

Insurance Class Action Update

2020 1Q

By Mark A. Johnson

“An eventful first quarter” would be the understated lead-in of the year. In the past three months, the insurance class action space has seen several labor depreciation decisions that continue to result in further new filings and a few decisions in tag and title class actions. And oh, yes, a pandemic arrived that spawned a tsunami of commercial business interruption claims.

COVID-19 Business Interruption Claims Spread

Almost as soon as states started issuing stay-at-home orders and ordering nonessential businesses to close, a wave of class actions and individual suits has been filed against several insurers for denial of claims under business interruption coverage in commercial policies. The complaints allege that practices and coverage terms are “uniform.”

Many insurers issue a standard endorsement that excludes “loss or damage caused by or resulting from any virus” that is “capable of inducing physical distress, illness or disease.” In at least one case, the plaintiffs allege that the covered cause of loss is not the virus but rather the effect of the government’s closure orders. They explain that the loss of business from closing resulted regardless of whether each business was exposed to the virus, and so it wasn’t “caused” by COVID-19. That argument seems a bit contorted over what actually caused the closure of businesses – the COVID-19 virus or governments’ orders to close to reduce spreading of the virus – and for the exclusion to have any meaning, it would require the loss to result because the business premises were infected. Under that stilted meaning of causation, the failure of nails to secure shingles to a roof rather than high winds would “cause” damage to a roof. Time will tell whether plain language and common sense prevail over the pressures of populism and the desire to compensate businesses in trying economic times.

How these cases, pending in dozens of state and federal courts, are resolved has yet to be determined. On April 20, a motion was filed in the Judicial Panel on Multidistrict Litigation (MDL) to transfer similar cases nationwide to one venue, the Eastern District of Pennsylvania. *In re COVID-19 Bus. Interruption Ins. Coverage Litig.*, MDL No. 2942. That motion identified nine related actions, and in the past three weeks, additional related actions and a potential tag-along action have been identified. Another motion seeks transfer to the Northern District of Illinois, and other venues will likely be offered up as well. Insurers facing COVID-19 business interruption claims in federal court would do well to carefully follow the MDL’s actions to weigh in with their positions on whether and, more important, where these cases will be transferred and managed for pretrial purposes.

In one state court case, the plaintiff applied to the Pennsylvania Supreme Court to use its “King’s Bench” jurisdiction and skip the lower state courts to decide whether business interruption claims in that case and “hundreds” of others are covered. *Tambellini Inc. v. Erie Ins. Exch.*, Case No. 52 WM 2020, Supreme Court of Pennsylvania. The defendant strongly opposed this unique gambit, supported by another insurer and several trade organizations as amicus, arguing that the forms of each insurer differ, as do the facts and circumstances of each claim. However, on May 14, the Supreme Court denied the plaintiff’s petition and returned the case to a normal path.

Short of an early winnowing of these cases by one or more authoritative decisions applying the virus exclusion, COVID-19 business interruption claims are going to be a prominent feature of the insurance class action landscape for some time.

Vehicle Tax, Tag and Title Class Action Decisions

In March, the Fifth Circuit upheld dismissal of one class action alleging taxes and title fees for total loss claims. *Singleton v. Elephant Ins. Co.*, 953 F.3d 334, 338 (2020). The court of appeals commented that ACV is equivalent to market value, and under Texas law, fair market value is what a willing buyer and willing seller will agree upon, a definition that “plainly excludes taxes and fees that are remitted to the state.”

Still More Labor Depreciation Class Actions

Labor depreciation class actions have been a beehive of activity so far this year. The North Carolina Supreme Court upheld dismissal of a labor depreciation class action, holding that the policy permitted deduction of labor depreciation in determining ACV and was not ambiguous. *Accardi v. Hartford Underwriters Ins. Co.*, 838 S.E.2d 454, 457–58 (N.C. 2020).

Then the Sixth Circuit arrived at the opposite conclusion in reversing dismissal of two cases, holding that under Ohio law, the failure to define depreciation in a policy to include labor depreciation made the policy ambiguous, and therefore the court adopted the insureds’ interpretation that labor depreciation was not included in depreciation. *Perry v. Allstate Indem. Co.*, 953 F.3d 417 (6th Cir. 2020); *Cranfield v. State Farm Fire & Cas. Co.*, 798 Fed. App’x 929 (6th Cir. 2020). The *Cranfield* decision noted that the district court’s decision had agreed with the majority of courts to address the issue and commented that whether labor depreciation is properly deducted “has divided courts across the nation.” Petitions for en banc review are pending in both cases.

Close on the heels of the Sixth Circuit decision, on March 30 the Fifth Circuit affirmed the refusal to dismiss labor depreciation claims under Mississippi law and affirmed class certification of those claims. *Mitchell v. State Farm Fire & Cas. Co.*, 954 F.3d 700 (5th Cir. 2020). Because the insured’s interpretation of the policy as excluding labor depreciation was reasonable, the insurer’s contrary interpretation rendered it ambiguous. The court of appeals also had little problem affirming class certification over the insurer’s predominance and superiority arguments.

Briefing has concluded in the Sixth Circuit in *Hicks v. State Farm Fire & Cas. Co.*, Case No. 19-5719, on appeal of certification of a class of Kentucky insureds seeking labor depreciation. The court of appeals previously had held that Kentucky law prohibited labor depreciation, but it accepted a second appeal to hear the propriety of class certification. *Hicks v. State Farm Fire & Cas. Co.*, 751 Fed. App’x 703 (6th Cir. 2018). Oral argument is set for June 17.

Several new labor depreciation class actions have been filed this quarter; at last count, 12 new ones are pending in Ohio, and there are others in Tennessee and Mississippi. Some recent cases have alleged classes of insureds from more than one state, whether to take advantage of perceived efficiencies or of a more favorable venue. Time will tell whether expanding the states covered by the class definition runs afoul of *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017), as that doctrine develops, or causes problems for plaintiffs under Rule 23(b)(3).

Noteworthy for many insurers is that some new labor depreciation class actions are going beyond personal lines to allege claims on behalf of classes of commercial insureds. *Northside Church of Christ v. Ohio Sec. Ins. Co.*, Case No. 3:20-cv-00184 (M.D. Tenn.). And other cases have gone the settlement route, with motions for preliminary approval filed or settlements announced in at least five cases in the Western and Middle Districts of Tennessee.

Insurers should keep a close watch on the labor depreciation cases and make sure they've recently evaluated their nonmaterial depreciation practices for structural damage claims.



Contact

Mark A. Johnson

Partner | Columbus

T +1.614.462.2698

F +1.614.462.2616

mjohnson@bakerlaw.com

bakerlaw.com

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