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Insurance Class Action Quarterly Update

By Mark Johnson

This quarter has seen a few new types of class actions against insurers as well as aging of some more mature theories wending their way through the courts.

Replacement cost for leased vehicles includes tax and title

A Florida federal district court recently ruled that an insurer was required to include the full sales tax and title transfer fees in the replacement cost for a total loss claim of a leased vehicle, even though the insured never incurred those fees. *Roth v. Geico General Insurance Company*, No. 16-cv-62942-WPD (S.D. Fla. June 14, 2018). The insurer argued that neither is owed under the policy or under Florida law for a leased vehicle, but the court found otherwise.

The court noted that the policy did not distinguish between owned and leased vehicles in defining actual cash value and replacement costs; "owned autos" was defined as owned, financed and leased vehicles. Further, the premium was the same whether the vehicle was owned or leased. Thus, because an insurer must pay all costs associated with replacing a total loss vehicle under an actual cash value policy, it made no difference that the insured leased the vehicle and never paid replacement sales tax and title fees. What was not explained is how much of the total loss payment, including these additional items, goes to the lienholder/lessor. No other cases appear to address this issue for leased vehicles.

Conflict of New Mexico UM/UIM coverage with statutory minimum

Earlier this year, a New Mexico federal district court refused to dismiss claims against an insurer alleging that the underinsured portion of uninsured/underinsured motorist insurance (UM/UIM) is illusory when sold at state-minimum levels. *Bhasker v. Kemper Insurance Co.*, No. 1:17-cv-00260-JB-JHR (D.N.M. Jan. 10, 2018). In New Mexico, UM/UIM is a single coverage with one premium, and insurers are required to offer UM/UIM at state-minimum levels of 25/50. To apply, an insured's UM/UIM coverage limits must be greater than the tortfeasor's liability limits (when combined with any other applicable policies). If not, the insured is not "underinsured," even if damages exceed the tortfeasor's liability limits. The plaintiff complained that because the state also requires

liability insurance minimums of 25/50, an insured with minimum UM/UIM coverage could never recover UIM benefits, so that coverage is illusory. However, insurers are compelled by statute to offer UM/UIM at state-minimum levels, and are prohibited from selling UM/UIM coverage at limits higher than an insured's liability limits. Thus, under *Bhasker*, UM/UIM coverage was illusory when a tortfeasor's liability and an insured's UM/UIM limits were both at state-minimum levels, which the insurer was required to offer.

The *Bhasker* decision has spawned other copycat class actions pending in New Mexico federal court. *Crutcher v. Liberty Mut. Ins. Co.*, No. 1:18-cv-00412-JCH-KBM (D.N.M.); *Apodaca v. Young Am. Ins. Co.*, No. 1:18-cv-00399-GBW-JHR (D.N.M.); *Martinez v. Progressive Preferred Ins. Co. et al.,* Case No. D-202-CV-2018-03583 (Bernalillo County New Mexico, Second Judicial District); *Thaxton v. GEICO*, No. 1:18-cv-00306-SCY-KK (D.N.M.); *Schwartz v. State Farm Auto Ins. Co.*, No. 1:18-cv-00328-KBM-SCY (D.N.M.). Motions to dismiss are already pending in many of those cases, arguing that the insurers simply follow the New Mexico statutory framework for UM/UIM coverage, while the *Bhasker* court was presented only with application of the filed rate and voluntary payment doctrines. Several defendants have also filed motions to certify the question of illusory coverage to the New Mexico Supreme Court. Although this line of cases is somewhat unique to New Mexico's UM/UIM statute, insurers could find themselves facing a similar conflicting UM/UIM statutory framework elsewhere.

Colorado releases effective to waive UM/UIM benefits

In *Calderon v. American Family Mutual Insurance Co.*, the Colorado Supreme Court held that an insurer cannot deduct MedPay benefits paid to a policyholder from UM/UIM benefits. 383 P.3d 676 (Colo. 2016). This decision, as expected, generated a spate of class actions, but in two of them the federal district court dismissed the plaintiffs' claims because they had signed releases before Calderon. Last week the 10th Circuit upheld one of those dismissals, ruling that the releases do not offend public policy. Although the insurance policy may not contravene interpretation of UM/UIM laws, the parties are free to waive statutory rights in settlement of claims. *McCracken v. Progressive Direct Ins. Co.*, 2018 WL 3543048 (10th Cir. July 24, 2018).

Auto Body Shop Antitrust Litigation

These cases allege antitrust claims against several insurers, based on an alleged adoption of the same rates to reimburse body shops for repair work and other acts. The district court in Florida, where they were consolidated, dismissed the complaints after amendments, but last fall a panel of the 11th Circuit reversed. *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indemn. Co.*, 870 F.3d 1262 (2017).

But that panel decision may not stick. On April 20, 2018, the Court of Appeals vacated the panel decision and granted a rare en banc review. En banc briefing is complete, and oral argument is set for the week of Oct. 22, 2018.

Labor Depreciation Class Actions Plod Forward

After the Arkansas class actions filed up to five years against insurers for deducting labor depreciation from actual cash value payments on homeowners claims, labor depreciation class actions have met with varying levels of success and failure in a number of states, and some cases are near a decision point.

The Eighth Circuit put an effective end to most of the handful of Missouri-based labor depreciation class actions, finding that no common issues predominated because actual cash value must be calculated on a case-by-case basis, including whether to include labor depreciation. In *re State Farm Fire and Casualty Co.*, 872 F.3d 567 (8th Cir. 2017). An exception is *McLaughlin v. Fire Insurance Exchange*, where despite the Eighth Circuit's decision, a Missouri state court certified a class and recently directed issuance of class notice. No. 1316-CV11140, Jackson Cty. Cir. Ct.,

And the Eighth Circuit is poised to rule on certification by an Arkansas federal district court of a class asserting labor depreciation claims. *Stuart v. State Farm*, No. 16-3784. That appeal is fully briefed and awaiting oral argument. Virtually all of the other Arkansas labor depreciation class actions have settled, so the decision may have limited applicability.

In Kentucky, the labor depreciation question is up for resolution by the Sixth Circuit. *Hicks v. State Farm*, No. 14-cv-00053, E.D. Ky. After upholding the plaintiffs' claim for breach of contract for deducted labor depreciation, at the beginning of a class certification hearing, the district court granted a motion for leave to file an interlocutory appeal of that decision, which the court of appeals granted. The Sixth Circuit will hear oral argument in the next few weeks on whether labor depreciation may be deducted under Kentucky law. Case no. 18-5104.

Ohio labor depreciation class actions are somewhat mixed. One state court denied a motion to dismiss, finding the policy ambiguous in not defining actual cash value to exclude labor depreciation. *Ingram v. Liberty Mutual Ins. Co.*, Franklin Cty., C.P. Ct. (March 13, 2018). A motion to certify the labor depreciation question to the Ohio Supreme Court was granted in two pending federal court cases, but that high court denied review. *Perry v. Allstate Indem. Co.*, No. 16-cv-01522, and *Cranfield v. State Farm Fire and Cas. Co.*, Case no. 16-cv-01273,

N.D. Ohio. Another state court has stayed a decision on a motion to dismiss addressing the inclusion of labor depreciation in calculating actual cash value pending rulings on similar motions in *Perry and Cranfield. Parker v. American Family Mut. Ins. Co.*, No. CV-16-865773, Cuyahoga Cty. C.P. Ct.

Illinois cases are likewise mixed. Earlier this year, the Madison County Circuit Court denied the insurer's motion to dismiss, holding that the policy was ambiguous. *Sproull v. State Farm Fire & Cas. Co.*, No. 16-L-1341 (Ill. Cir. Ct. Feb. 26, 2018). A motion to certify the question to the Illinois Supreme Court is pending. On the other hand, another Illinois court had ruled that depreciation is applicable to nonmaterial components of replacement cost. *Gee v. State Farm Fire & Cas. Co.*, 2013 WL 8284483 (N.D. Ill. Sept. 23, 2013).

Finally, a federal district court in Tennessee, before ruling on a motion to dismiss, certified the labor depreciation question to the Tennessee Supreme Court, which accepted and set oral argument for October 2018. *Lammert v. Auto-Owners*, No. M2017- 02546-SC-R23-CV.