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Insurance Class Action Update

2022 Q4

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The end of this past year witnessed further development of total loss, uninsured/underinsured motorist (UM/UIM) and COVID premium rebate class actions, along with movement in new(er) property and casualty class actions involving discrimination in claims adjusting and allegations of software errors that overestimated the size of insured spaces, leading to higher premiums. Also, class actions are appearing against insurers for violation of anti-wiretap statutes based on tracking of consumers' browsing histories.

Total Loss Valuation Claims in Full Swing

One class action challenging the valuation of vehicles under total loss claims was dismissed as premature. *Cudd v. State Farm Mutual Automobile Ins. Co.*, 2022 WL 16541166 (M.D. Ga. Oct. 29, 2022). The plaintiff alleged breach of contract and unjust enrichment claims and claimed that the use of a negotiation discount from advertised prices underpaid the actual cash value (ACV) of total loss vehicles. However, the policy contained an appraisal provision to determine the ACV of a totaled vehicle when a policyholder disagrees with the insurer's ACV offer. The policy required the policyholder to first state disagreement with the insurer's ACV offer before submitting the disagreement to appraisal. Because the plaintiff did not first notify the insurer of his disagreement in order to trigger the appraisal process, his claims were premature. While the court refused to indicate whether use of the negotiation discount was improper, the court's validation of the appraisal process throws a major wrench into the plaintiff's class certification engine.

The court in *Cudd* wisely began its opinion with the following observation: "[T]he Court observes the obvious. Its role is not to serve as the state insurance commissioner deciding best practices for the adjustment of claims. The courts are not the proper forum for deciding such public policy issues. The courts are established to provide a forum for the resolution of justiciable cases and controversies."

But the U.S. Court of Appeals for the Eleventh Circuit refused to hear a Rule 23(f) appeal from a class certified for total loss valuation claims based on mistakes in calculating the vehicle tax. *Geico General Ins. Co. v. Ewing*, Case No. 22-90016 (11th Cir. Dec. 12, 2022). That class certification decision was explored here.

Class Claims for Discrimination in Adjusting Dismissed

Allegations to represent a class of policyholders allegedly discriminated against on the basis of race or sexual orientation were dismissed in *Sullivan v. Liberty Mutual Ins. Co.*, Case No. 1:21–cv–06084 (N.D. Ill. Oct. 26, 2022) (doc. no. 37). The plaintiffs alleged to represent a Rule 23(b)(2) class only of policyholders allegedly discriminated against in claims adjusting, but the court had previously dismissed claims for declaratory and injunctive relief because plaintiffs were no longer policyholders of the insured. 2022 WL 2105904 (Jun. 10, 2022). As only the plaintiffs' individual damages claims remained pending and they had not alleged a damages class under Rule 23(b)(3), the class allegations were untenable.

Meanwhile, a complaint asserting similar class allegations for racial discrimination in claims handling practices was filed in *Huskey v. State Farm Fire and Cas. Co.*, Case No. 1:22-cv-07014 (N.D. Ill. filed Dec. 14, 2022).

Class Certified over Double Counting Garage Space for Coverage Limit

In *Hilario v. Allstate Ins. Co*., the court certified a Rule 23(b)(3) class alleging 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 coverage amount. 2022 WL 17170148 (N.D. Calif. Nov. 22, 2022). The court narrowed the class definition to exclude those with renters insurance and policyholders not impacted by the use of the allegedly faulty software. The court found predominance was met because the questions of liability were uniform. The court rejected the argument that a policyholder who overpaid for coverage would have had the benefit of that higher coverage limit if a claim was filed because the damages claimed were for overcharged premiums, not compensation for losses.

UM/UIM Class Claims Rejected

Claims on behalf of a class for wrongfully withholding UM/UIM payments were dismissed in *Laures v. Progressive Casualty Ins. Co*., 2022 WL 4778000 (S.D. Ill. Oct. 2, 2022). The insurer offered $5,000 but allegedly did not tender that amount, so the insured sued for breach of contract on behalf of other policyholders who, during the preceding 10 years, were offered money by the insurer for claimed UM/UIM damages but did not receive a tender of that offered payment within 30 days. The court held that neither an implied covenant of good faith and fair dealing nor the policy obligated the insurer to pay insureds unaccepted settlement offers in the absence of an executed release or arbitration award.

California COVID Rebate Class Action Rumbles Forward

As previously reported, a handful of class actions were filed asserting that auto insurance premiums for lower casualty risks experienced during the pandemic were insufficient. [2020 4Q, 2021 1-3Q, 2021 4Q-2022 1Q]. In one such case, *Day v. Geico Casualty Co*., the court had previously found that under California law, determining the amount of premium refunds was not barred by the filed rate doctrine. The *Day* court followed that up by certifying a class of 2 million California policyholders with claims that the refund given wasn't enough. 2022 WL 16556802 (N.D. Calif. Oct. 31, 2022).

In certifying the class, the court first rejected the insurer's challenges to the plaintiff's expert report, then had little difficulty in finding the required elements of Rule 23 had been met. Because the plaintiff's expert proposed a damages model that would calculate a percentage refund applicable to all class members, in the same way as the insurer's refund, predominance was satisfied.

After required briefing of whether the court should use its discretion to abstain from exercising equitable jurisdiction, the court decided that it should keep the *Day* case. 2022 WL 17825119 (N.D. Calif. Dec. 20, 2022). The court held that claims will not require determination of complex economic policy (rate making) better handled by an administrative agency, and that the court is equipped to handle and appropriately decide the case. One cannot help but see two diametrically different judicial philosophies when comparing this and other decisions in *Day* with that of the federal court in *Cudd* above, which stated that courts are not the proper forum for deciding public policy issues.

Dismissed Pennsylvania UM/UIM Class Actions Under Review

We previously reported on class actions filed in Pennsylvania state courts alleging claims seeking recovery of UIM insurance benefits that were denied based on the application of the other owned vehicle exclusion, when the insured was injured while operating a vehicle not insured under the applicable policy. [2022 Q2-Q3] Since then, the Third Circuit has taken up whether dismissal of those cases was proper. The appellants also filed a motion to certify the underlying question of application of the other owned vehicle exclusion to the Pennsylvania Supreme Court. *Stanton v. State Farm Mutual Automobile Ins. Co*., Case No. 22-2524; *Berardi v. USAA General Indemnity 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. Briefing is underway in the consolidated appeal.

Co-Insurance Penalty Class Decertified

We had previously reported that a 20-state class of insureds was certified based on claims that an insurer improperly included the value of the commercial plaintiff's building foundation when calculating a coinsurance penalty, even though the foundation was not covered. *Mason's Automotive Collision Center LLC v. Auto-Owners Ins. Co*., 2022 WL 2713552 (W.D. Ark. Jul. 13, 2022). [2022 Q2-3] However, the court has since reconsidered its decision and decertified the class. 2022 WL 16700680 (Nov. 3, 2022).

The court found that a Rule 23(b)(2) class for declaratory relief was not cohesive because of the individual questions required to be resolved to determine whether a foundation loss was covered. And a Rule 23(b)(3) class was rejected because "[t]he [c]ourt is persuaded that it would need to evaluate each member's claim files to evaluate liability and damages." Even though coinsurance provisions were uniform, too many individual questions to determine liability precluded predominance.

Wiretapping Class Actions Gain Headway

A few years ago, class actions were filed against retailers and others under federal and state anti-wiretapping statutes. The plaintiffs claimed that session replay software and similar

technologies that track and record visitors' movements on a website constitute wiretapping. At least 15 states require consent from all parties when a communication is recorded or intercepted, and the claims assert that the plaintiffs were not aware of and did not consent to the tracking of their movements within a website. Steep statutory penalties – ranging from $1,000 to $50,000 per violation – create potentially staggering class wide damages.

Late last year, class actions were filed against insurers asserting these same claims, e.g., *Vondbergen v. Liberty Mutual Ins. Co.*, Case No. 2:22-cv-04880 (E.D. Pa.). Those cases follow decisions of the Third Circuit last year reversing summary judgment for defendants on these wiretapping claims. *Popa v. Harriet Carter Gifts, Inc.*, 45 F.4th 687 (3d Cir. 2022), 52 F.4th 121 (3d Cir. 2022). Insurers would do well not only to watch these cases but also to take steps to proactively reduce the risk of liability for these claims.

Multistate Labor Depreciation Class Actions Take a Hit

As previously reported, alleged multistate labor depreciation class actions have become the norm, with courts split over standing issues. Last fall the Eastern District of Tennessee held that a Tennessee plaintiff does not have standing to represent a class that includes non-Tennessee insureds. *Rivers Of Life International Ministries v. Guideone Ins. Co.*, 2022 WL 17261845 (W.D. Tenn. Nov. 18, 2022). The court reasoned that the Tennessee plaintiff did not incur injury in any other state and had no connection with other states, and because the laws of the states that define the alleged class are not "materially the same," the resolution of the plaintiff's claim would have no impact on the non-Tennessee claims.

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