3378 Actions

217k3382 k. Questions of Law or Fact.

[Most Cited Cases](#)

Whether and when a satisfactory proof of loss was received, in the context of the statute requiring insurers to pay the amount of any claim due to any insured within 30 days of receipt of satisfactory proofs of loss, is a question of fact. LSA-R.S. 22:658B(1).

[6] Insurance 217  **3336**

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(C) Settlement Duties; Bad Faith

217k3334 In General

217k3336 k. Reasonableness of Insurer's Conduct in General. [Most Cited Cases](#)

The statutory penalties, under the statute requiring insurers to pay the amount of any claim due to any insured within 30 days of receipt of satisfactory proofs of loss, are inappropriate when the insurer has a reasonable basis to defend the claim and was acting in good-faith reliance on that defense; bad faith should not be inferred from an insurer's failure to pay within the statutory time limits when such reasonable doubts exist. LSA-R.S. 22:658B(1).

[7] Insurance 217  **3336**

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(C) Settlement Duties; Bad Faith

217k3334 In General

217k3336 k. Reasonableness of Insurer's Conduct in General. [Most Cited Cases](#)

In order for an insurer to avoid being arbitrary or capricious after receiving a satisfactory proof of loss, in the context of the statute requiring insurers to pay the amount of any claim due to any insured within 30 days of receipt of satisfactory proofs of loss, it is necessary for the insurer to determine whether there exists a legitimate basis for not paying at least what it considers to be undisputed. LSA-R.S. 22:658B(1).

[8] Appeal and Error 30  **1008.1(11)**

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)3 Findings of Court

30k1008 Conclusiveness in General

30k1008.1 In General

30k1008.1(8) Particular Cases

and Questions

30k1008.1(11) k. Insurance.

[Most Cited Cases](#)

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Insurance 217 3335

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(C) Settlement Duties; Bad Faith

217k3334 In General

217k3335 k. In General. **Most Cited**

Cases

Insurance 217 3382

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(C) Settlement Duties; Bad Faith

217k3378 Actions

217k3382 k. Questions of Law or Fact.

Most Cited Cases

The determination of whether an insurer acted in bad faith in failing to pay a claim within the statutory time limits turns on the facts and circumstances of each case; as this determination is largely factual, great deference must be accorded the trier-of-fact. LSA-R.S. 22:658B(1).

[9] Insurance 217 3360

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(C) Settlement Duties; Bad Faith

217k3358 Settlement by First-Party Insurer

217k3360 k. Duty to Settle or Pay.

Most Cited Cases

Insured's claim for underinsured motorist (UIM) benefits was undisputed, and thus personal automobile insurer's failure to pay claim within statutory period following receipt of insured's satisfactory proof of loss was arbitrary, capricious, and without probable cause, notwithstanding insurer's argument that it relied on assertions of representative of insured's counsel that statutory time line had been met; insurer only provided conditional intent-to-offer letter to insured within statutory period outlining terms of payment of UIM policy limits. Louisiana Revised Statutes 22:658A(1).

On Appeal from the 19th Judicial District Court, In and for the Parish of East Baton Rouge, State of Louisiana, Trial Court No. 559,997. **Wilson E. Fields**, Judge Presiding. **Leonard Cardenas, III**, Baton Rouge, LA, for Plaintiff-Appellant, Steven W. Richardson.

Glen Scott Love, **Stephen Dale Cronin**, Baton Rouge, LA, for Defendant-Appellee, GEICO Indemnity Company.

Before **CARTER**, C.J., **GAIDRY** and **WELCH**, JJ.

CARTER, C.J.

*1 The plaintiff insured appeals the trial court's grant of summary judgment in favor of the defendant insurer that resulted in the dismissal of the insured's claim for statutory penalties and attorney's fees under former **LSA-R.S. 22:658** (current **LSA-R.S. 22:1892**). For the reasons expressed, we reverse and remand for further proceedings.

FACTS

This case arises out of a motor vehicle collision in East Baton Rouge Parish on October 27, 2006. Steven W. **Richardson**, insured by **GEICO** Indemnity Company (**GEICO**) ^{FNI}, was seriously injured when a vehicle operated by Timothy G. Coryell, and insured by Safeco Insurance Company, negligently struck his vehicle. On March 10, 2007, **Richardson** settled with Coryell and Safeco for Safeco's policy limits of \$50,000.00 after Safeco confirmed Coryell's liability for the accident.

Shortly thereafter, by a letter dated May 23, 2007, **Richardson** demanded that **GEICO** unconditionally tender its underinsured motorist (UIM) policy limits of \$25,000.00, plus \$3,000.00 for medical payments coverage. It is undisputed that **GEICO** received **Richardson's** demand letter on May 25, 2007. Attached to **Richardson's** demand letter was a copy of Safeco's \$50,000.00 check made payable

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to **Richardson** and his attorney; an affidavit of Safeco's insured attesting to the fact that he had no other automobile liability insurance coverage in effect; a copy of the police report; and copies of **Richardson's** medical records and medical bills reflecting that **Richardson's** medical treatment through May 2007 totaled over \$65,000.00, well above the underlying liability insurance coverage.
FN2

It is undisputed that **Richardson's** demand letter did not contain information about any claim for reimbursement involving medical payments that were previously made by the Medical Care Recovery Unit of the Department of the Navy (the Navy). It is also undisputed that **GEICO** received separate notification of the Navy's lien in a "Notice of Claim" that was sent to **GEICO** by the Navy on March 9, 2007, almost three months prior to **GEICO's** receipt of **Richardson's** demand letter. The Navy's notice indicated that the "United States" was making claim to "any and all available insurance coverage including, but not limited to, ... Medical Payments, [and] Underinsured or Uninsured benefits" for the reasonable value of the medical care and treatment that had been provided by or through the United States to **Richardson**, with proof of the medical expenses to be forwarded at a later date.
FN3

After receiving the Navy's notice-of-claim letter and **Richardson's** demand letter, **GEICO** began a series of numerous contacts and/or attempts to contact **Richardson's** attorney's office, as well as the Navy, in an effort to confirm the amount and payment details for the Navy's outstanding medical payments lien.
FN4 On June 6, 2007, the Navy's representative informed **GEICO** that the Navy's lien amount totaled \$13,976.57, and that **Richardson's** attorney had requested a compromise of the lien. Approximately three weeks later, on June 20, 2007, **GEICO** sent a letter to **Richardson's** attorney, advising of **GEICO's** "intent to offer the [UIM] policy limits of \$25,000.00 pursuant to [Richardson's] demand [letter] of May 24th, 2007."

Additionally in the intent-to-offer letter, **GEICO** reiterated that "the issues regarding the Navy lien also need to be addressed along with the specific distribution of the Medical Payments benefits." Further, **GEICO's** notice of its intent to offer the UIM policy limits was conditioned upon the proper execution of Safeco's underlying liability insurance release, as well as **GEICO's** UIM release.
FN5 On June 21, 2007, **Richardson's** attorney's office representative confirmed receipt of **GEICO's** intent-to-offer letter, advised **GEICO** that the Navy's lien amount was now \$14,799.19, and informed **GEICO** that further negotiations were ongoing with **Richardson** regarding a reduction of the lien.

* After **GEICO** sent the intent-to-offer letter, **GEICO** continued to attempt to contact **Richardson's** attorney to discuss the issue of the Navy's lien and the status of the case. On July 16, 2007, **Richardson's** attorney's office contacted **GEICO** to inform **GEICO** that the Navy's lien had finally been settled for \$12,000.00. Two days later, **Richardson's** attorney advised **GEICO** in a faxed letter that due to the settlement of the medical payments lien from the underlying liability policy limits, **GEICO** was released from any obligation to pay the lien.
FN6 **Richardson's** attorney further informed **GEICO** that a release could not be required as a condition of payment of the UIM policy limits, and doing so was "contrary to law and unreasonable, arbitrary and capricious." **Richardson's** attorney made demand "once again" for an immediate and unconditional tender of **Richardson's** UIM policy limits and any available medical payments coverage. At this point, **Richardson's** attorney indicated that a satisfactory proof of loss had been provided to **GEICO** in the May 23, 2007 letter, and that **GEICO** had breached its contractual obligations to **Richardson**, subjecting **GEICO** to statutory damages and attorney's fees. **GEICO** responded on July 18, 2007, by forwarding checks for **Richardson's** \$25,000.00 UIM policy limits and \$3,000.00 medical payments coverage.
FN7

On October 12, 2007, **Richardson** filed a petition

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against **GEICO**, alleging that **GEICO** had arbitrarily and capriciously, and without good cause, failed to make a timely and unconditional UIM tender to **Richardson**, thereby entitling **Richardson** to statutory penalties and attorney's fees. The petition did not include any allegations regarding the Navy's lien. **GEICO** answered **Richardson's** petition by denying that the letter it received on May 25, 2007, was a satisfactory proof of loss, since the letter did not include information regarding the Navy's lien. Additionally, **GEICO** asserted that it had diligently attempted to address and resolve the Navy's lien with **Richardson's** attorney, but was not able to confirm the amount and the settlement of the lien until July 16, 2007, contending that it was at that point that **GEICO** received a satisfactory proof of loss. Because a tender of the UIM policy limits and medical payments coverage was promptly forwarded to **Richardson's** attorney two days after receipt of the **Richardson's** satisfactory proof of loss, **GEICO** asserted that **Richardson's** claim for statutory penalties and attorney's fees was without merit.

Almost two years later, on July 31, 2009, **GEICO** filed a motion for summary judgment, with a supporting affidavit referencing numerous attached exhibits. The affidavit was sworn by **GEICO's** Claims Examiner, Thomas Miller, who had personally worked on **Richardson's** claim. **GEICO** argued in its motion for summary judgment that **Richardson** was not entitled to penalties and attorney's fees against **GEICO** for "bad faith" because the pleadings, exhibits, and Miller's affidavit showed that **Richardson** could not sustain his burden of proving that **GEICO** "failed to pay" the UIM claim within thirty days of receiving "satisfactory proof of loss." Additionally, **GEICO** argued that **Richardson** could not sustain his burden of proving that **GEICO** was arbitrary, capricious, or without probable cause in allegedly "failing" to timely pay **Richardson's** UIM claim. **Richardson** filed no affidavits or memorandum in opposition to **GEICO's** motion for summary judgment.

* In its memorandum in support of the motion for summary judgment, **GEICO** maintained that the statutory thirty-day time period in [LSA-R.S. 22:658 FN8](#) did not begin to run until the Navy's lien was "finalized." Once **GEICO** was informed that the Navy's lien had been settled and that **GEICO** was authorized to pay the UIM limits and medical payment coverage directly to **Richardson**, **GEICO** promptly issued payment the following day. Thus, **GEICO** contended that **Richardson** was paid within the statutory time period. Alternatively, **GEICO** argued that it diligently and actively adjusted **Richardson's** UIM claim in good faith, attempting to resolve the uncertainty of the Navy's lien for the medical payments coverage, and reasonably relied on a good faith defense that it could not directly pay **Richardson** the UIM limits until the Navy's lien was finally resolved. **GEICO** also maintained that **Richardson's** attorney and/or attorney's office staff had acknowledged that it was necessary for **GEICO** to verify the Navy's lien before making an unconditional tender.

On November 9, 2009, the summary judgment motion was tried. Judgment in favor of **GEICO**, dismissing **Richardson's** claims with prejudice, was signed on November 20, 2009. No reasons were assigned. On appeal, **Richardson** contends that the trial court erred in failing to find that **GEICO** was arbitrary, capricious, or without probable cause when it failed to unconditionally tender the *undisputed* portion of **Richardson's** claim within the statutorily-mandated time period after **GEICO** received a satisfactory proof of loss on **Richardson's** UIM and medical payments claims,

SUMMARY JUDGMENT

Appellate courts review summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. [Pugh v. St. Tammany Parish School Bd.](#), 07-1856 (La.App. 1 Cir. 8/21/08), 994 So.2d 95, 97 (on rehearing), writ denied, 08-2316 (La.11/21/08), 996 So.2d 1113. An appellate court

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thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to summary judgment as a matter of law. *Ernest v. Petroleum Service Corp.*, 02-2482 (La.App. 1 Cir. 11/19/03), 868 So.2d 96, 97, writ denied, 03-3439 (La.2/20/04), 866 So.2d 830. A motion for summary judgment should only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to summary judgment as a matter of law. LSA-C.C.P. art. 966B. Summary judgment is favored and “is designed to secure the just, speedy, and inexpensive determination of every action.” LSA-C .C.P. art. 966A(2).

On a motion for summary judgment, the initial burden of proof remains with the moving party. However, if the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the opposing party's claim, action, or defense, but rather to *point out* to the court that there is an absence of factual support for one or more elements essential to the opposing party's claim, action, or defense. Thereafter, if the opposing party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966C(2).

***4** Once the motion for summary judgment has been properly supported by the moving party, the failure of the opposing party to produce evidence of a material factual dispute mandates the granting of the motion. *Pugh*, 994 So.2d at 97; see also LSA-C.C.P. art. 967B. But the law is well settled that the record as a whole must show that all critical elements of the opposing party's case have been put to rest, regardless of whether the opposing party filed

counter affidavits. This is because the burden of proof is on the mover to present a prima facie case; the opponent has nothing to prove in response to the motion if a prima facie case is not made. *Estain v. U.S. Dept. of Transp. and Development*, 01-0554 (La.App. 1 Cir. 5/10/02), 819 So.2d 375, 378. Further, despite the legislative mandate that summary judgments are favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. *Willis v. Medders*, 00-2507 (La .12/8/00), 775 So.2d 1049, 1050.

In *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512 (La.7/5/94), 639 So.2d 730, 751, the Louisiana Supreme Court set forth the following parameters for determining whether an issue is genuine or a fact is material:

A “genuine issue” is a “triable issue.” More precisely, “[a]n issue is genuine if reasonable persons could disagree. If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. Summary judgment is the means for disposing of such meretricious disputes.” In determining whether an issue is “genuine,” courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence. “Formal allegations without substance should be closely scrutinized to determine if they truly do reveal genuine issues of fact.”

A fact is “material” when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. “[F]acts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute.” Simply put, a “material” fact is one that would matter on the trial on the merits. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of a trial on the merits. [Citations omitted.]

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Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. *Guardia v. Lakeview Regional Medical Center*, 08-1369 (La.App. 1 Cir. 5/8/09), 13 So.3d 625, 628.

LAW AND ANALYSIS

At issue in GEICO's motion for summary judgment is the appropriate date of Richardson's satisfactory proof of loss, if any, *and* whether GEICO arbitrarily, capriciously, and without probable cause failed to pay Richardson's UIM and medical payments claims within thirty days of receipt of the satisfactory proof of loss. As the moving party, GEICO had the initial burden of proof for purposes of seeking summary judgment; however, as a defendant in this matter, GEICO would not bear the burden of proof on these issues at trial. Therefore, GEICO was only required to *point out* to the trial court that there was an absence of factual support for one or more elements essential to Richardson's action.

*5 [1][2] Louisiana Revised Statutes 22:658A(1) requires all insurers to pay the amount of any claim due any insured within thirty days *after receipt of satisfactory proofs of loss*. Section B(1) of this statute provides the following:

Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor ..., when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of fifty 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 in the event a partial payment or tender has been made, fifty percent of the difference between the amount paid or tendered and the amount found to be due as well as reasonable attorney fees and costs.

This statute must be strictly construed because it is penal in nature. *Hart v. Allstate Ins. Co.*, 437 So.2d 823, 827 (La.1983). Furthermore, this statute is applicable to a UIM claim. *Id.* An insured who claims penalties and attorney's fees under this statute has the burden of proving that the insurer received a "satisfactory proof of loss" as a necessary predicate to a showing that the insurer was arbitrary, capricious, or without probable cause. *Id.*, 437 So.2d at 827-828.

[3] It is well-settled that a satisfactory proof of loss is that which is sufficient to *fully* apprise the insurer of the insured's claims. *Louisiana Bag Co., Inc. v. Audubon Indem. Co.*, 08-0453 (La.12/2/08), 999 So.2d 1104, 1119. *See also McDill v. Utica Mut. Ins. Co.*, 475 So.2d 1085, 1089 (La.1985). Accordingly, for a satisfactory proof of loss of a UIM claim, the insured must establish that the insurer received sufficient facts to fully apprise the insurer that the owner or operator of the other vehicle involved in the accident was uninsured or underinsured, that he was at fault, that such fault gave rise to damages, and establish the extent of those damages. *Hart*, 437 So.2d at 828. Further, to prevail under LSA-R.S. 22:658B(1), the insured must establish that the insurer received satisfactory proof of loss, failed to pay the claim within the applicable statutory period, and that the failure to timely tender a reasonable amount was arbitrary, capricious, or without probable cause. *Louisiana Bag Co.*, 999 So.2d at 1112-1113; *Khaled v. Windham*, 94-2171 (La.App. 1 Cir. 6/23/95), 657 So.2d 672, 679, *writ denied*, 95-1914 (La.11/1/95), 661 So.2d 1369.

[4][5] Louisiana has adopted liberal rules concerning the lack of formality relative to proof of loss. *Louisiana Bag Co.*, 999 So.2d at 1119; *Sevier v. U.S. Fidelity & Guar. Co.*, 497 So.2d 1380, 1384 (La.1986); *Versai Management Corp. v. Clarendon America Ins. Co.*, 597 F.3d 729, 739 (5th Cir.2010). As long as the insurer obtains sufficient information to act on the claim, the manner in which it obtains the information is immaterial. *Sevier*, 497

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So.2d at 1384. Thus, a satisfactory proof of loss occurs when the insurer has adequate knowledge of the loss. *Versai Management Corp.*, 597 F.3d at 739. Whether and when a satisfactory proof of loss was received is a question of fact. *Boudreaux v. State Farm Mut. Auto. Ins. Co.*, 04-1339 (La.App. 4 Cir. 2/2/05), 896 So.2d 230, 236.

*6 [6][7][8] However, the statutory penalties are inappropriate when the insurer has a reasonable basis to defend the claim and was acting in good-faith reliance on that defense. *Block v. St. Paul Fire & Marine Ins. Co.*, 32,306 (La.App. 2 Cir. 9/22/99), 742 So.2d 746, 752. This is especially true where there is a reasonable and legitimate question as to the extent and causation of a claim; bad faith should not be inferred from an insurer's failure to pay within the statutory time limits when such reasonable doubts exist. *Id.* In order for an insurer to avoid being arbitrary or capricious after receiving a satisfactory proof of loss, it is necessary for the insurer to determine whether there exists a legitimate basis for not paying at least what it considers to be undisputed. *Reed v. State Farm Mut. Auto. Ins. Co.*, 03-0107 (La. 10/21/03), 857 So.2d 1012, 1022. The determination of whether an insurer acted in bad faith turns on the facts and circumstances of each case. This is because a prerequisite to any recovery under the statute is a finding that the insurer not only acted (or failed to act), but did so, arbitrarily, capriciously, and without probable cause. As this determination is largely factual, great deference must be accorded the trier-of-fact. *Block*, 742 So.2d at 752.

[9] GEICO attempted to point out in its motion for summary judgment that **Richardson** was unable to prove that a satisfactory proof of loss had been made until GEICO received notice of the amount and final settlement of the Navy's lien on July 16, 2007. However, one of the attachments to the Miller affidavit submitted in support of GEICO's motion for summary judgment reveals that in GEICO's June 20, 2007 notice-of-intent letter, in which it indicated that it intended to offer the UIM

policy limits to **Richardson**, GEICO acknowledged that its intent to offer the UIM limits was made "pursuant to [**Richardson's**] demand of May 24th, 2007." (Emphasis added.) Thus, the evidence offered by GEICO to point out **Richardson's** lack of a satisfactory proof of loss actually shows the opposite. GEICO's intent-to-offer letter clearly reveals that GEICO was in receipt of a satisfactory proof of loss for **Richardson's** claim on May 25, 2007, when it indisputably received **Richardson's** demand letter and intended to offer the UIM policy limits to its insured in response to that demand. Accordingly, GEICO had thirty days (until June 24, 2007) to pay the amount of the UIM claim that was due **Richardson**. It is undisputed that payment was not made until July 17, 2007, which is outside of the thirty-day time period.

GEICO argues, however, that **Richardson** produced no evidence to show that GEICO acted in an arbitrary and capricious manner in making the untimely payment. GEICO submitted Miller's affidavit in support of the summary judgment, outlining GEICO's numerous and repeated attempts to contact **Richardson's** attorney and/or a representative of the Navy in order to resolve the issue of the outstanding medical payments lien. The evidence reveals that GEICO attempted to contact **Richardson's** attorney on June 21, 2007, but instead spoke with a representative in the attorney's office. GEICO was advised that GEICO's intent-to-offer the UIM limits letter had been received. **Richardson's** attorney's office representative confirmed that GEICO's intent-to-offer letter "satisfied [**Richardson's**] demand within the statutory deadlines[.]" and that **Richardson** "did not expect GEICO to release funds until the issue of the Navy's lien was addressed." According to Miller's affidavit, **Richardson's** attorney also advised GEICO on June 28, 2007, that he understood that GEICO was "not delaying payment, but was only seeking verification that the lien issues had been addressed." Thus, GEICO maintains that its attempt to confirm the Navy's lien was a legitimate and reasonable reason to delay payment to

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Richardson that precludes penalties and attorney's fees under [LSA-R.S. 22:658](#).

*7 A determination of whether an insurer's failure or refusal to pay within the time limits is arbitrary, capricious, or without probable cause is primarily a question of fact that depends upon facts known to the insurer at the time of the insurer's action. [Louisiana Bag Co.](#), 999 So.2d at 1114; [Cryer v. Gulf Ins. Co.](#), 276 So.2d 889, 892 (La.App. 1 Cir.1973). The phrase "arbitrary, capricious, or without probable cause" is synonymous with "vexatious," and a "vexatious refusal to pay" means "unjustified, without reasonable or probable cause or excuse." [Reed](#), 857 So.2d at 1021. In this regard, the record indicates that **GEICO** knew of the Navy lien well before it received **Richardson's** demand letter, and that **GEICO** actively attempted to verify the amount of the Navy claim before making payments under the UIM policy limits and medical payments coverage. **GEICO** argues that it reasonably relied upon the assertions of a representative in **Richardson's** attorney's office that the statutory time line had been met, and **Richardson** did not submit any opposing evidence to the contrary.

But the evidence submitted by **GEICO** also clearly shows that **GEICO** became aware of the estimated amount of the Navy lien as early as June 6, 2007, when **GEICO** was informed by the Navy representative that the lien amount was \$13,976.57. Therefore, even though **GEICO** was advised that **Richardson's** attorney was actively seeking a compromise of the Navy's lien, **GEICO** had actual and adequate knowledge by June 6, 2007, that the undisputed amount involved in **Richardson's** UIM claim was the difference between the \$25,000.00 UIM policy limits and the approximate \$14,000.00 amount of the Navy lien. At that point, **Richardson** contends that **GEICO** should have unconditionally tendered the undisputed amount to **Richardson** with the Navy named as an additional payee on the check, pursuant to [McDill](#), 475 So.2d at 1091-1092. We agree.

While the insurer is not required to tender payment

for amounts that are reasonably in dispute, "there can be no good reason-or no probable cause-for withholding an undisputed amount." [Louisiana Bag Co.](#), 999 So.2d at 1114 (quoting [Hammett v. Fire Ass'n of Philadelphia](#), 181 La. 694, 160 So. 302, 304305 (1935)). Pursuant to [LSA-R.S. 22:658](#), an insurer is required to make an unconditional payment of what it indisputably owes when the insured has demonstrated that he is entitled to recover under the insurance contract. [Demma v. Auto. Club Inter-Insurance Exchange](#), 08-2810 (La.6/26/09), 15 So.3d 95, 103104. The record clearly shows that **GEICO** made no unconditional tender of the undisputed portion of the UIM limits in this case. **GEICO's** intent-to-offer letter outlining the terms of payment of the UIM policy limits was not absolute and unconditional, without stipulations and conditions. See [Warner v. Liberty Mut. Fire Ins. Co.](#), 543 So.2d 511, 515-516 (La.App. 4 Cir.1989). An unconditional tender must have "no strings attached," and thus by definition cannot be an offer to settle or a letter outlining the *intent* to offer a settlement. [Demma](#), 15 So.3d at 102.

*8 A *McDill* tender must be an unconditional tender. *Id.* Further, the *McDill* tender is a good faith act on the part of the insurer acknowledging the insurer's contractual obligation to pay. *Id.*, 15 So.3d at 104. An insurer that has a reasonable basis to defend the claim and who acts in good faith reliance on that defense is not subject to sanctions under [LSA-R.S. 22:658](#) unless clear proof is presented that the insurer was arbitrary, capricious, or without probable cause in refusing to pay. *Id.* While **GEICO** argues it reasonably relied on **Richardson's** attorney's representative's assertions that **GEICO's** letter evidencing the intent to offer the UIM policy limits satisfied **Richardson's** demands, **GEICO** fails to *point out* how that reliance affected its obligation to unconditionally tender the undisputed amount of **Richardson's** UIM and medical payments claims when **GEICO** had actual and adequate knowledge of the undisputed amount on June 6, 2007.

The Louisiana Supreme Court has recognized that

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“[a]ny insurer who *fails to pay [an] undisputed amount* has acted in a manner that is, *by definition*, arbitrary, capricious or without probable cause ...” *Louisiana Bag Co.*, 999 So.2d at 1116 (citation omitted)(emphasis added). Thus, the failure to pay an undisputed amount is a per se violation of the statute. *See Id.*; *Versai Management Corp.*, 597 F.3d at 739. **GEICO**'s motion for summary judgment evidence failed to “point out” an absence of factual support that **GEICO** arbitrarily, capriciously, and without probable cause failed to unconditionally tender the undisputed amount of the UIM claim within thirty days of receiving **Richardson's** satisfactory proof of loss. Thus, we conclude that **GEICO** did not meet its burden of presenting a prima facie case in its motion for summary judgment. Accordingly, the trial court erred in granting summary judgment in favor of **GEICO** and in dismissing **Richardson's** suit. *See Estain*, 819 So.2d at 378.

CONCLUSION

For the reasons assigned, we reverse the grant of summary judgment in favor of **GEICO** on **Richardson's** claim for statutory penalties and attorney's fees due to **GEICO's** failure to unconditionally tender the undisputed portion of **Richardson's** UIM and medical payments claims within the statutorily-mandated time period. We remand to the trial court for further proceedings in accordance with this opinion. All costs of this appeal are assessed to defendant insurer, **GEICO** Indemnity Company.

REVERSED AND REMANDED.

FN1. At times in the record, **GEICO** is also referred to as Government Employees Insurance Company.

FN2. A copy of the demand letter is in the record; however, the attachments referenced in the demand letter were not included in the evidence filed in the record.

The demand letter was attached to an affidavit executed by **GEICO's** Claims Examiner, Thomas Miller, who personally handled **Richardson's** UIM claim. The Miller affidavit was filed and admitted into evidence in support of **GEICO's** motion for summary judgment.

FN3. A copy of the Navy's claim letter was attached to Miller's affidavit.

FN4. Miller's affidavit outlines at least twenty-two instances where **GEICO** contacted the Navy's representative or **Richardson's** attorney and/or attorney's office representative in an attempt to address the issue of the Navy's outstanding lien.

FN5. A copy of **GEICO's** intent-to-offer letter was attached to Miller's affidavit.

FN6. A copy of the faxed letter was attached to Miller's affidavit. Additionally, a copy of the “Agreement to Protect Government's Interest” executed by **Richardson's** attorney on February 12, 2007, and accepted by the Navy on March 5, 2007, was attached to Miller's affidavit as well.

FN7. A copy of **GEICO's** letter outlining the payment of **Richardson's** UIM policy limits and medical payments coverage was attached to Miller's affidavit.

FN8. Acts 2008, No. 415, § 1, effective January 1, 2009, re-designated the provisions of Title 22 into a new format and numbering scheme, including the re-numbering of former **LSA-R.S. 22:658** to the current **LSA-R.S. 22:1892** and former **LSA-R.S. 22:1220** to the current **LSA-R.S. 22:1973**, without changing the substance of the provisions. Both of these statutes prohibit insurers from failing to timely pay claims after receiving satisfactory proofs of loss when that failure to pay is arbitrary,

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capricious, or without probable cause. However, only the shorter time period of thirty days provided in [LSA-R.S. 22:658](#) (current [LSA-R.S. 22:1892](#)) is at issue in this case. Because Richardson's cause of action arose under the previous statute number, it will be utilized throughout this opinion. See [Guillory v. Lee, 09-0075 \(La.6/26/09\)](#), 16 So.3d 1104, 1111 n. 5.

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