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Insurance Class Action Update

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The close of 2023 solidified trends in established class action theories and provided a glimpse of new theories to come. In the auto total loss valuation sphere, one that has seen a lot of action for many years, undervaluation cases shifted in the insurers' favor on class certification, with one notable exception: projected sales adjustment cases. On the flip side, insureds gained major wins on the merits of tax and regulatory fee cases, and we've since seen these cases shift to settlement posture. In the labor depreciation world, a federal judge put the brakes on plaintiffs' counsels' attempts to use information learned in prior settlements. On the new side, a COVID-19 premium putative class case received the green light to proceed and a privacy class action challenging the submission of personal information to the Insurance Services Office (ISO) was dismissed from federal court and sent back to state court.

Total Loss Valuation Class Actions

Insurers saw big wins in a pair of Fifth Circuit decisions. In *Sampson v. USAA GIC*, the Fifth Circuit vacated an order certifying a class of insureds whose claims were valued via a CCC report and paid less than the NADA® clean retail value. 83 F.4th 414 (5th Cir. 2023). Because the total loss statute defined other permissible valuation sources, the Fifth Circuit held that this created "an explosion of predominance issues because [defendant] has the due process right to argue, for each individual plaintiff, that damages should be determined by a different legally permissible method that would produce lower damages than NADA® (or no damages at all)." *Id.* at 420. But in remanding, the Fifth Circuit left undecided the plaintiffs' argument that damages are not elements of their bad faith claim. *Id.* at 422 n.6. Just months later, the Fifth Circuit answered that very question and held that proof of injury is required for breach of contract, a highly individual question, and without a breach, the bad faith claim failed. *Bourque v. State Farm Mut. Auto. Ins. Co.*, 89 F.4th 525, 529 (5th Cir. 2023).

We previously have written about insurers' use of appraisal clauses to defend against class certification. [2023 Q2-3 Report; 2023 Q1 Report; 2022 Q4 Report] The Eleventh Circuit recently weighed in on the issue, finding that the appraisal clause is mandatory but not a condition precedent in a case challenging vehicle valuation. *Cudd v. State Farm Mutual Automobile Insurance Company*, No. 22-13916, 2024 WL 65998 (11th Cir. Jan. 5, 2024). Therefore, the Eleventh Circuit held that the trial court erred by dismissing the suit rather than simply compelling appraisal. *Id.* at *3.

In our previous report, we noted that insurers have faced an uphill battle in class actions challenging the use of projected sales adjustments. [2023 Q2-3 Report] Recently, another court certified a class, making the hill steeper for insurers to surmount. *Clippinger v. State Farm Mutual Automobile Insurance Co.*, No. 2:20-cv-02482-TLP-cgc, 2023 WL 7213796 (W.D. Tenn. Aug. 25, 2023). But not all is bad news: the Southern District of Iowa denied class certification, finding that "in the absence of a 'prescribed formula' for calculating ACV, there are too many variables in the market value analysis to make class certification appropriate." *Kroeger v. Progressive Universal Ins. Co.*, No. 4:22-cv-00104, 2023 WL 9059523, at *8 (S.D. Iowa Nov. 20, 2023). And the Northern District of Illinois compelled two claims to arbitration based on a provision requiring any dispute of $10,000 or less to be arbitrated in accordance with Minnesota's No-Fault Act. *Williams v. State Farm Mut. Auto. Insur. Co.*, No. 22 C 1422, 2023 WL 8827946, at *3 (N.D. Ill. Dec. 21, 2023).

Total Loss Tax, Title, Premiums, and Diminished Value Class Actions

The tax and regulatory fee cases saw less action at the end of 2023. As previously reported, many of these cases have swayed in the insureds' favor. [2023 Q2-3 Report] Since then, one insurer sought and obtained preliminary approval of a class settlement in *Ewing v. Geico Indemn. Co.*, No. 20-cv-00165 (N.D. Ga. Dec. 5. 2023), ECF No. 195, and another insurer obtained final approval of a class settlement in *Andrew v. State Auto Mut. Ins. Co.*, No. 2:21-CV-5867 (S.D. Ohio Oct. 10, 2024), ECF No. 51.

Labor Depreciation Class Actions

Class certification was denied in another multistate labor depreciation class action, but this time because of adequacy concerns. *Goble v. Trumbull Ins. Co.*, 2023 WL 9050956 (S.D. Ohio Dec. 29, 2023). The plaintiffs sought to certify a class for labor depreciation claims, but they also pursued an individual claim for replacement of windows in their home. Significant financial disparity between their representative and individual claims, as well as deposition testimony showing that the class representatives had little interest in pursuing their claim for labor depreciation, led the court to conclude that they were not adequate class representatives and denied class certification. *Id.* at *6-8. The plaintiffs' counsel later filed a new plaintiff's motion to intervene and to serve as a class representative as well as a motion to issue precertification notice to the putative class, both of which are pending. Case no. 2:20-cv-05577, doc. nos. 96, 97 (Jan. 12, 2024).

We previously reported on a new plaintiffs' strategy in one labor depreciation class action of pressing for depositions of personnel who performed the same insurer's analysis of claim forms filed in settlement of another labor depreciation class action. In response, insurers filed motions to enforce final judgments approving settlement agreements in order to preclude testimony about settlement administration. [2023 Q1 Report] Since then, one court firmly rejected this strategy and granted a motion to enforce the previously court-approved settlement agreement, as it held that depositions of personnel who reviewed claim forms filed under the settlement would breach that agreement. *Holmes v. LM Ins. Corp.*, 2023 WL 6979239 (M.D. Tenn. Oct. 23, 2023).

Sales Tax Depreciation Class Action

One state court of appeals affirmed the denial of class certification of claims for depreciation of sales tax when adjusting structural damage claims. *Kazanjian v. Farmers Ins. Co.*, 2023 WL 8230253, No. B317615 (Calif. App. 2d Dist. Nov. 28, 2023). The trial court had denied class certification because claims would require individualized analysis to determine whether each insured had been harmed and injunctive and declaratory relief would not address claims already adjusted. The certification motion defined the class as every insured with a structural loss, but the plaintiff only appealed denial of certification of injunctive and declaratory relief claims. Because the trial court could not fashion a declaratory judgment or injunction to remedy past underpayment of claims, it was within its discretion to refuse to certify a class based on that alleged relief. *Id.* at *6-7.

An appeal of a state trial court decision that held depreciation of sales tax to be proper was subsequently dismissed because of the appellant's noncompliance. *Ramyead v. State Farm Gen. Ins. Co.*, No. B329614 (Cal. App. 2d Dist. Dec. 11, 2023).

COVID-19 Refund Class Action

Another court refused to dismiss claims seeking pandemic-era premium refunds based on the filed rate doctrine. *Echo & Rig Sacramento, LLC v. Amguard Ins. Co.*, 2023 WL 6927314, No. 2:23-cv-00197-DJC-JDP (E.D. Calif. Oct. 18, 2023). The court found that "the Plaintiff is not challenging the rate approved by the Commissioner, but rather the Defendant's application of the rate in light of Plaintiff's reduced operations due to the COVID-19 pandemic." *Id.* at 4. The court dismissed claims alleging the failure to provide refunds based on the insurance commissioner's bulletins ordering retroactive refunds. However, the court let stand Unfair Competition Law claims based on allegations that the insurer engaged in an unfair business practice by continuing to charge a rate that produced an "excessive" rate of return in light of new circumstances and by failing to reassess the insured's exposure.

Spyware Class Action Survives Dismissal Motion

We reported more than a year ago about class actions filed against insurers under federal and state anti-wiretapping statutes, based on claims that insureds unknowingly used websites that track and record visitors' movements within a website. [2022 Q4 Report] Recently, a court refused to dismiss such claims. *Vondbergen v. Liberty Mutual Ins. Co.*, 2023 WL 8569004, Case No. 2:22-cv-04880 (E.D. Pa. Dec. 11, 2023). The court allowed jurisdictional discovery to address whether the insurer was subject to specific personal jurisdiction based on operation of its website. *Id.* at *4-8. The court also did not accept the insurer's arguments that session replay software is not a device and that browsing activity did not constitute interception of communications within the meaning of the Pennsylvania Wiretap Act. The court suggested that these questions may be more appropriate to decide after development of the record. *Id.* at *9-12.

Privacy Class Action Dismissed for Lack of Standing

Last year, we discussed a new theory of class claims that an insurer's submission of claimants' personal and financial information to ISO for inclusion in databases improperly discloses confidential information, 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.). [2023 Q1 Report] That court recently dismissed those claims for lack of standing, holding that the lengthy complaint does not allege what confidential information was accessed, by whom or any purported harm incurred by the plaintiffs. There was no alleged imminent harm, and alleging that injury may occur in the future did not confer Article III standing. 2023 WL 7411752, *6-8 (D. N.J. Nov. 9, 2023). The plaintiffs' motion to remand to state court was granted, so this claim may yet be evaluated substantively by a court.

More Action on New Mexico UM/UIM Claims

We have previously reported on New Mexico decisions allowing claims that uninsured motorist/underinsured motorist (UM/UIM) coverage at the minimum level permitted by statute is illusory. In a positive decision for insurers, one district court refused to certify a question to the New Mexico Supreme Court of whether claims of insureds who bought minimum limits coverage can also encompass claims of those who purchased above-minimum limits UIM coverage. *Crutcher v. Liberty Mut. Ins. Co.*, 2023 WL 6847496 (D. N.M. Oct. 17, 2023). The only named plaintiff did not hold above-minimum-limits coverage and the court has yet to decide on the scope of the class definition, so resolution of the proposed certified question may not be determinative. *Id.* at *3.

New Jersey Class PIP Claims Survive – Barely

One court refused to dismiss claims based on an alleged failure to provide written disclosures for personal injury protection (PIP) coverage. *McMillian v. GEICO Indemnity Co.*, 2023 WL 7039535, No. 23-01671 (D. N.J. Oct. 26, 2023). The plaintiff alleged a class action based on claims that the insurer had issued PIP coverage of less than $250,000 without obtaining written waivers mandated by New Jersey law. In support of its motion to dismiss, the insurer submitted written evidence that the plaintiff *had* received notice and affirmatively chose her coverages, which the plaintiff denied. Because authenticity of the signed disclosures was disputed, the court did not dismiss the core claim under Rule 12(b)(6). However, the court warned that if the insured had in fact received and signed the required disclosures, she could not serve as a class representative. *Id.* at *3.

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