

# Insurance Class Action Update

2019 4Q

By Mark A. Johnson

Last year finished with a flourish with more activity in labor depreciation and tag and title class actions, another state high court decision on IMEs for first party claims, and affirmation of ACV only roof coverage.

---

## Vehicle Tax, Tag and Title Class Action Decisions

Decisions have been issued on initial dispositive motions in some class actions for total loss taxes and title and registration fees. The Western District of Wisconsin concluded that a policy requiring payment of the market value of a vehicle that is a total loss did not require payment of tag, tax and title fees. *Thompson v. Progressive Universal Ins. Co.*, 2019 WL 6037367 (Nov. 14, 2019).

Meanwhile, other courts took a different path. One concluded that a policy providing for payment of ACV was ambiguous under Ohio law as to whether it includes payment of tax and registration fees. *Ostendorf v. Grange Indem. Ins., Co.*, 2020 WL 134169 (S.D. Ohio Jan. 13, 2020). That court also held that mandatory arbitration did not apply because the dispute was over the definition of policy language. *See also Davis v. Geico Cas. Co.*, 2020 WL 68573 (S.D. Ohio Jan. 7, 2020). Those federal decisions on state law run contrary to an Ohio trial court decision, holding that ACV does not include sales tax and fees. *Diggins v. Permanent General Assur. Corp. of Ohio*, Case No. CV-19-912705 (Cuyahoga Cty. C.P. Ct., June 28, 2019).

The Seventh Circuit may weigh in on these claims in *Sigler v. GEICO Cas. Co.*, in an appeal of a decision characterized as an “outlier” by the *Ostendorf* court. The lower court in *Sigler* found that because the insured failed to purchase another vehicle upon a total loss, the policy did not require payment of taxes and title fees. 2019 WL 2130137 (C.D. Ill. May 15, 2019). Perhaps the court of appeals may change the status of this “outlier” decision. At last count over 20 tag and title class actions are pending around the country.

---

## Total Loss Valuation Class Action Must Go To Appraisal

The total loss valuation cases are rumbling along as well. Recently the Middle District of North Carolina held that plaintiff’s dispute about use of a condition adjustment in the valuation of a total loss was subject to mandatory appraisal

under the policy. *Fortson v. Garrison Property and Casualty Ins. Co.*, 2019 WL 2019 WL 5575582 (Oct. 29, 2019).

---

## Pennsylvania First Party IMEs Require Court Approval

Similar to a decision under Kentucky law previously reported ([link](#)), the Pennsylvania Supreme Court held that IMEs for insureds seeking first party medical benefits can proceed only under a statute that permits a court to order an IME. *Sayles v. Allstate Ins. Co.*, 2019 WL 6138409 (Nov. 20, 2019). The insurer relied on a policy provision requiring an insured seeking first party medical benefits to submit to an IME when required by the insurer, and by a physician selected by the insurer.

The high court held that 75 Pa. C.S. § 1796(a) sets for the regime for when a court may order an IME, and as a consequence policy provisions that conflict with or vary from that statute are void as against public policy. The court noted that only a court has authority to order an IME and select the examining physician in those circumstances, regardless of approval of policy language by the Insurance Department.

---

## Ohio ACV Roof Coverage Class Tossed

The Sixth Circuit affirmed dismissal of Ohio claims that stretched the bounds of basic contract principles. *Richelson v. Liberty Ins. Corp.*, 2020 WL 113904 (6th Cir. Jan. 6, 2020). Plaintiff claimed that an endorsement limiting roof damage claims to ACV was misleading because it led him to believe that he had received an extra layer of coverage. The court of appeals concluded that the only reasonable interpretation of the policy is that roof damage claims were payable at ACV—and not replacement cost of the roof. In doing so, the court rejected plaintiff’s arguments that the declarations were entitled to more weight than an endorsement, because Ohio law required interpretation of a contract to include examination of the entire contract.

Plaintiff also argued that the deductible only applied to RCV claims, but the court rejected this as well. “Honoring the plain language” in the policy, which states that ACV claims are explicitly subject to a deductible, the district court’s dismissal of the claims was affirmed.

---

## Yet More Labor Depreciation Class Actions

Labor depreciation class actions have continued their march forward, as reported earlier this year. [[link1](#), [link2](#)] Briefing in the Sixth Circuit began in December in the appeal of class certification in *Hicks v. State Farm Fire and Cas. Co.*, Case no. 19-503, and should conclude in February. As reported last month, the Fifth Circuit heard argument in October in an appeal of class certification and of the propriety

of deducting labor depreciation under Mississippi law. We may see two circuit decisions in 2020 on class certification of these claims.

Meanwhile, the Sixth Circuit is also reviewing district court decisions holding that Ohio law permits deduction of labor depreciation. *Perry v. Allstate Indem. Co.*, 2018 WL 6169311 (N.D. Ohio Nov. 26, 2018); *Cranfield v. State Farm Fire and Cas. Co.*, 340 F.Supp.3d 670 (N.D. Ohio 2018). The court of appeals found that oral argument is unnecessary in *Cranfield*, so a decision may be in the offing soon.

And, the North Carolina Supreme Court is hearing an appeal of the dismissal of a labor depreciation class action. *Accardi v. Hartford Underwriters Ins. Co.*, No. 42A19. The trial court had found that North Carolina law permitted deduction of labor depreciation in determining ACV. No. 2018 WL 5273971 (N.C. Super. Ct. Oct. 22, 2018).

Some cases have already gone the settlement route. In *Stuart v. State Farm*, Case 4:14-cv-04001, (W.D. Ark.), a motion for preliminary approval of an Arkansas class settlement was filed Dec. 10. Settlement was reached after a certified class had been affirmed by the Eighth Circuit.

Meanwhile, labor depreciation class actions continue to be filed in several states. See, e.g., *Floyd v. Allstate Indemnity Company*, No. 4:20-CV-00183 (D. S.C.); *Butler v. The Travelers Home and Marine Insurance Co., et al.* (D. S.C.) *Russ v. Travelers Prop. and Cas. Co.*, No. 2:19cv5487 (S.D. Ohio); *Shields v. Met. Prop. and Cas. Ins Co.*, 2019 MS U.S. Dist. Ct., North 1:19-CV-00222 (N.D. Miss.); *Rivers v. Allstate Insurance Co.* (E.D.N.C.); *Davis, et al. v. Liberty Mutual Fire Insurance Co.* (E.D. N.C.).



## Contact

### **Mark A. Johnson**

Partner | Columbus

T +1.614.462.2698

F +1.614.462.2616

mjohnson@bakerlaw.com

**bakerlaw.com**

Recognized as one of the top firms for client service, BakerHostetler is a leading national law firm that helps clients around the world address their most complex and critical business and regulatory issues. With six core national practice groups – Business, Digital Assets and Data Management, Intellectual Property, Labor and Employment, Litigation, and Tax – the firm has nearly 1,000 lawyers located coast to coast. For more information, visit [bakerlaw.com](http://bakerlaw.com).

Baker & Hostetler LLP publications inform our clients and friends of the firm about recent legal developments. This publication is for informational purposes only and does not constitute an opinion of Baker & Hostetler LLP. Do not rely on this publication without seeking legal counsel.