No. 16-31139

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARCUS BERRY,

Plaintiff – Appellee

v.

AUTO-OWNERS INSURANCE COMPANY,

Defendant – Appellant

On Appeal from the United States District Court, Middle District of Louisiana, No. 3:13-cv-00145, Honorable Brian A. Jackson, Presiding

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BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant Auto-Owners Insurance Company certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant, Auto-Owners Insurance Company, respectfully requests oral argument. This appeal will require the Court to interpret the law establishing limitations on a plaintiff's recovery against a liability insurer in a direct action. This appeal also will require the Court to determine whether Louisiana law imposes an evidentiary requirement that insurance policies be entered in evidence at trial in order to give effect to policy limits even if those limits are not contested. Oral argument may assist the Court in resolving these issues.

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JURISDICTIONAL STATEMENT

Auto-Owners Insurance Company ("Auto-Owners") appeals from (1) the June 17, 2016 Ruling and Order denying its "Motion for Relief From a Judgment Pursuant to Fed. R. Civ. P. 60(b) or Alternatively a Declaratory Judgment," which sought to amend the May 7, 2015 final judgment; and (2) the October 27, 2016 Ruling and Order denying its "Motion to Alter or Amend A Judgment Pursuant to Fed. R. Civ. P. 59(e)," which sought reconsideration of the district court's June 17, 2016 decision. Both Rulings and Orders were entered by the Honorable Brian A. Jackson in the United States District Court for the Middle District of Louisiana.

Auto-Owners timely filed a Notice of Appeal, dated November 2, 2016. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court abuse its discretion by relying on the erroneous legal premise that an insurer must generally introduce evidence of its policy limits at trial in a direct action, even when the limits are well known and uncontested, or else face potentially unlimited liability?

2. Assuming Auto-Owners somehow erred in failing to properly introduce evidence of its policy limits at trial, did the district court abuse its discretion in denying relief under Rule 60(b) to correct a judgment that is manifestly erroneous as a matter of law, when the error was clear on the face of the record, no party had detrimentally relied on the judgment, and Auto-Owners had good reason for failing to seek relief earlier?

3. Did the district court deprive Auto-Owners of procedural due process by holding it liable for punitive extra-contractual damages without any bad-faith claim being properly before the court?

STATEMENT OF THE CASE

This case arises out of a February 2012 auto collision involving Marcus Berry and Leon Roberson. At the time of the collision, Mr. Roberson was covered by an Auto-Owners liability policy with a $100,000-per-person limit for bodily injury. *See* ROA.329–ROA.367. Mr. Berry sued Mr. Roberson and Auto-Owners for damages that he allegedly suffered as a result of the collision.

From the beginning of this case, it has always been clear and undisputed that Mr. Roberson was covered at the time of the accident by a valid Auto-Owners liability policy. Auto-Owners admitted this point in its answer and has never suggested otherwise. Specifically, Auto-Owners admitted Paragraph 7 of Mr. Berry's Petition, which alleged: "[A]t the time of this accident there was in full force and effect a policy of insurance issued by defendant, AUTO OWNERS INSURANCE COMPANY, under the terms of which it agreed to insure and indemnify defendant, LEON ROBERSON, from the damages asserted herein." ROA.23; *see* ROA.42.

Likewise, there has never been any dispute or uncertainty concerning the limits of the Auto-Owners policy. Auto-Owners' Rule 26 initial disclosures, which were filed into the district-court record on August 2, 2013, state:

> Owners Insurance Company Policy No. 48-378-494-01, issued to Leon and Judy Roberson, which was in effect at the time of this accident, has a $100,000 per person/$300,000 per occurrence policy limit and was in effect at the time of the accident that is the subject matter of this proceeding.

ROA.72. Shortly thereafter, in response to Mr. Berry's interrogatories, Auto-Owners again disclosed the policy number and limits and provided Mr. Berry with a copy of the policy. ROA.465–ROA.466. And even before these disclosures, Mr. Berry was fully aware of the policy limits. In September 2012, before this lawsuit was even filed, counsel for Mr. Berry offered to settle with Auto-Owners for the policy limits of $100,000. *See* ROA.382. This same offer was repeated five times over the next 14 months. *See* ROA.371–ROA.372.

The only substantive pre-trial motion filed in this case was Mr. Berry's "Partial Motion for Summary Judgment," which urged the district court to "find Leon Roberson to be 100% at fault for the collision and find that Mr. Berry was injured in the collision." ROA.80. Auto-Owners and Mr. Roberson disputed causation but did not contest liability. *See* ROA.105 n.1. Yet nothing in this motion or any other motion raised any issue relating to the terms or limits of the Auto-Owners policy.

The Final Pretrial Order, which was filed on June 23, 2014, made clear that there were no disputes of fact or law with respect to the policy limits or any other term of the Auto-Owners policy. *See* ROA.132–ROA.143. The pretrial order noted only three disputed issues of fact:

> 1. The nature, extent and source of the injuries alleged by the plaintiff;
>
> 2. All those inherent in the pleadings on file, and those related to the contested issues of fact above; and,

3. The dollar value of any damages to which the plaintiff may be entitled to recover.

ROA.135. Further, the pretrial order noted only two disputed legal issues:

1. Causation for alleged severity of plaintiff's injuries; and

2. Damages sustained as the result of accident sued upon.

ROA.135. Finally, the existence and terms of the policy were listed by the parties as one of the "undisputed facts": "At the time of the collision, there was a policy of liability insurance (policy #48-378-494-01) provided by Defendant Auto Owners Insurance Company to policy holder Judy Roberson, under the terms of which it agreed to insure and indemnify Defendant, Leon Roberson, for the damages asserted herein." ROA.135.

Consistent with the pretrial order, the evidence and testimony presented at trial focused exclusively on the extent of the damages arising from Mr. Berry's injuries and whether these injuries were caused by the collision. None of the lawyers presented evidence or argument concerning the existence or specific terms of the Auto-Owners policy, or the extent of Auto-Owners' liability under that policy. Similarly, the verdict form was confined to five specific issues: (1) whether Mr. Berry was injured as a result of the February 15, 2012 collision; (2) whether Mr. Berry suffered from a pre-existing condition; (3) whether any pre-existing condition was aggravated by the collision; (4) what percentage of aggravation was attributable to the collision; and (5) the damages to which Mr. Berry is entitled in the categories of physical pain and

suffering, medical expenses, and loss of enjoyment of life. *See* ROA.211–ROA.212. Of course, none of these issues has anything to do with the extent of Auto-Owners' liability under the terms of its policy.

The jury returned a verdict in the amount of $1,290,000, which was ultimately reduced to $790,000 on the Defendants' motion for remittitur. *See* ROA.212, ROA.293. On May 7, 2015, the district court entered judgment against the Defendants in the amount of $790,000. ROA.297. On May 28, 2015, the Defendants filed a notice of appeal. ROA.298. Several days later, on June 3, 2015, Auto-Owners sent a $100,000 check to Mr. Berry as payment for its share of the judgment, up to its policy limit. *See* ROA.328. On July 27, 2015, the Defendants filed their opening brief in this Court, challenging the judgment on the grounds that the future medical expenses were not adequately supported by evidence and that the general-damages award was excessive. *See Berry v. Auto-Owners Insurance Company*, No. 15-30483. On December 10, 2015, a panel of this Court rejected these arguments and affirmed the district court's damages judgment. ROA.304–ROA.312.

On March 24, 2016—over nine months after the $100,000 check had been sent—counsel for Mr. Berry sent a letter to Auto-Owners claiming, for the very first time, that Auto-Owners was liable for the full judgment, well in excess of its policy limits, plus interest and costs. *See* ROA.381. In a subsequent letter, counsel for Mr. Berry elaborated his belief that Mr. Roberson and Auto-Owners were "solidarily liable" for the full amount of

the judgment because "[t]he Auto-Owners insurance policy was never entered into evidence at trial." ROA.383. On April 13, 2016, counsel for Mr. Berry sent a letter to Auto-Owners' counsel stating: "Please inform Auto-Owners that the judgment must be satisfied by Friday, April 22, 2016 by forwarding a check payable to Marcus Berry and Dudley DeBosier in the amount of $892,565.05. Otherwise, we will begin seizing Auto-Owners' assets." ROA.389.

In a different letter sent on April 11, 2016, counsel for Mr. Berry explained that "Marcus Berry did not deposit the $100,000.00 check sent by Auto-Owners on June 3, 2015 . . . because it did not satisfy the judgment and appeared to have strings attached." ROA.385. Conspicuously, however, Mr. Berry did not provide a reasonably prompt contemporaneous response informing Auto-Owners of his belief that the $100,000 check "did not satisfy the judgment." *Id*. Had he done so—and had Auto-Owners understood that Mr. Berry was relying on the erroneously imprecise wording of the judgment in an attempt to collect hundreds of thousands of dollars from Auto-Owners that he was not rightfully entitled to—Auto-Owners could have and would have included this issue in its appeal. Instead, it appears that Mr. Berry elected to silently hold the check for months and wait until the appeal was concluded before relaying his objection and demanding full payment of the judgment from Auto-Owners.

In light of Mr. Berry's new contentions, Auto-Owners filed a motion under Federal Rule of Civil Procedure 60(b) on April 20, 2016, seeking to clarify the judgment to state that Auto-Owners is liable only up to the policy limits of $100,000. *See* ROA.313–ROA.368. The Auto-Owners policy, with the declarations pages showing the policy limits, was attached. *See* ROA.329–ROA.367. In opposition, Mr. Berry argued that Auto-Owners is properly liable for the full amount of the judgment because it "chose not to introduce the policy into evidence at trial." ROA.371.

The district court denied Auto-Owners' motion. *See* ROA.426–ROA.436. Importantly, the district court did not suggest that Auto-Owners was properly liable for the full amount of the judgment under substantive law. Rather, the district court held only that Auto-Owners had failed to take the procedural steps that would have limited its liability to the $100,000 policy limit. The district court held that, under Louisiana law, "policies of insurance must generally be introduced into evidence in order for insurers to avail themselves of policy limits contained therein," and that "the Louisiana Direct Action Statute does not, in and of itself, limit an insurer's exposure under a judgment when evidence of policy limits is not introduced." ROA.432. The district court found that the insurance policy was not introduced as an exhibit at trial and that "the parties did not enter into any stipulation that set forth the policy limits." ROA.433. The district court went on to suggest that Auto-

Owners "could have mitigated any risk of prejudice created by admission of the policy into evidence by requesting that it not be published to the jury, that it be redacted, or that a limiting instruction be given." ROA.434.

Additionally, despite the undisputed policy-limits evidence that had now been brought to its attention, the district court refused to grant relief under Rule 60 and amend the judgment to properly limit Auto-Owners' liability. The district court explained that "extraordinary circumstances" were not present because Auto-Owners had the policy-limits evidence from the beginning of the case but failed to introduce it in evidence or to raise any issue with the wording of the judgment in its initial appeal. *See* ROA.434–ROA.435. The district court stated:

> Defendant's failure to raise the issue of its policy limits in its answer, (Doc. 3), in a motion for summary judgment, in response to Plaintiff's motion for summary judgment, (Doc. 17), in a proposed verdict form, in its proposed jury instructions, (Docs. 30, 38), and critically, by way of stipulation or introduction of evidence at trial militates against finding that "extraordinary circumstances" are present.

ROA.435. The district court suggested that "an insurer's failure to introduce a policy into evidence" may be "a deliberate decision designed to protect its insured from an excess judgment," and stated that it had "no way of knowing if there was any strategic value in withholding the policy from evidence." ROA.435.

Auto-Owners engaged new counsel, and then filed a timely motion on July 14, 2016, seeking reconsideration of the district court's decision

under Federal Rule of Civil Procedure 59(e). *See* ROA.440–ROA.458. Auto-Owners noted that the policy limits ***were*** in fact submitted into the district-court record in Auto-Owners' initial disclosures, and that these policy limits had never been disputed or questioned by Mr. Berry. Auto-Owners argued that it was not required to prove the policy limits at trial because they were not contested, and that in any event Louisiana law requires only that the policy limits be included in the district-court record. Auto-Owners further argued that, even assuming it had erred in some way, such error was excusable neglect and should not subject it to a judgment of more than seven times its policy limit.

The district court also denied Auto-Owners' Rule 59 motion, reaffirming its previous holding that "policies of insurance must generally be introduced into evidence in order for insurers to avail themselves of policy limits contained therein under the Direct Action Statute." ROA.528. The district court held that "Defendant's failure to introduce evidence of its policy limits was not excusable neglect." ROA.531. The district court quoted *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993), for the proposition that "the determination of 'excusable neglect' is 'at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission.'" ROA.531. The district court specifically noted the importance of factors such as "the danger of prejudice to the [non-moving party]" and "whether the movant acted in

good faith." ROA.531. Yet the district court did not actually discuss the danger of prejudice to Mr. Berry or whether Auto-Owners acted in good faith. Rather, the district court found Auto-Owners' purported error to be inexcusable merely because it "had the opportunity to limit its potential liability to Plaintiff at numerous stages of the trial and after the Final Judgment was rendered" but did not do so. *See* ROA.531.

Auto-Owners now appeals the district court's denial of its Rule 60(b) motion, both initially and on reconsideration under Rule 59(e).

SUMMARY OF THE ARGUMENT

Louisiana is one of only a few states that have established a procedural right of action directly against the insurers of alleged tortfeasors. That right of action, however, is a limited right, confined by the statute to "the terms and limits" of the insurance policy. While some claims, such as a claim of bad faith, may allow a policyholder to recover beyond an insurer's policy limits in special circumstances (and under *other* statutory laws), a claim by an injured third party under Louisiana's Direct Action Statute does not. Here, Mr. Berry brought his only claim against Auto-Owners under the Direct Action Statute. Accordingly, Mr. Berry had no legal right to recover more than the policy limits from Auto-Owners. Nevertheless, the district court entered judgment against Auto-Owners and its insured for more than seven times the applicable policy limits.

As an initial matter, Mr. Berry has never argued, and the district court never held, that Auto-Owners is liable for the full amount of the judgment under any substantive law. Instead, both suggest that Auto-Owners is liable for the full amount of the judgment because of an alleged procedural misstep: *i.e.,* Auto-Owners did not submit the insurance policy in evidence at trial. Notably, Mr. Berry does not dispute, *and never has disputed*, that the policy contained a $100,000 policy limit for a single plaintiff. In fact, he repeatedly sought to settle the case for that known limit. Rather, Mr. Berry seeks to rely on what one Louisiana court has

referred to as "a mere technicality"—a technicality that the trial court in that case allowed the insurer to fulfill through a post-trial motion. *See Willis v. State Farm Mut. Auto Ins. Co.*, 747 So. 2d 682, 685 (La. App. 3rd Cir. 1999). Similarly, this Court held in *Dey v. State Farm Mutual Automobile Insurance*, 789 F.3d 629 (5th Cir. 2015), that a judgment against an insurer for more than the insurer's policy limits—policy limits that were never put in evidence—was a manifest error of law that should be corrected on the insurer's post-trial motion. Here, however, the district court abused its discretion by denying Rule 60(b) relief to Auto-Owners to correct the judgment.

First, the district court's decision was an abuse of discretion because it rested on an erroneous legal basis. The district court held that "Louisiana law is clear that policies of insurance must generally be introduced in evidence in order for insurers to avail themselves of the policy limits contained therein." ROA.432. Contrary to that contention, however, Louisiana law provides that policy limits ***must not*** be shown to the jury unless they are disputed, and, in this case, they were not disputed. *See* LA. CODE EVID. art. 411. Moreover, Louisiana law is also clear that, while the jury's role is to determine the plaintiff's "*actual* damages without regard to legal limits," the "trial court's role [is] to enter judgment in accordance with, not only the jury's verdict, but also the legal limits of [the plaintiff]'s recovery and [the insurer]'s liability." *Malloy v. Vanwinkle*, 662 So. 2d 96, 102–103 (La. App. 4th Cir. 1995) (emphasis in

original). Two of the Louisiana cases cited by the district court in support of its purported rule are superseded by a subsequent change in the law and distinguishable in several respects, and the third case actually supports Auto-Owners' position.

Auto-Owners' actions before the trial court were sufficient to invoke the limits of its policy, and no applicable source of law would require more. Mr. Berry indisputably knew what the policy limits were before the case was even filed, and he never contested them. Auto-Owners disclosed the policy limits to Mr. Berry on multiple occasions and even filed a statement of the policy limits *in the record* on the district court docket more than a year before trial. *See* ROA.72. In the pretrial order, the parties stipulated to the existence of the policy (which contained a clear statement of its limits), and again Mr. Berry did not raise any issue concerning the policy limits as a disputed issue of fact or law. Auto-Owners was entitled to rely on that pretrial order and, thus, did not need to prove uncontested issues at trial.

Second, even assuming that Auto-Owners did commit some procedural misstep, the district court abused its discretion by refusing to grant relief under Rule 60(b) based on "excusable neglect" when the controlling equitable factors plainly weigh in Auto-Owners' favor. It is beyond dispute that the judgment does not "reflect the true merits of the case," and that Auto-Owners has been denied "substantial justice" by a judgment that goes far beyond what Auto-Owners rightfully owes. *See*

Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. Unit A Jan. 1981). Furthermore, Mr. Berry has not detrimentally relied on the judgment, and he will not be prejudiced if the judgment is corrected because he never had any legal right to recover more than the policy limits in the first place. Auto-Owners' delay in seeking post-trial relief is attributable to the fact that Mr. Berry simply held Auto-Owners' check for the policy limits (without complaint or objection) for nine months until the appeal was concluded before notifying Auto-Owners, for the first time, that he intended to recover the full judgment from the insurer alone. Moreover, the judgment can be quickly and easily corrected without any further proceedings or litigation expenses by the parties. Yet the district court ignored most of these considerations and denied relief merely because Auto-Owners had missed earlier opportunities to limit its liability.

Third, the district court denied Auto-Owners procedural due process by holding it liable for punitive extra-contractual damages without any bad-faith claim being properly before the court. Mr. Berry's only claim in this case is under the Direct Action Statute, and although damages beyond an insurer's policy limits are sometimes recoverable by an insured in a bad-faith action, they are ***not*** recoverable in a direct action by a third party such as Mr. Berry. Although it appears that Mr. Berry has attempted to assert a bad-faith-based argument in response to Auto-Owners' Rule 60(b) motion, claiming for the first time that Auto-Owners acted in bad faith in the defense of its insured, this is doubly

improper because no such claim was stated in the complaint or pretrial order, and because Mr. Berry could not assert such a claim in any event. Yet despite having no notice of any such claim and no opportunity to defend against it, Auto-Owners is nonetheless being held liable for hundreds of thousands of dollars in extra-contractual damages, which is in essence a judgment for bad-faith damages. Under such circumstances, Auto-Owners has been denied procedural due process by the district court's entry of the excess judgment and its refusal to amend it.

ARGUMENT

This Court "review[s] the district court's decision granting or denying relief under Rule 60(b) for abuse of discretion." *United States v. Fernandez*, 797 F.3d 315, 318 (5th Cir. 2015). "A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Esmark Apparel, Inc. v. James*, 10 F.3d 1156, 1163 (5th Cir. 1994). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). "Thus, abuse of discretion review of purely legal questions . . . is effectively *de novo*." *United States v. Delgado-Nunez*, 295 F.3d 494, 496 (5th Cir. 2002). Furthermore, a district court abuses its discretion in weighing equitable considerations "by not meaningfully addressing the positive equities . . . and by improperly characterizing the negative equities." *See Rodriguez-Gutierrez v. INS*, 59 F.3d 504, 509 (5th Cir. 1995).

I. The district court abused its discretion by refusing to correct a judgment that is manifestly contrary to law, based on its erroneous holding that Louisiana law generally requires an insurer to prove uncontested policy limits at trial.

A. The judgment against Auto-Owners for more than its policy limits in a direct action is manifestly contrary to law.

Louisiana's Direct Action Statute grants a "right of action against an insurer where the plaintiff has a substantive cause of action against

the insured." *Solieau v. Smith True Value and Rental*, 144 So. 3d 771, 775 (La. 2013). However, that otherwise nonexistent right is expressly limited by the statute that created it to an "action against the insurer ***within the terms and limits of the policy***." LA. REV. STAT. § 22:1269(A) (the "Direct Action Statute") (emphasis added). Thus, in a direct action, "it is clear that ***a liability insurer is not liable beyond its policy limits***." *Sumrall v. Bickham*, 887 So. 2d 73, 79 (La. App. 1st Cir. 2004) (emphasis added).

Mr. Berry's only claim against Auto-Owners in this case is created by the Direct Action Statute. Furthermore, the following three points are undisputed:

1. Mr. Berry's right of recovery, pursuant to the Direct Action Statute, is expressly limited, as a matter of law, to the policy limits of the applicable liability policy;
2. The liability policy between Mr. Roberson and Auto-Owners had an applicable $100,000 policy limit; and
3. Mr. Berry knew what the policy limits were for over a year before trial, never contested them, and recognized their applicability by repeatedly trying to settle for them.

Based on those three undisputed points standing alone, it was an error of law to hold Auto-Owners liable under the Direct Action Statute for more than its undisputed policy limits. The district court held, however, that Auto-Owners should be liable for the full judgment under the Direct Action Statute solely because Auto-Owners failed to fulfill an alleged

requirement of placing the insurance policy in evidence at trial. *See* ROA.432. However, because this holding is based on an erroneous view of the law, the district court abused its discretion. *See, e.g.*, *Koon*, 518 U.S. at 100.

On its face, the Direct Action Statute does not require an insurer to introduce an insurance policy in evidence at trial in order to invoke "the terms and limits of the policy." *See* LA. REV. STAT. § 22:1269(A). Nor has any such requirement been established through case law. In fact, Louisiana law prohibits disclosing undisputed policy limits to the jury during trial. Under Louisiana law, "[t]he trial court's role [is] to enter judgment in accordance with, not only the jury's verdict, but also the legal limits of [the plaintiff]'s recovery and [the insurer]'s liability." *Malloy*, 662 So. 2d at 102. Here, the legal limit of Mr. Berry's recovery and Auto-Owners' liability is the $100,000 policy limit—a policy limit that is not, and never has been, disputed by Mr. Berry. Although the jury determined that Mr. Berry's "actual damages" exceeded $100,000, the district court was bound to enter judgment against Auto-Owners in accordance with the legal limit of its liability. *See id.*

In a similar case, this Court found that a judgment against an insurer for more than the policy limits—even when the insurer intentionally excluded evidence of those policy limits at trial—was a manifest error of law. *See Dey*, 789 F.3d at 635. This Court explained that the insurer's desire to avoid the potential prejudice of communicating its

policy limits to the jury did not preclude the insurer from "from arguing post-verdict that the judgment cannot be for more than such limit." *Id*. And ultimately, because there was no claim in the case allowing the plaintiff to recover more than the policy limits, the excess judgment was "a manifest error of law" that the district court properly corrected upon the insurer's Rule 59 motion. *See id.*

B. The district court erroneously held that an insurer must prove its policy limits at trial, even when the limits are uncontested, or else face potentially unlimited liability.

The district court held, erroneously, that "Louisiana law is clear that policies of insurance must generally be introduced in evidence in order for insurers to avail themselves of the policy limits contained therein." ROA.432 (citing *Williams v. Bernard*, 425 So. 2d 719 (La. 1983); *Willis v. State Farm Mut. Auto Ins. Co.*, 747 So. 2d 682 (La. App. 3rd Cir. 1999); *Payton v. Colar*, 488 So. 2d 1271 (La. App. 4th Cir. 1986)). However, Louisiana law imposes no such general requirement. In fact, Louisiana law clearly provides that policy limits ***must not*** be shown to the jury unless they are in dispute. Louisiana Code of Evidence article 411, which became effective on January 1, 1989, provides: "Although a policy of insurance may be admissible, ***the amount of coverage under the policy shall not be communicated to the jury*** unless the amount of coverage is a disputed issue which the jury will decide." (Emphasis added). Of the three cases relied upon by the district court, two predate

the enactment of Article 411, which changed the law in Louisiana regarding introduction of policy limits.[1] Further, the cases are distinguishable in critical respects and do not support the general rule that the district court purported to follow.

First, *Williams* did not involve a claim brought under the Direct Action Statute, but rather was a first-party suit on an insurance policy by an insured against its own insurer. *See* 425 So. 2d at 720. The Court also noted that "whether and to what extent [the insurer's] coverage was limited" was actually an issue to be decided by the jury, because the insurer had made a "general demand for a jury trial" that "did not specify particular issues to be tried by jury." *Id.* at 721.[2] Thus, because the insurer's liability could only be limited by a jury finding, the insurer had to introduce the policy in evidence at trial to establish that contractual limit. *See id.* Finally, and most importantly, the holding in *Williams* rested on a premise that is no longer good law. The Court explained: "We are aware of no law which prevents an insurer which has been sued on

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[1] The comment to Article 411 explains that it was "intended to clarify Louisiana law." As explained by one Louisiana appellate court: "Article 411 was enacted in response to the urging of the insurance industry that it was extremely prejudicial to their interests . . . for jurors to know how much insurance was available." *Vaughn v. Progressive Sec. Ins. Co.*, 896 So. 2d 1207, 1215 (La. App. 3rd Cir. 2005).

[2] By contrast, the course of proceedings in federal trials is governed by Final Pretrial Orders, which control and limit the scope of issues to be tried. *See* FED. R. CIV. P. 16; *see also Robinson v. Bump*, 894 F.2d 758, 761 (5th Cir. 1990).

its policy from introducing evidence of its policy limits, particularly after evidence or a stipulation of its coverage is introduced at trial." *Id.* As noted above, however, precisely such a law was enacted six years later, when Louisiana Code of Evidence article 411 made clear that evidence of policy limits typically should not be introduced to the jury.

Like *Williams*, *Payton* also predates the enactment of Article 411 and is thus superseded to the extent that it would suggest that policy limits must generally be presented to the jury. Moreover, *Payton* involved a situation where the policy limits were actually disputed: "During the trial, Insurors Indemnity had attempted to introduce in evidence its premises liability policy which has applicable limits of $300,000.00, but the Trial Judge sustained objections to the policy's authenticity and coverage." 488 So. 2d at 1272. Although *Payton* supports the common-sense point that evidence of a policy's terms and limitations must be introduced and proven when they are contested (which is consistent with Article 411), it certainly does not establish that the policy ***always*** must be introduced in evidence, even when it is uncontested.

In *Willis*, the defendant insurer, State Farm, did not introduce its policy in evidence at trial or state the policy limits in its pleadings. *See* 747 So. 2d at 683. After a judgment was issued holding State Farm liable for an amount beyond its policy limits, the insurer moved for a new trial to allow the policy to be introduced, which was ***granted***. *See id.* The appellate court then affirmed the trial court's decision to grant a new

trial, explaining that "the trial court believed that all parties knew what the policy limitations actually were"—that "no one was mislead [sic], ***everybody knew what the policy limits were***, and the absence of the policies in the record ***was a mere technicality***." *Id.* at 685 (emphasis added). The appellate court further explained that the trial court had refused to "allow[ ] a windfall to one party and an injustice to the other" merely because the insurer "overlooked the technical importance of putting the policy limits in the record." *Id.* at 686. Although *Willis* does suggest that the policy limits should be put "in the record" in some way, *see id.*, it does not hold that the policy limits must always be put in evidence at trial. Even more importantly, *Willis* implies that when the policy limits are well known and undisputed, a failure to place them into the court record is a "mere technicality" that should not subject the insurer to liability beyond the limits of its coverage.

C. Auto-Owners was not required to prove the policy limits at trial because Mr. Berry did not dispute these limits in the pretrial order or elsewhere.

Here, there is no question that the policy limits were well known to Mr. Berry and that he has never disputed them. Nearly two years before trial, Mr. Berry first offered "to unconditionally release Leon Roberson and Auto-Owners from this matter in exchange for the Auto-Owners' policy limits." ROA.382. Over the ensuing 14 months, Mr. Berry repeated that offer at least five times. *See id.* During that same time period, Auto-

Owners made its policy limits abundantly clear, both by providing Mr. Berry a certified copy of the policy (*see* ROA.473), and by filing a statement of the limits into the court record. *See* ROA.72 ("Policy No. 48-378-494-01 . . . has a $100,000 per person/$300,000 per occurrence policy limit").[3] Thus, there is not a shadow of a doubt that Mr. Berry knew what the policy limits were or that the limits were in the record.

Even more importantly, in the pretrial order, Mr. Berry did not raise any issue regarding the amount or applicability of the policy limits as a disputed issue for trial. Indeed, the parties expressly stipulated to the existence of the policy containing the policy limits and even identified the policy by its policy number.[4] Accordingly, Auto-Owners was not required to offer proof at trial as to the uncontested policy limits. *See Shell Oil Co. v. M/T GILDA*, 790 F.2d 1209, 1215 (5th Cir. 1986) ("A party need not offer proof as to matters not contested in the pre-trial order."); *Swift v. State Farm Mut. Auto. Ins.*, 796 F.2d 120, 123 (5th Cir. 1986) ("Once the order is entered, it controls the scope and course of the trial."); *Robinson*,

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[3] Admittedly, counsel for Auto-Owners could have done more to draw the district court's attention to these undisputed policy limits prior to entry of the final judgment. At that time, however, Auto-Owners had no reason to believe that Mr. Berry would take the position that Auto-Owners could be cast in judgment beyond its policy limits.

[4] *See* ROA.135; *see also Dey*, 789 F.3d at 635 ("[T]he pretrial order, to which both parties stipulated, stated that any damages sustained by Dey would be covered by his uninsured motorist coverage. Dey, therefore, had no basis to claim surprise by State Farm's argument that his damages must be limited to the amount of his uninsured motorist coverage.").

894 F.2d at 761 (noting the "underlying purpose of the pretrial procedure to define and limit the issues for trial"). For two years, Mr. Berry never contested the policy limits and repeatedly recognized them with his settlement offers. When the parties identified in the Final Pretrial Order the few contested issues that still required resolution during the jury trial, predictably, neither the amount nor applicability of the policy limits were identified as contested issues.[5] Auto-Owners was entitled to rely on that controlling order and, thus, was not required to offer proof at trial as to its uncontested policy limits.

II. Assuming Auto-Owners somehow erred in failing to introduce evidence of its policy limits at trial, the district court abused its discretion in denying relief under Rule 60(b).

Even accepting for argument purposes that Auto-Owners failed to take a procedural step that it should have taken to invoke the policy

[5] The district court suggested that Auto-Owners had the burden "to identify a potentially contested issue for which it has the burden of proof at trial." ROA.530. However, Auto-Owners had no reason to suspect that it was a "potentially contested issue" because Mr. Berry had repeatedly demonstrated over a two year period that he did not contest the policy limits and, instead, accepted them as beyond dispute. Significantly, Mr. Berry still does not contest the policy limits. Thus, contrary to the district court's suggestion, if Mr. Berry intended to change his position after two years, it was his burden to identify that newly disputed issue in the pretrial order. *See e.g.*, *McLean Contracting Co. v. Waterman Steamship Corp.*, 277 F.3d 477, 479 (4th Cir. 2002) ("The burden of proof on issues that have been placed in dispute, however, is independent of the burden to identify disputed issues.").

limits as a limitation on its liability, any such failure would certainly constitute a "mistake, inadvertence, . . . or excusable neglect" that would justify relief under Rule 60(b). As this Court has explained, Rule 60(b) "seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Seven Elves*, 635 F.2d at 401 (quotation omitted). "In this light, it is often said that the rule should be liberally construed in order to do substantial justice. . . . What is meant by this general statement is that, although the desideratum of finality is an important goal, the justice-function of the courts demands that it must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause." *Id.*

As the district court acknowledged, the determination of "excusable neglect" "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer*, 507 U.S. at 395. "These include . . . the danger of prejudice to the [other party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.*

A. This Court has repeatedly held that Rule 60(b) relief should be granted to correct a judgment that is clearly erroneous, even when a party has failed to timely raise an issue before the district court.

This Court has previously reversed a district-court decision and held that relief should have been granted under Rule 60(b) to correct a Social Security disability award that was "clearly at variance with the plain wording" of the governing statute. *See Meadows v. Cohen*, 409 F.2d 750, 751–53 (5th Cir. 1969).[6] The Court characterized the parties' arguments in that case as follows:

> The Government's position, simply stated, is that the retroactive effect of the disability award is limited by statute and that the District Court erred in failing to bring its judgment into conformity with the law. Mrs. Meadows, on the other hand, makes essentially one argument in support of the District Court's decision, namely, that because the statutory provision limiting retroactivity was not raised at trial or within the 10 days permitted under F.R.Civ.P. 59(E), the Secretary was precluded from relying upon it.

Id. at 752. The Court found that "the agency cannot be too greatly faulted for having failed to call the limiting provision to the trial court's attention" because the question of retroactivity had not previously been presented or contested—"only after the Court had reversed the Secretary's decision . . . and awarded benefits from 1960 did the

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[6] The claimant, Mrs. Meadows, had been granted retroactive benefits going back several years before her claim was filed, despite the fact that the applicable statute restricted retroactive benefits to a twelve-month period before filing. *See Meadows*, 409 F.2d at 751–52 & n.2.

retroactivity issue come to the fore." *See id.* at 752–53. The Court further explained:

> After entry of the judgment, which was clearly at variance with the plain wording of § 423(b), the Secretary sought modification. While this motion was not filed as promptly as it might have been, the error was brought to the Court's attention ***before any party had detrimentally relied on the judgment or sustained any loss by reason of it*** or through the intervention of third parties. Under these circumstances and the compelling policies of basic fairness and equity reflected by 60(b), the Court had a duty to conform its judgment to the law as enacted by Congress.

Id. at 753 (emphasis added).[7]

Similarly, in *FDIC v. Castle*, 781 F.2d 1101 (5th Cir. 1986), this Court reversed a district-court decision and held that relief should have been granted under Rule 60(b) to correct a judgment that erroneously limited the defendants' liability, even though the FDIC had failed to raise the issue before the trial court. The Court explained that "certain circumstances exist in which a court should examine its judgment even though the Rule 60(b) movant negligently failed to raise the theory at

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[7] The Court also explained: "[W]e cannot agree with the rather technical contention that the statutory limitation on retroactivity constituted an affirmative defense that was waived by failure to plead and prove it at trial. It is as much a part of the grant of legislative benefits as are the schedules of benefits payable." *Meadows*, 409 F.2d at 753. By the same reasoning, the policy provisions ***limiting*** liability are as much a part of the policy as the provisions that create liability. Moreover, the limitation to a recovery "within the terms and limits of the policy" is established in the Direct Action Statute itself. *See* LA. REV. STAT. § 22:1269(A).

trial." *Id.* at 1104–05. The Court cited extensive precedent holding that "it is appropriate to consider and accept contentions not raised at *any* point during the trial proceedings where there is only a question of law involved and a refusal to consider it would result in a miscarriage of justice." *Id.* at 1105 (quotation omitted); *see also id.* ("Considering such contentions even though raised late in the proceedings is particularly appropriate where application of the law is clear."). The Court specifically noted that no party had detrimentally relied on the judgment, and thus there were "no intervening equities that would make it inequitable to grant relief." *Id.* (quotation omitted). The Court also found that "Rule 60(b) relief was appropriate [because] application of the FDIC's federal statutory and common law protections is meritorious, requires no further factual development, and is clear on the face on the record." *Id.*

Recently, this Court affirmed a district court's grant of relief to correct a judgment against an insurer in excess of the policy limits. *See Dey*, 789 F.3d at 631.[8] Although *Dey* involved a request for relief under Rule 59(e) rather than Rule 60(b), it is nonetheless instructive because it illustrates that a judgment in excess of the insurer's policy limits is a manifest error that should be corrected even if evidence of the policy limits had not been previously introduced. In that case, an insured, Dey, sued his insurer, State Farm, seeking damages based on an uninsured-

[8] The Court noted that review was *de novo* because the insurer's motion "raise[d] an issue of law." *See Dey*, 789 F.3d at 634.

motorist claim and also asserting a bad-faith claim based on State Farm's alleged failure to settle for an adequate amount. *See id.* at 631–32. The district court granted partial summary judgment in State Farm's favor on the bad-faith claim, which, as this Court noted, "effectively limited [the insured's] damage award to the policy limit" of $100,000. *Id.* at 635. At the subsequent trial on Dey's damages claim, State Farm moved to exclude any evidence of its policy limits, and the policy limits were never admitted in evidence at trial. *See id.* After trial, judgment was entered against State Farm in the amount of $229,400.50. *Id.* at 634. State Farm then moved under Rule 59(e) to reduce the judgment to the policy-limit amount of $100,000. *Id.*

The district court granted State Farm's motion, and this Court affirmed. *Dey*, 789 F.3d at 634–35. The panel first rejected Dey's argument that the policy limitation was an affirmative defense that State Farm had failed to plead:

> We have been provided with no legal support for the contention that such an argument must be pled as an affirmative defense. Even if this were an affirmative defense, such a defense may be raised at a pragmatically sufficient time, and [if the plaintiff] was not prejudiced in its ability to respond, it is not waived. Dey was not subject to "unfair surprise" or prejudice. As the district court noted, the pretrial order, to which both parties stipulated, stated that any damages sustained by Dey would be covered by his uninsured motorist coverage. Dey, therefore, ***had no basis to claim surprise by State Farm's argument that his damages***

> ***must be limited to the amount of his uninsured motorist coverage***.

Id. at 635 (emphasis added, quotation and citation omitted). The Court went on to reject the argument that the policy limits could not be invoked because they were not entered in evidence:

> Similarly unavailing is Dey's contention that State Farm waived its argument that Dey's damages could not be more than the policy limit because it moved to have evidence of the policy limit excluded at trial. State Farm sought the exclusion of the policy limit because it would be prejudicial. Preventing juror's knowing the amount of available insurance, a silence that might increase the possibility jurors will award less than the limit, is a completely distinguishable position from arguing post-verdict that the judgment cannot be for more than such a limit.

Id.

It appears that the district court here erroneously relied on Louisiana case law, rather than federal law, in determining whether Rule 60(b) relief was warranted, even after specifically noting that authority on which it was relying was based on "state procedural law." *See* ROA.434–435 (citing *Payton*, 488 So. 2d at 1272). Even under Louisiana law, however, Auto-Owners would be entitled to relief. Louisiana courts have excused policyholders' failure to introduce evidence of an insurance policy when the pretrial order reflected that there were no disputed issues of fact or law concerning insurance coverage. *See, e.g.*, *Perkins v. Carter*, 30 So. 3d 862, 869 (La. App. 5th Cir. 2009); *Malloy*, 662 So. 2d at 99. By the same reasoning, Auto-Owners cannot be faulted for failing to

introduce evidence of the policy limits when the pretrial order in this case made clear that there were no disputed issues relating to the policy limits.

B. Based on the equitable considerations the Supreme Court has identified as controlling, any procedural error by Auto-Owners clearly constitutes "excusable neglect" that calls for relief under Rule 60(b).

An application of the *Pioneer* factors demonstrates that any error Auto-Owners may have committed is excusable, and that the judgment should be corrected to properly reflect Auto-Owners' true limit of liability under statutory law. *First*, there is literally no "danger of prejudice" to Mr. Berry if the erroneous judgment is corrected. *See Pioneer*, 507 U.S. at 395. Under the Direct Action Statute, which provides Mr. Berry's right of action against Auto-Owners, an insurer is liable "only within the policy limits and coverages" and "is not liable beyond its policy limits." *Sumrall*, 887 So. 2d at 79. Mr. Berry has no right under any substantive law to recover more than $100,000 from Auto-Owners, and neither the district court nor Mr. Berry has ever suggested that he does. Granting relief under Rule 60(b) would not require a new trial or other further proceedings, and therefore would not subject Mr. Berry to any additional litigation expenses. Rather, the judgment could be quickly and easily corrected to specify what should have been (and in fact was) clear to everyone from the beginning of this litigation—that Mr. Berry cannot recover more than the $100,000 limit from Auto-Owners.

Second, "the length of the delay and its potential impact on judicial proceedings" provide no reason to deny relief to Auto-Owners. *See Pioneer*, 507 U.S. at 395. Although Auto-Owners' Rule 60(b) motion was filed on April 20, 2016, almost one year after entry of the district court's judgment, and after the initial appeal was concluded, there is an obvious reason for this delay—Mr. Berry waited until March 2016 to notify Auto-Owners that he would be seeking to collect the entire judgment from Auto-Owners, notwithstanding the policy limits. This delay is particularly striking in light of the fact that Auto-Owners sent Mr. Berry a $100,000 check soon after judgment was entered, in ***June 2015***. Indeed, it is difficult to avoid the plain inference that Mr. Berry withheld his objection to the $100,000 payment for nine months, until Auto-Owners' appeal was concluded, to deny Auto-Owners any opportunity to bring this matter to the Court's attention before the first appeal was concluded. Moreover, there is no "potential impact on judicial proceedings": the proceedings in this case have concluded and there is no need for further proceedings, only a simple correction of the judgment.

Third, the "reason for the delay" here suggests that relief is warranted. *See Pioneer*, 507 U.S. at 395. As explained above, the reason for the delay is that Mr. Berry did not inform Auto-Owners of his intent to seize upon the phraseology of the judgment to seek payment beyond the policy limits from Auto-Owners for more than nine months after Auto-Owners sent him a check. Soon after Mr. Berry made his position

clear through correspondence in March and April of 2016, Auto-Owners promptly filed a Rule 60(b) motion on April 20, 2016.

Fourth, Auto-Owners' motion under Rule 60(b) was brought in good faith to correct an error in the judgment that it was not aware of until after the judgment had become final. *See Pioneer*, 507 U.S. at 395. Although the district court never suggested that Auto-Owners acted in bad faith, it did mention that Auto-Owners may have withheld evidence of its policy limits as a matter of strategy.[9] But there is simply no logical reason for Auto-Owners to choose, as a matter of trial strategy, to subject itself to a judgment far in excess of its policy limits in order to "protect its insured from an excess judgment," as the district court suggested.[10]

It is true that Auto-Owners' actions were guided at least in part by a strategy to prevent the policy limits from being shown to the jury, based on the concern that knowledge of the policy limits might induce the jury to award higher damages. Such concerns are well founded and have been

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[9] *See* ROA.435 ("The Court is guided, in part, by the cautionary language in *Willis* that recognizes the difficulty of discerning whether an insurer's failure to introduce a policy into evidence is a deliberate decision designed to protect its insured from an excess judgment. *Willis*, 99-708, 747 So. 2d at 83. The Court has no way of knowing if there was any strategic value in withholding the policy from evidence.").

[10] ROA.435. In fact, the defendant insured was absent from the trial, a point specifically noted by the Plaintiff. As counsel for Mr. Berry told the jury, "Mr. Roberson did not bother to attend trial." ROA.1057.

recognized by the Louisiana Legislature and by this Court.[11] However, Auto-Owners' decision to pursue this strategy at trial certainly does not mean that its subsequent motion to reduce the judgment to the policy limits was in bad faith. As this Court explained in *Dey*, "[p]reventing juror's knowing the amount of available insurance. . . is a completely distinguishable position from arguing post-verdict that the judgment cannot be for more than such a limit." 789 F.3d at 635.

Although the district court mentioned the *Pioneer* factors for excusable neglect, it did not apply them or otherwise make an equitable determination "taking account of all relevant circumstances surrounding the party's omission." *Pioneer*, 507 U.S. at 395. The district court completely failed to address the danger of prejudice to Mr. Berry, the reason for delay, and the potential impact on judicial proceedings. This failure to "meaningfully address[ ] the positive equities" is in itself an abuse of discretion. *See Rodriguez-Gutierrez*, 59 F.3d at 509.[12] Ultimately, the district court's denial of relief appears to rest almost entirely upon its

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[11] *See, e.g.*, *Vaughn*, 896 So. 2d at 1215 ("Article 411 was enacted in response to the urging of the insurance industry that it was extremely prejudicial to their interests . . . for jurors to know how much insurance was available."); *Dey*, 789 F.3d at 635 ("State Farm sought the exclusion of evidence of the policy limit because it would be prejudicial.").

[12] *See also Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1224 (9th Cir. 2000) (finding an abuse of discretion where the district court denied relief under Rule 60(b)(1) without conducting the equitable analysis required under *Pioneer*).

finding that Auto-Owners "had the opportunity to limit its potential liability to Plaintiff at numerous stages of the trial and after the Final Judgment" but had failed to do so at an earlier stage of the case. ROA.531. That observation easily can be made with regard to many Rule 60(b) motions, but it should not end the analysis.

Even if Auto-Owners' motion "was not filed as promptly as it might have been," no party has "detrimentally relied on the judgment or sustained any loss by reason of it." *Meadows*, 409 F.2d at 753. Auto-Owners "cannot be too greatly faulted," nor should it be, for failing to act to limit its liability to the policy limits before learning that Mr. Berry was seeking to recover beyond the policy limits, a point not weighed by the district court. *Id.* at 752. Moreover, Auto-Owners' right to limit its liability to the limits of its policy "is meritorious, requires no further factual development, and is clear on the face of this record." *Castle*, 781 F.2d at 1105. Accordingly, the "compelling policies of basic fairness and equity reflected by 60(b)" require that the judgment be amended to prevent Auto-Owners from being forced to pay hundreds of thousands of dollars that it does not rightfully owe. *Meadows*, 409 F.2d at 753. Because the district court abused its discretion in denying Rule 60(b) relief under these circumstances, this Court should reverse the district court's decision and order that the judgment be corrected.

III. Because a judgment for extra-contractual damages is punitive in nature and justified only on a showing of bad faith, the district court denied Auto-Owners procedural due process by holding it liable for more than seven times its policy limits without any bad-faith claim being properly before the court.

While punitive damages are generally not available under Louisiana law, the Insurance Code contains penal provisions that allow courts to render judgments for extra-contractual damages against insurers who are found to have acted in bad faith. *See* LA. REV. STAT. § 22:1892; LA. REV. STAT. § 22:1973. "In bad faith actions," plaintiffs seek to recover "punitive damages" from insurers. *Holt v. Aetna Cas. & Sur. Co.*, 680 So. 2d 117, 130 (La. App. 2nd Cir. 1996). And, as the Louisiana Supreme Court has noted, extra-contractual damages under the Insurance Code are "considered penal in nature." *Durio v. Horace Mann Ins. Co.*, 74 So. 3d 1159, 1170 (La. 2011).

However, extra-contractual damages against insurers are available only in bad faith actions, and "[t]he party seeking damages must prove that the insurer's actions or failure to act were unjustifiable." *Holt*, 680 So. 2d at 130. Conversely, in a direct action, an insurer may only be held liable for damages within "the terms and limits" of the insurance policy. *See* LA. REV. STAT. § 22:1269. Moreover, that right to bring an action for bad faith damages is vested in the insured, not in a third-party plaintiff. *See Paul v. Allstate Ins. Co.*, 720 So. 2d 1251, 1255–56 (La. App. 5th Cir. 1998); *Venible v. First Fin. Ins. Co.*, 718 So. 2d 586, 589–90 (La. App. 4th

Cir. 1998). Legally, the lack of any "bad faith claim effectively limited [Mr. Berry's] damage award to the policy limit." *Dey*, 789 F.3d at 635. A claim is not properly before the Court if it was not pleaded and is raised for the first time in response to a motion. *See Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 415–16 (5th Cir. 2015) (quoting *Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005)).

"The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). Under traditional notions of due process, "*some* form of hearing is required before the owner is finally deprived of a protected property interest." *Id.* at 433 (emphasis in original, internal quotation marks omitted). Without notice that an insurer is in jeopardy of serious loss (*i.e.*, extra-contractual damages) and the opportunity to defend against it, the insurer is deprived of its procedural due process rights under the Fifth Amendment of the U.S. Constitution. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.") (alteration in original, internal quotation marks omitted).

Here, Auto-Owners has been cast in judgment for $790,000 (plus interest), despite an undisputed $100,000 policy limit. Auto-Owners

moved the district court to amend the judgment to reflect that policy limit. In opposing Auto-Owners' motion, Mr. Berry *did not dispute the policy limit*, but argued that Auto-Owners should be held liable for the full amount nevertheless. ROA.371–ROA.373. And significantly, Mr. Berry argued in his opposition that "Auto-Owners conducted the defense of Leon Roberson in bad faith." ROA.372. Thus, Mr. Berry opposed relief under Rule 60(b) based on an argument for an award in excess of policy limits that, as a matter of settled law, was not even available to him.

The district court denied the Rule 60(b) motion and made clear that Auto-Owners' liability is not confined to its policy limits but, rather, Auto-Owners is liable for the additional $690,000 as well. The district court did not point to any substantive law to support holding Auto-Owners liable for damages beyond its undisputed policy limits. Because extra-contractual damages are only potentially available upon a finding of bad faith, and Auto-Owners is being held liable for $690,000 in extra-contractual damages, the district court's judgment in essence subjects Auto-Owners to bad faith damages. Because an award of extra-contractual damages is "penal in nature," *Durio*, 74 So. 3d at 1170, Auto-Owners is penalized by the judgment. If Auto-Owners is being penalized this additional $690,000 because it did not submit arguably unneeded evidence of uncontested policy limits at trial, the penalty is a steep one indeed, and the extra-contractual damages are manifestly unjust.

However, if the damages are rooted in an implicit finding of bad faith, then Auto-Owners' due process rights have been violated.

No claim for bad faith was ever pleaded or joined in this case, *see* ROA.21–ROA.23, and no such claim was ever properly before the district court. *See Fennell,* 804 F.3d at 415–16. Nor were any issues of bad faith or extra-contractual damages listed in the pretrial order. *See* ROA.135. Indeed, they could not have been. Such a claim would belong to the insured defendant (Mr. Roberson) and not to the plaintiff (Mr. Berry). Thus, Auto-Owners was not placed on notice that it should have been prepared to present evidence to defend against any such claims. *See Shell Oil*, 790 F.2d at 1215. And further, an action for bad faith would not be ripe until after an excess judgment is entered against the defendant insured. *See Belanger v. Geico Gen. Ins. Co.*, 623 F. App'x 684, 686 (5th Cir. 2015) ("[T]he cause of action arose when the state trial court entered the excess judgment against [the insured].").

As a result, the district court's judgment deprives Auto-Owners of its property interest in $690,000 (plus interest) without notice that it was in jeopardy of such loss or any meaningful opportunity to defend against such deprivation of its property. *See Mathews*, 424 U.S. at 348.

CONCLUSION

For the foregoing reasons, Auto-Owners respectfully requests that this Court reverse the district court and remand this case for entry of an amended judgment limiting Auto-Owners' liability to Mr. Berry to its policy limit of $100,000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 2016 an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Matthew J. Paul

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,896 words, as determined by the word-count function of Microsoft Word 2013, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century font.

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I hereby certify that, in the foregoing brief filed using the Fifth Circuit CM/ECF document filing system, (1) the privacy redactions required by Fifth Circuit Rule 25.2.13 have been made, (2) the electronic submission is an exact copy of the paper document, and (3) the document has been scanned for viruses with the most recent version of AVG Internet Security Business Edition and is free of viruses.

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