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Insurance Class Action Update

2023 Q1

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This year began like the last one ended, with lots of activity. Total loss class actions kept going around the country, and labor depreciation class actions experienced ups and downs, depending on one's viewpoint. New class actions involving sales tax depreciation, appraisal and privacy claims for data shared with vendors made an entrance, as did additional Washington health care reimbursement rate class actions. And we saw appellate action in some previously reported class actions alleging claims based on uninsured/underinsured motorist coverage, COVID-19 premium rebates and how property space for coverage limits is calculated.

Total Loss Valuation Claims Drive Forward

A series of cases challenging the use of "projected sales adjustment" – which adjusts the list price of a vehicle to reflect consumer purchasing behaviors, such as negotiated discounts – proceed. In three of the cases, insurers experienced partial success by obtaining dismissal of declaratory relief claims. *Stromquist v. Progressive Universal Ins. Co.*, 2023 WL 2537838 (D. Neb. Mar. 16, 2023); *Holmes v. Progressive Universal Ins. Co.*, 2023 WL 130477 (N.D. Ill. Jan. 9, 2023); *Martorana v. Progressive Direct Ins. Co.*, 2023 WL 2465639 (D. Mass. Mar. 10, 2023). In *Stromquist and Holmes*, the courts found it speculative whether the plaintiffs will suffer another total loss and submit hypothetical claims to the defendant insurers, and thus they dismissed declaratory relief claims for lack of standing. In *Martorana*, the court dismissed the declaratory relief claim as duplicative of the breach of contract claim.

But each court declined to dismiss the remaining claims for breach of contract, bad faith and statutory violations, one finding that multiple courts permitted a similar bad faith claim to proceed. *Stromquist*, 2023 WL 2537838. A fourth case challenging the use of projected sales adjustment has been teed up for a class certification decision. *Costello v. Mountain Laurel Assurance Co.* (TV2), 2:22-CV-00035 (E.D. Tenn.) The plaintiff moved for certification on March 10, and the insurer's response is due May 12.

Appraisal clauses continue to be a useful tool to defend total loss cases. As in *Cudd* [2022 Q4 Report], the insurer in *Urbassik v. Am. Family Mut. Ins. Co.* obtained dismissal by invoking the policy's appraisal provision. 2023 WL 2185973 (N.D. Ohio Feb. 23, 2023). Unlike *Cudd*, though, the insurer and the plaintiff completed the appraisal process, which resulted in a valuation higher than the original settlement payment. But the court still dismissed the breach of contract claim because the insurer complied with the policy by using appraisal to resolve the dispute and issued payment accordingly.

Labor Depreciation Class Actions

Labor depreciation class actions continue to see uneven results. A federal district court interpreted Texas law to find that the phrase "actual cash value" in an insurance policy is ambiguous, giving way to the insured's interpretation that it does not include depreciation of "anticipated" labor costs. *Sims v. Allstate Fire & Cas. Ins. Co.*, 2023 WL 175006 (W.D. Tex. Jan. 11, 2023). Insureds have refined their arguments to create a false dichotomy between past labor to create a structure (e.g., installing shingles on a new roof) and future labor to repair it (e.g., replacing damaged shingles on an existing roof) in deciding what depreciation costs may be deducted from replacement cost value in determining the actual cash value of a loss. The *Sims* court appeared to accept that argument. Another court reached the same conclusion under Texas law, disallowing labor depreciation. *Cortinas v. Liberty Mut. Pers. Ins. Co.*, Case No.

SA:22-CV-00544-OLG (W.D. Tex. Mar. 14, 2023) (Doc. No. 37). But *Sims* and *Cortinas* are seemingly contrary to another Texas district court decision, *Tolar v. Allstate Texas Lloyd's Co.*, 772 F. Supp. 2d 825 (N.D. Tex. Mar. 22, 2011).

However, insureds' efforts to pursue multistate labor depreciation class claims have faced challenges. In *Rivers of Life Int'l Ministries v. Guideone Ins. Co.*, the court held that a Tennessee plaintiff lacks standing to pursue class claims on behalf of non-Tennessee policyholders in 12 other states, and it dismissed claims asserted under laws other than Tennessee. 2022 WL 17261845 (W.D. Tenn. Nov. 18, 2022). The court was persuaded by a similar decision in *Brown v. Auto-Owners Ins. Co.*, 2022 WL 2442548 (N.D. Ill. June 1, 2022), and found that the Tennessee plaintiff had no connection to and no injuries in the 12 other states alleged as part of the class, so that success on the Tennessee claim would not determine a result for insureds in other states. The court also held that the laws of the 13 states at issue are not materially the same. 2022 WL 17261845 at *4. The question of standing to assert labor depreciation claims on behalf of multistate classes is pending in other cases, so expect more decisions soon.

Sales Tax Depreciation Class Action

A class complaint was filed March 1 asserting claims based on depreciation of sales tax on structural damage claims. *Pitkin v. State Farm Gen. Ins. Co.*, Case 3:23-cv-00924-JCS (N.D. Calif.). This follows more widely known labor depreciation claims by claiming that depreciating sales tax when determining the actual cash value of a loss is an improper deduction and that all sales tax should be paid as part of actual cash value. *Pitkin* asserts a class of California-only policyholders, and in some respects, it may be limited in broader applicability based on the complaint's reliance on California Insurance Code § 2051. A motion to dismiss the non-breach of contract claims is pending.

New Theory of Privacy Claims Based on Claims Data Shared With Vendors

In January, a class action complaint was filed alleging that insurers disclose enormous quantities of confidential data to Verisk Analytics Inc. and its subsidiary Insurance Services Office Inc. (ISO) in a manner that violates various common law privacy rights and results in a breach of contract. *Byko v. State Farm Mut. Auto. Ins. Co.*, No. 3:23-cv-01316-MAS-TJB (D. N.J.). In short, claims are based on the insurer's submission of claimants' personal and financial information to ISO for inclusion in databases, which are available to third parties who obtain a license to use them.

The complaint is against State Farm, Verisk Analytics Inc. and ISO, but the allegations cast a broad net over the practices of many property and casualty insurers. The plaintiffs, all of whom are Oklahoma residents for now, allege they represent first-party and third-party classes of persons submitting claims under "Oklahoma-based" insurance policies.

Washington Reimbursement Rate Class Actions Persist

Two class actions were filed against an insurer alleging that its claims processing database improperly limits payments by location because the geography-based database fails to consider individual circumstances in determining whether a charge is reasonable. *Lawrence A Thomas DC PS v. Safeco Ins. Co. of Am. Inc.*, No. 2:23-cv-00545-RSL (W.D. Wash.); *Cogent Brain PS v. Safeco Ins. Co. of Am. Inc.*, No. 2:23-cv-00544-RSM (W.D. Wash). The complaints against Safeco allege that two different classes of Washington health care providers were paid for services under personal injury protection claims, defined to exclude providers that are barred from asserting the claims under an Illinois state court class settlement, so that it includes in the class providers for which prospective relief under that settlement has now expired. *Lebanon Chiropractic Clinic, PC v. Liberty Mut. Ins. Co.*, 2016 WL 546909 (Ill. Ct. App. Feb. 9, 2016); Case No. 14-L-521 (St. Clair County, Ill., Cir. Ct.).

These new cases follow others in Washington where health care providers have sued insurers based on their rate of reimbursement. See, e.g., *Schiff v. Liberty Mut. Fire Ins. Co.*, 24 Wash. App. 2d 513, 520 P.3d 1085 (Wash. Ct. App. 2022) (holding that 80th percentile bill review practice using a database to determine reasonableness of bills is an unfair practice), petition for review granted, 526 P.3d 844 (2023); *Folweiler Chiropractic, PS v. Am. Fam. Ins. Co.*, 5 Wash. App. 2d 829, 429 P.3d 813 (2018).

New Wisconsin Appraisal Class Action

A class action was filed March 1 on behalf of Wisconsin policyholders, asserting that the insurer improperly rejected insureds' demands for appraisal. *Novak v. State Farm Fire and Cas. Co.,* No. 1:23-cv-00283-WCG (E.D. Wisc.). The claims appear to rest on whether the disagreement between insured and insurer is over the amount of loss, which triggers appraisal, or over the scope of the loss and what repairs are covered, which do not. The complaint alleges that the insurer has a "practice of improperly characterizing disputes over causation, scope and means and method of repair in the context of a covered loss as coverage issues to deny insureds their right to appraisal," and it seeks damages and declaratory relief.

New York No-Fault Coverage Exhaustion Class Certified

One federal district court certified a class of New York insureds asserting that they had been underpaid first-party, no-fault claims.

Lanzillotta v. Gov't Employees Ins. Co., 2023 WL 2652265 (E.D.N.Y. Mar. 25, 2023). The plaintiff alleges that the insurer improperly advised insureds that medical and wages benefits under no-fault coverage had exhausted limits before they had been reached by deducting 20 percent of lost earnings above a certain level from coverage limits when wage benefits had been paid. The class was limited to insureds submitting no-fault claims that paid lost wage benefits and who earned gross monthly wages in excess of $2,000, for whom the insurer claimed coverage limits had been met. The court found that the acceleration of policy exhaustion for class members earning more than $2,000 per month, in violation of the no fault statute, established breach of contract as a matter of law, easily satisfying predominance. Id. at *9.

Appeal of Certified California COVID-19 Rebate Class Turned Away

As reported last quarter, the court in *Day v. Geico Cas. Co.* had certified a class of 2 million California policyholders asserting claims that refunds of auto insurance premiums for lower casualty risks experienced during the pandemic were insufficient. [2022 4Q Report] In a 2-1 decision, a panel of the Ninth Circuit denied permission to appeal that order. Appeal No. 22-80134, Dist. Ct. No. 5:21-cv-02103-BLF (Feb. 22, 2023) (Doc. No. 146). Just a few days later, the district court granted the insurer's motion to strike the jury demand. No. 5:21-cv-02103-BLF (Feb. 27, 2023) (Doc. No. 147).

Appeal Allowed of Class Certified for Garage Space Coverage Limit Claims

But in another class action, the Ninth Circuit granted the insurer permission to appeal an adverse class certification decision. *Hilario v. Allstate Ins. Co.*, Appeal No. 22-80138, Dist. Ct. No. 3:20-cv-05459-WHO (Feb. 24, 2023) (Doc. No. 100). The district court had certified a Rule 23(b)(3) class for claims that the insurer overcharged premiums for homeowners insurance because of a software error that double counts the square footage of garage space in determining the appropriate coverage amount. 2022 WL 17170148 (N.D. Calif. Nov. 22, 2022) [2022 4Q Report].

Update on Appeal of Dismissed UM/UIM Class Actions

The following updates our last report on appeal of dismissal of Pennsylvania underinsured motorist (UIM) class actions involving the other owned vehicle exclusion [2022 4Q Report]. In *Stanton v. State Farm Mut. Auto. Ins. Co.*, the Third Circuit referred to the merits panel the appellants' motion to certify the underlying question of law to the Pennsylvania Supreme Court, and denied appellants' motion to stay pending a decision in another case (Case No. 22-2524 (Nov. 30, 2022, Doc. No. 26) (Dec. 15, 2022, Doc. No. 30)), after which the appeal was voluntarily dismissed. (Feb. 21, 2023, Doc. No. 35).

The remaining cases in the consolidated appeal will be deemed submitted on the briefs on May 19, without oral argument. *Berardi v. USAA Gen. Indem. Co.*, Case Nos. 22-2231, -2538; *Smith v. USAA Cas. Co.*, Case No. 22-2232; *Jones v. Geico Choice Ins. Co.*, Case No. 22-2414; *Purcell v. Geico Cas. Co.*, Case Nos. 22-2415, -2557.

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