

Insurance Class Action Update

2019 1Q

By Mark A. Johnson

The new year began with dramatic growth in vehicle total loss class actions over payment of sales tax and title transfer and registration fees, interpretations of the filed rate doctrine, and further activity in labor depreciation class actions.

Vehicle Total Loss Sales Taxes and Fees Class Actions

A bevy of class actions have sprouted in several courts based on failure to pay sales taxes and title transfer and registration fees with payment of first party total loss vehicle claims. As first reported in last year's second quarter [report](#), the plaintiffs allege that insurers are liable for not paying sales taxes and title and registration fees as a part of the actual cash value of a total loss claim, regardless of whether the vehicle is replaced. In most cases, plaintiffs allege that taxes and title fees are required to be paid in order to replace a vehicle and that actual cash value is not defined in the policy to exclude those items or to condition their payment on replacing the totaled vehicle.

The genesis of these claims appears to arise from decisions in Florida. *Bastian v. United Services Auto. Ass'n* found that state and local taxes are part of the replacement cost for a totaled vehicle. 150 F. Supp. 3d 1284 (M.D. Fla. 2015). A more recent decision required payment of sales tax and title transfer fees as replacement cost regardless of whether the totaled vehicle was leased. *Roth v. GEICO General Ins. Co.*, 2018 WL 3412852 (S.D. Fla. June 14, 2018). Plaintiffs' counsel in the Florida class actions appears to be involved in recently filed cases in several other states as well. At last count, about 15 class actions based on this claim have been filed against insurers in Colorado, Texas, Wisconsin, Florida, Ohio, Indiana, Texas and California.

Since last quarter's report, a Florida class of these claims was certified in *Jones v. Govmt. Employees Ins. Co.*, 2019 WL 1490703 (M.D. Fla. April 4, 2019). The court readily found that requirements for certification of a single-state class of policyholders was met. However, the court refused to certify a class of policyholders from eight other states simply because the plaintiffs did not cite to authority that those states charged mandatory tag and title transfer fees. As a result, the plaintiffs did not meet numerosity, commonality or typicality for a multistate class. Based on the court's comments, though, a renewed and more complete motion to certify a multistate class may be coming.

It's difficult to evaluate these claims because of differing states' laws and, in some cases, differing policy language. For example, while Ohio requires payment of sales tax only if the insured replaces the vehicle within 30 days of settling the loss (OAC § 3901-1-54[H][7]), Indiana appears to require payment of sales tax at the time a claim is paid. Indiana Department of Insurance Bulletin No. 82 (1994). Time will tell how courts outside Florida respond to these claims, but for now, expect more of them to be filed.

New York Total Loss Valuation Class Bypasses Appraisal

The Second Circuit affirmed the refusal to force an insured to submit to appraisal claims against an insurer in determining the value of a total loss vehicle. *Milligan v. CCC Information Services, Inc.*, 2019 WL 1461002 (2d Cir. April 3, 2019). The district court dismissed a statutory claim as not containing a private right of action and the negligence claim for lack of a duty. However, the lower court upheld the contract claim against the insurer only and found that the insurer's demand for appraisal was not timely under the policy.

The insurer and vendor appealed denial of motions to compel appraisal. While finding an appraisal to be within the scope of the Federal Arbitration Act, the court of appeals found that appraisal was appropriate only to resolve factual disputes over the amount of loss, not legal questions over the statutory standard for calculating total losses, incorporated as part of the policy. Since claims of the plaintiff and the alleged class raised the latter, appraisal was not appropriate.

New Jersey Filed Rate Doctrine Forecloses Lender Placed Insurance Class Action

A New Jersey federal district court boldly barred lender placed insurance claims under the filed rate doctrine. *Francese v. American Modern Ins. Group, Inc.*, 2019 WL 1615086 (D. N.J. April 16, 2019). Distinguishing a Third Circuit decision that refused to apply the doctrine to statutory Real Estate Sales Practices Act claims, the court found persuasive decisions of the Second and Eleventh circuits holding that the filed rate doctrine barred a challenge to lender placed insurance premiums allegedly inflated by kickbacks and other improper consideration.

The court also dismissed different claims challenging payment of insurance benefits to the financial institution – the insured under a lender placed policy. Finding that the insurance contract unambiguously showed that benefits would be paid only to the financial institution, the court held that the plaintiff had failed to plausibly allege an entitlement to insurance proceeds. While lender placed insurance class actions are clearly on the wane, this decision is noteworthy for not reflexively following other district court decisions but, rather, independently analyzing appellate authorities.

But the Filed Rate Doctrine Doesn't Stop Illinois Claims Over Rates

An Illinois Court of Appeals refused to reverse the failure to dismiss a class challenge to auto premiums based on “undisclosed, non-risk-based factors.” *Corbin v. Allstate Corp.*, 2019 Ill. App. (5th) 170296 (Jan. 29, 2019). The plaintiff alleged that the insurer collected data showing that longtime policyholders were more likely willing to pay higher premiums than the risks presented and used that analysis as a factor in setting auto rates. The practice was referred to as “elasticity of demand” or “price optimization.” The trial court denied a motion to dismiss that argued the claims were barred by the filed rate and primary jurisdiction doctrines.

The appellate court found that the Illinois Department of Insurance (DOI) was not given explicit statutory authority to approve or disapprove rates. In 1969, the legislature enacted an open competition rating law in place of a statutory scheme requiring prior approval of rates by the DOI, and when the open competition law expired in 1971, it did not reinstate the prior approval law. As a consequence, insurers “are free to establish rates in response to their independent assessments of economic and market conditions” without DOI approval. Ironically, then, the filed rate doctrine didn't apply to bar claims challenging those freely established rates. And because the DOI does not have exclusive authority to regulate deceptive practices by insurance companies, the primary jurisdiction doctrine didn't apply either.

Labor Depreciation ... and the Beat Goes On

Rumors of the death of labor depreciation class actions appear to have been greatly exaggerated. The Tennessee Supreme Court ruled that the policy was ambiguous under Tennessee law on what depreciation may be deducted in determining actual cash value. *Lammert v. Auto-Owners (Mut.) Ins. Co.*, 2019 WL 1592687 (Tenn. April 15, 2019). Construing the policy in favor of the insured, then, the court ruled that an insurer may not deduct labor depreciation from actual cash value payments. Since last quarter's report, more labor depreciation class actions have been filed. *Lovelace v. Ameriprise Auto & Home Ins. Agency, Inc.*, 4:19-cv-00150 (E.D. Ark.) (filed Feb. 27, 2019); *Donofrio v. Auto-Owners (Mut.) Ins. Co.*, No. 3:19-cv-00058 (S.D. Ohio) (filed Feb. 25, 2019).

And since the Sixth Circuit's pronouncement that Kentucky law forbade the deduction of labor depreciation in determining actual cash value, *Hicks v. State Farm Fire and Cas. Co.*, 751 Fed. Appx. 703 (2018), the district court on remand unsurprisingly granted the plaintiffs' amended motion for class certification. 2019 WL 846044 (E.D. Ky. Feb. 21, 2019). The court found no problem with the difficulty in identifying class members through manual review of claims files and data or the many challenges to proof of claims on a classwide basis.

Kentucky PIP Claims Update

On April 18, the Kentucky Supreme Court denied a motion to reconsider its decision in *Government Employees Ins. Co. v. Sanders*, 2018 WL 5732087 (Ky. Nov. 1, 2018). That decision, reported in the [3Q 2018 update](#), held that insurers could not deny claims for PIP medical expenses based on a paper medical review.



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