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Insurance Class Action Update

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By Mark A. Johnson

A busy end to last year and start of this one have kept courts and lawyers busy in the property and casualty class action space. Several class certification decisions were issued in total loss valuation cases. Tag and title, labor depreciation, and other class actions asserting claims relating to personal injury protection, storage fees and medical billing have developed further – some successful and some not. Pandemic refund claims have for the most part been rejected, except in California.

Total loss valuation claims in full swing

Class actions challenging the valuation of vehicles under total loss claims continue to spread. Several courts have already held that proof of undervaluation (e.g., injury) is an individual issue on liability that precludes class certification. [link to Q1-3 2021 report]

Three months ago, the U.S. Court of Appeals for the 9th Circuit weighed in to affirm denial of class certification for lack of predominance and superiority. *Lara v. First Nat'l Ins. Co. of America*, 25 F.4th 1134 (2022). While the question of whether the insurer's use of CCC's condition adjustment for total loss claims violated Washington law was a common question, proving that it was a breach of contract was not. The Court of Appeals recognized that breach of contract requires proof of injury, and determining the actual value of each class member's vehicle compared to the adjusted CCC value would be an inherently individual determination. For some, the actual value could be lower than what was paid.

And the court rejected the argument that many stumble on, that proof of injury is only damages that can be decided separately: "[I]f there's no injury, then the breach of contract and unfair trade practices claims must fail. That's not a damages issue; that's a merits issue." *Id*. at *5. Following *Lara*, one district court decertified classes and granted summary judgment for the insurer. *Ngethpharat v. State Farm Mutual Auto. Ins. Co.*, 2022 WL 1404526 (W.D. Wash. May 4, 2022).

The 5th Circuit quickly followed suit in affirming denial of class certification in *Prudhomme et al. v. Government Employees Insurance Co*., 2022 WL 510171 (Feb. 21, 2022). Rather than rely on individual proof of injury to show lack of predominance, though, the Court of Appeals found a lack of adequacy under Rule 23(a)(4) because some members of the alleged class received total loss payments above the alleged unlawful valuation, which created an impermissible intraclass conflict. *Id*. at *1.

Not all courts agree, however. In *Lewis v. GEICO*, the district court granted class certification of total loss claims, finding: "The predominant issues here are whether GEICO's insurance policies, under a uniform contract, included coverage for sales tax and transfer fees and whether GEICO breached by applying condition adjustments without itemizing or explaining them. The resolution of these issues will be determined by common proof on the meaning of the subject contract language." 2022 WL 819611, *9 (D. N.J. March 18, 2022).

The *Lewis* court quickly rejected the actual injury argument, holding that proof of whether the CCC-adjusted amount for each vehicle was above, at or below the actual value was a damages question. Like many, the *Lewis* court also rejected ascertainability arguments, stating that "information gaps" were of the insurer's own making. *Id*. at *1. This tiresome reasoning (and this is far from the first court to use it) implies that the business of insurers ought not to be adjusting claims but instead should be organizing data retrieval to best suit the needs of whatever theory de jure of class claims is presented.

Class settlements were reached in some Washington total loss cases. *Stanikzy v. Progressive Direct Insurance Co.*, Case No. 2:20-cv-00118 (W.D. Wash.); *Tereshchenko v. American Family Mutual Insurance Company*, Pierce Cty., Washington, Superior Ct., Case No. 19-2-07123-6.

The total loss class actions will be a fixture on the litigation front for the time being, until more courts follow the logic of the 9th and 5th Circuits.

Tax, tag and title class action update

Meanwhile, class actions asserting another type of total loss claim – payment of tax, tag and title fees – rumbles on. One court certified a class of Texas insureds with total loss claims when the total amount paid did not include sales taxes and title and registration fees. *Angell v. GEICO Advantage Insurance Company*, 2021 WL 5585732 (S.D. Texas Nov. 30, 2021). The court rejected the defendant's core argument that the plaintiffs were claim splitting by not including claims for how the value of total losses is determined. The 5th Circuit has granted a Rule 23(f) petition to accept an appeal of this decision.

Likewise, an Ohio district court certified a tax, title and tag class action in *Davis v. GEICO Casualty Co.*, 2021 WL 5877843 (S.D. Ohio Dec. 13, 2021). The court found no issue with claim splitting by the plaintiffs and found predominance met because liability could be determined in a common manner. That the plaintiffs' damages model could lead to different amounts did not preclude class certification.

Total loss storage fees class shot down

Under yet another theory arising from vehicle total losses, a state court of appeals affirmed both decertification of a class asserting claims based on garage storage fees deducted from total loss payments and summary judgment for the insurer. *Puopolo v. Commerce Insurance Co.*, 2022 WL 1217215 (Mass. Ct. App. April 26, 2022). The policy provides that the insurer will pay only reasonable storage fees, and out-of-network shops stored the plaintiffs' vehicles at rates higher than what had been negotiated with network shops. Since the policy obligated the insurer to pay only reasonable fees and the plaintiffs did not submit proof that the fees of their chosen shops were reasonable, the class was properly decertified and summary judgment properly granted against the plaintiffs.

Some PIP class claims successful, others not so much

A multistate class asserting claims that an insurer failed to respond to PIP claim submissions within 30 days was dismissed. *Anderson v. State Farm Mutual Auto. Ins. Co.*, 2021 WL 5937763 (N.D. Ill. Dec. 16, 2021). Even if the plaintiffs accurately stated the PIP laws of 13 states, they didn't allege that they ever submitted a claim for PIP benefits or suffered the alleged unreasonable delay that is the basis for their claims. No injury, no standing.

However, another insurer agreed to a class settlement with a class of healthcare providers that it improperly underpaid PIP claims in violation of a policy. *Rosenberg v. GEICO General Insurance Co.*, Case No. 0:19-cv-61422 (S.D. Fla.). The claims appear to be based on policy language that pays 80% of medically necessary charges pursuant to a schedule of maximum charges but also states that charges for less than that 80% shall be paid as billed.

Medical billing claims certified

One group of plaintiffs was successful in obtaining certification of both a damages and an injunctive relief class for claims challenging agreements by certain providers not to bill the insurers for medical services. *Taqueria El Primo LLC v. Illinois Farmers Ins. Co.*, 2021 WL 6127880 (D. Minn. Dec. 28, 2021). The insurer contended that the contracts are confidential settlement agreements that ended investigations and litigation because the providers had been engaged in insurance fraud and fraudulent billing. The court refused to certify a damages class for breach of contract because each class member would have to prove injury from a denied claim. However, it did certify a damages class based on a claim under the Minnesota Consumer Fraud Act. The court also certified an injunctive relief class to bar the billing limitations in the future. The 8th Circuit denied permission to appeal. Case No. 22-8002 (April 14, 2022).

Pandemic premium refund claims

Previous reports have discussed several class actions filed against insurers alleging they charged too much for auto premiums during the pandemic because of reduced driving and thus fewer claims. [link to Q4 2020 and Q1-3 2021 reports] More activity has occurred in this space since.

One court tossed such claims based on the filed rate doctrine, a decision that the 2nd Circuit is now reviewing. *Grossman v. GEICO Casualty Co.*, 2021 WL 5229080 (S.D. N.Y. Sept. 13, 2021) (2d Cir. Case No. 21-27). Interestingly, the appellants/plaintiffs cite to *Siegal v. GEICO Casualty Co.*, 523 F. Supp. 3d 1032 (N.D. Ill. 2021) [link to Q1-3 2021 report] to support their argument that their claim that premiums were too high did not challenge rates. The 8th Circuit rejected this sophistry in *Alissa's Flowers, Inc. v. State Farm Fire & Cas. Co.*, holding that claims challenging premiums are in essence a challenge to rates upon which the premiums are based, which is barred by the filed rate doctrine. 2022 WL 319846 (8th Cir. Feb. 3, 2022).

However, courts applying California law reason that a program to refund pandemic-era premiums was not within the insurance department's purview, especially when the plaintiffs allege trigger words such as false statements that the amount of refunds was adequate. *Day v. GEICO Cas. Co.*, 2022 WL 179687 (N.D. Calif. Jan. 20, 2022). California has become fertile ground for more class actions alleging that pandemic premium refund programs were insufficient. See, e.g., *Chavez v. Allstate Northbrook Ins. Company,* Case No. 3:22-cv-00166 (S.D. Calif.); *Kurshan v. Safeco Ins. Co. of America*, Case No. 2:22-cv-00137 (E.D. Calif.).

Policy cancellation premium claims

A class was certified by one federal district court over an auto policy cancellation fee that was not described in the policy. *Connor v.*

Permanent General Assurance Corp., Case No. 9:20-cv-81979 (S.D. Fla. April 11, 2022) (Doc. No. 96). The court rejected arguments that alleged class members did not have the same contracts because their applications differ, finding both the policy and application to be the contract. Defendant argued that one named plaintiff's prior conviction for a felony (kidnapping) rendered them inadequate, an argument that the court also rejected. A few weeks later, the court then granted partial summary judgment as to the plaintiffs' theory of liability but denied as to damages (Doc. No. 112).

Labor depreciation

As forecast [link to Q1-3 2021 report], filings of labor depreciation class actions asserting multistate classes have increased.

Some states (as opposed to federal courts divining state law) are deciding the question on their own. The Arizona Supreme Court last month heard arguments on certified questions of whether Arizona law permits labor depreciation and recognizes the broad evidence rule. *Walker v. Auto Owners Ins. Co.*, Case No. CV-21-0236-CQ. The Washington Department of Insurance decided that going forward, insurers are not permitted to depreciate labor and other nonmaterial cost items as of Jan. 1, regardless of policy language. WAC 284-20-010 (Nov. 12, 2021).

Coming attractions

In a forecast of claims to come based on autonomous and smart cars, class claims were recently filed complaining that an insurer improperly raised vehicle owners' premiums based on random false forward collision warnings in vehicles' logs that never occurred. *Schneider v. State Nat'l Ins. Co.*, Case No. 2022-CH-04132, Cook Cty., Ill., Cir. Ct. (filed April 29, 2022). The insurer decided to factor such warnings into a safety score that determines drivers' usage-based premiums, but plaintiffs alleged that sporadic and random collision warnings unfairly categorized those drivers as reckless.

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