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Insurance Class Action Update

2018 4Q

By Mark A. Johnson

The final quarter of 2018 witnessed a number of new twists on old theories in class actions involving auto and homeowners claims and coverages, as well as further activity in some long-running class actions.

Vehicle Total Loss Class Actions

Total loss vehicle claims remain fertile ground for class actions against insurers. Another class action on valuation methodology was filed in the Middle District of Georgia, asserting that the insurer engaged in a scheme with third-party software vendors to artificially deflate the value of total losses to less than the actual pre-loss value of vehicles. *Relf v. State Farm Mutual Automobile Ins. Co.*, case no. 4:18-cv-00240 (M.D. Ga.) (filed Dec. 12, 2018).

As was the case in the total loss class actions reported last quarter (2018 Q3 Insurance Class Action Update), the plaintiff asserts that total loss valuation reports provided by Mitchell and J.D. Power violate Georgia law because they are not statistically valid. The plaintiff alleges that the methodology for identifying comparable vehicles, which includes calculating base values and making condition adjustments, is not based on statistically valid methodologies or values, but rather is wholly arbitrary. The plaintiff asserts a Georgia class of insureds making first-party claims for total loss that were adjusted using the challenged valuation system and that included a downward adjustment.

Auto Diminished Value Claims Resurface

An old(er) theory of vehicle diminished value recently surfaced in a new class action filed in California. *Tufano v. State Farm Mut. Auto. Ins. Co.*, case no. 2:18-cv-03281 (E.D. Calif.). The plaintiff's vehicle was damaged in an accident caused by another State Farm insured, and he complained that his policy defines property damage to exclude diminution in value. The plaintiff alleges that this coverage was illusory because he purchased insurance before receiving the policy and relied on falsely advertised insurance that was different from what was provided. He also asserts that he was entitled to payment of diminution in value under his liability coverage, as his claim was made under the at-fault driver's policy.

The plaintiff seeks to represent a nationwide class of State Farm insureds who purchased auto coverage, a subclass of insureds who sustained loss and were not paid diminution in value, and a class of all persons who were not paid diminution in value with third-party auto damage claims.

Georgia Homeowners Diminished Value Class Actions Continue to Develop

Class actions alleging unpaid diminished value for homeowners claims in Georgia, which came on the scene some time ago, continue to percolate. In *Anderson v. American Family Ins. Co.*, the court granted the insurer's motion for summary judgment and dismissed the plaintiff's claims, dismissing a class certification motion as moot. 2018 WL 4976805 (M.D. Ga. Oct. 15, 2018). The court did not reject homeowners' diminished value claims generally, but found that the plaintiff failed to provide evidence of decreased value from a leaking pipe claim for which the cost to repair was paid. The plaintiff offered no foundation for his lay opinion that his home lost value and did not opine on the market value of his home. Further, the court criticized the plaintiff's expert's report, saying that it was a "cut and paste" of reports from prior cases and that it failed to opine on the home's impaired value.

And final approval of a class settlement was granted in another Georgia homeowners diminished value class action in the same court. *Thompson v. State Farm Fire and Casualty Co.*, No. 5:14-cv-32 (M.D. Ga. Jan. 14, 2019). Georgia policyholders with eligible claims will automatically receive a diminished value assessment pursuant to a uniform methodology by trained personnel and, in some cases, independent appraisers, with the full amount of assessed diminished value paid to those class members. While the amount paid to class members will not be known until those assessments are performed, the plaintiff's counsel was awarded $6.7 million in fees and costs.

Pennsylvania Invalidates UM/UIM Household Vehicle Exclusion

The Pennsylvania Supreme Court recently held that a household vehicle exclusion under UM/UIM coverage was invalid. *Gallagher v. GEICO Indemnity Co.*, 2019 WL 290122 (Jan. 23, 2019). The plaintiff had one policy covering his motorcycle, providing $50,000 of UM/UIM coverage, and another policy with $100,000 of UIM for each of two other vehicles. When the plaintiff was injured by an underinsured motorist, the insurer paid the limits of UM/UIM coverage under the motorcycle policy, but denied coverage under the second policy based on the household vehicle exclusion.

The high court found that a Pennsylvania statute clearly states that stacked UM/UIM coverage is the default unless the insured waives stacked coverage following a statutorily prescribed waiver. Because the household vehicle exclusion operates as a "de facto waiver" of stacked UIM coverage under the statute, without complying with the signed waiver requirement, the exclusion was unenforceable as a matter of law.

A group of insurers are already facing class actions as a result of this decision. *Koehler v. USAA Casualty Insurance Co.*, case no. 190102149; *Rutt v. Donegal Mutual Insurance Co.*, case no. 190102148; *Loose v. Pennsylvania National Mutual Insurance Co.*, case no. 190102147; *Butta v. Geico Casualty Co.*, case no. 190102146; *Stockdale v. Allstate Fire & Casualty Insurance Co.*, case no. 190102151 (all in Philadelphia County Common Pleas Court). Insurers are well-advised to examine their Pennsylvania auto policies for compliance, but that won't prevent class actions on this issue from growing as to current policies.

Ohio Labor Depreciation Redux

As mentioned in last month's report, the Northern District of Ohio ruled that "ACV cannot reasonably be interpreted to exclude labor from a depreciation calculation" on homeowners claims. *Perry v. Allstate Indem. Co*., 2018 WL 6169311 (N.D. Ohio Nov. 26, 2018); *Cranfield v. State Farm Fire and Cas. Co*., 2018 WL 6169200 (N.D. Ohio Nov. 26, 2018). Those decisions were appealed by the plaintiffs to the Sixth U.S. Circuit Court of Appeals. Whether the appellate court's recent decision in *Hicks v. State Farm Fire and Casualty Co*., which held that Kentucky law prohibited a deduction from ACV for labor depreciation, is followed or distinguished promises to be of key focus. 2018 WL 4961391 (6th Cir. Oct. 15, 2018). Briefing in both appeals begins in March.

Not wanting to miss out, another plaintiff recently filed a complaint asserting class claims for deduction of labor depreciation in the Southern District of Ohio. *Schulte v. Liberty Insurance Corp*., Case no. 3:19-cv-00026 (filed Jan. 28, 2019). The plaintiff seeks to represent a class of Ohio policyholders who received actual cash value payments for loss or damage to a structure in Ohio where the cost of labor was depreciated. Some of the plaintiff's lawyers are the same Kentucky lawyers who represented the plaintiff in *Hicks*.

Meanwhile, a stay was lifted in another labor depreciation class action in an Ohio state court in Cuyahoga County; the stay had been imposed pending the district court's decisions in *Perry* and *Cranfield*. *Parker v. American Family Mut. Ins. Co*., Case no. CV-16-865773 (Cuyahoga Cty. C.P. Ct.). That case now awaits a decision on a pending motion to dismiss. For now, until an authoritative and reliable ruling answers the question, Ohio labor depreciation class actions are running on separate tracks in state and federal courts.

Challenge to Constitutionality of Amended Florida PIP Statute

Last October, an alleged class action was filed challenging an insurer's denial of Florida PIP claims. *Lowry v. State Farm Mutual Auto. Ins. Co*., Case no. 18-cv-62575 (S.D. Fla.). In 2012, the legislature amended the PIP statute to provide coverage for medical expenses only if the insured receives initial services within 14 days after the vehicle accident. While the insurer abided by the amended statute, the plaintiff contends that the statute runs afoul of Florida's constitution as a violation of due process, equal protection and access to courts.

However, on Dec. 21, the insurer filed a motion to dismiss, which argued that the plaintiff's claims were raised in a prior state court action that was dismissed with prejudice, and consequently are barred by claim preclusion. *Scenic Health Alliance, Inc. and Lowry v. State Farm Mutual Auto. Ins. Co*., 2018 WL 6004364 (Fla. 17th Jud. Cir. Ct. Oct. 23, 2018). The motion to dismiss makes several other arguments, including that another court in the same federal district previously dismissed the same claims against another insurer. *Arias-Bonello v. Progressive Select Ins. Co*., 2017 WL 7792704 (S.D. Fla. Aug. 8, 2017).

Coda to Snyder Class Action in Colorado

In what seems like an epilogue to *War and Peace*, yet another chapter was written in this 2014 class action against more than 100 insurers, for what can at best be summarized as a shotgun of claims about payment of replacement cost benefits for homeowners claims and an alleged industrywide conspiracy. *Snyder v. ACORD Corporation*, case no. 1:14-cv-01736 (D. Colo). The defendants' motions to dismiss were granted on Jan. 15, 2016, and the Tenth U.S. Circuit Court of Appeals affirmed. *Snyder v. ACORD Corporation*, 2017 WL 1279032 (10th Cir. April 6, 2017). As part of its decision granting the motions to dismiss, the trial court awarded the defendants attorneys' fees against the plaintiffs, and following remand some of the defendants pursued a motion to determine those fees.

This month, the district court awarded those defendants fees of nearly $1.6 million against the plaintiffs and also separately against their attorney. 2019 WL 319407 (Jan. 24, 2019). The court found that the plaintiffs' motions were "completely without merit and 'prolix, redundant, and meandering,'" including "verbose, unreasoned filings and numerous errata" that forced defendants to expend more time defending the action than expected, and also noted the struggle throughout the case "to decipher [p]laintiffs' arguments." The court was mindful that "individuals' health, families and even dogs have been affected by this litigation." But the court could not ignore the "obstinate pattern of behavior" that unjustifiably cost the industry "millions of dollars" when finding the plaintiffs' counsel personally liable for fees along with the plaintiffs. Following a submission by defendants to deduct fees incurred prior to plaintiffs' counsel's involvement and unrelated to the appeal, as the court directed, on Feb. 7 the court entered judgment against plaintiffs' counsel for $1 million in fees.

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