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Insurance Class Action Update

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By Mark A. Johnson

The past quarter saw more of the same in labor depreciation and tag and title class action activity, with a few decisions on less commonly recurring claims and one that's an oldie but (in some states for the plaintiffs' bar) a goodie.

Upcoming Key Labor Depreciation Decisions

Since last quarter's report, more labor depreciation class actions have been filed in Tennessee and now in Mississippi and South Carolina. *Butler v. The Travelers Home and Marine Ins. Co.*, Case no. 3:19-cv-02621 (D. S.C.) (filed Sept. 16); *Ferguson v. American Family Home Ins. Co.*, Case no. 3:19-cv-00728 (S.D. Miss.) (filed Oct. 11). Some of the existing Tennessee cases have been joined by Mississippi insureds. These cases follow the Tennessee Supreme Court's decision holding that a policy that does not expressly refer to labor depreciation in the definition of actual cash value or depreciation is ambiguous, and is construed against the insurer. *Lammert v. Auto-Owners (Mut.) Ins. Co.*, 2019 WL 1592687 (April 15, 2019). Mississippi claims are based on guidance by the Mississippi Department of Insurance that if labor is depreciated, the policy should clearly state as much. Bulletin 2017-8 (Aug. 4, 2017).

The appearance of Mississippi insureds in the Tennessee cases is no accident. The Fifth Circuit recently heard oral argument on whether a class should have been certified in *Mitchell v. State Farm*, which originated in the Northern District of Mississippi. The district court in that case had also denied a motion to dismiss, finding that labor should not have been depreciated. 335 F.Supp.3d 847 (2018); 327 F.R.D. 552 (2018).

Similarly, in July the Sixth Circuit accepted a discretionary appeal of the district court's certification of a class action in *Hicks v. State Farm Fire and Cas. Co.*, 2019 WL 846044 (E.D. Ky. Feb. 21, 2019). Case no. 19-503. Just last year the court of appeals had ruled in the same case that Kentucky law prohibited deduction of labor depreciation. *Hicks v. State Farm Fire and Cas. Co.*, 751 Fed. Appx. 703. Since Tennessee is within the Sixth Circuit, the outcome of that appeal may have a significant impact on the Tennessee labor depreciation cases, just as the decision by the Fifth Circuit in *Mitchell* may affect other cases in that circuit. One can only guess that plaintiffs' counsel is rolling the dice on a decision on class certification by the Sixth Circuit in *Hicks* over the Fifth Circuit in *Mitchell*, in packing Mississippi insureds in the Tennessee cases. In any event, a decision from the Fifth Circuit will likely come first, as briefing in *Hicks* hasn't begun.

Meanwhile, the Sixth Circuit is also reviewing district court decisions holding that Ohio law permits deduction of labor depreciation in *Perry v. Allstate Indem. Co*. and *Cranfield v. State Farm Fire and Cas. Co*., 340 F.Supp.3d 670 (N.D. Ohio 2018); 2018 WL 6169311 (N.D. Ohio Nov. 26, 2018). Those appeals are fully briefed, and the court has recently ordered that oral argument is unnecessary in one. Nos. 18-4267, 19-3004. Separately, the district court in *Schulte v. Liberty Insurance Corp*., Case no. 3:19-cv-00026 (S.D. Ohio), refused to certify the question to the Ohio Supreme Court, and no appeal was filed from the state court decision in *Parker v. American Family Insurance Co*., allowing labor depreciation in Ohio. For now, it looks like this question of Ohio law will be settled by the Sixth Circuit.

Update on Vehicle Tax, Tag and Title Class Actions

Class actions for total loss taxes and title and registration fees keep rumbling along. In *Coleman v. United Services Automobile Ass'n*, the court dismissed without prejudice breach of contract claims for payment of sales tax and transfer fees under total loss claims. Because the policy defined actual cash value as the costs to buy a comparable vehicle, not necessarily replacement costs, ACV was limited to the purchase price of a replacement vehicle and not incidental costs. 2019 WL 3554184, Case no. 1:19-cv-01745 (N.D. Ill. July 31, 2019).

The federal district court in another case granted the insurer's motion to compel appraisal and dismissed the complaint. *McGowan v. First Acceptance Ins. Co*., Case no. 8:19-cv-01101 (M.D. Fla. Aug. 14, 2019). The court held that plaintiff's claims only raised a question of the amount of loss, not coverage, so that appraisal was required by the policy. Plaintiffs have appealed that decision to the Eleventh Circuit. This strategy, of seeking simultaneous dismissal and compelling appraisal, was implemented before in cases reported the past two quarters (April and July 2019).

Adding to all of the pending cases, another class action has been filed asserting claims for payment of tag and title fees. *Wilkerson v. American Family Mutual Insurance Co*. was filed Oct. 17 in the Northern District of Ohio, Eastern Division. Case no. 1:19-cv-02425-CAB. It appears that the tag and title class actions have a number of miles yet to travel.

Diminished Value Class Action Fails

Class actions based on some theory of diminution of value of autos, which were hot more than 10 years ago, have occasionally resurfaced. In *Martins v. Vermont Mutual Ins. Co*., the court held that the policy did not provide coverage of inherent diminution in value for first-party claims. The court followed the rationale of a Massachusetts Supreme Court decision finding that Massachusetts law does not require payment of third-party diminished value claims. 2019 WL 3818293, Case no. 1:17-cv-12360 (D. Mass. Aug. 14, 2019).

Third Circuit Recharges Rental Car Class Action

A few months ago, the Third Circuit Court of Appeals reversed summary judgment for an insurer in a class action over rental car expenses. *Stechert v. The Travelers Home and Marine Ins. Co*., 2019 WL 3526449 (Aug. 2, 2019). The policy provided for rental coverage of up to 30 days unless the insurer determined that replacement transportation could be obtained sooner. The adjustor, in limiting rental coverage to a series of five-day periods pursuant to internal practice, did not make any finding that replacement transportation could have been obtained. The plaintiffs "felt compelled" to lease another car that was a lemon because they were led to believe rental coverage was ending. The court found summary judgment inappropriate because of inconsistencies between the policy and internal documents and conduct of the insurer, even though the plaintiffs received the full 30 days of benefits. This curious outcome, where the plaintiffs seemingly received everything their policy provided, also revived the plaintiffs' bad faith claim.

Florida PIP Class Certification Reversed

In another court of appeals decision, the Eleventh Circuit reversed certification of an injunction class under Rule 23(b)(2) over Florida PIP claims handling processes. In *AA Suncoast Chiropractic Clinic P.A. v. Progressive American Ins. Co*., the plaintiffs are providers who received assignments of insureds' PIP claims. 2019 WL 4316088 (11th Cir. Sept. 12, 2019). PIP benefits are capped at $2,500, unless there's an emergency medical condition, in which case $10,000 in benefits is available. The district court refused to certify a damages class because of the individual assessments necessary to prove liability and damages. However, the lower court certified an injunction class based on requested declaratory relief that the insurer's reliance on non-treating physicians to determine whether an emergency condition existed was unlawful.

The court of appeals found that the relief sought by the certified class "is not an injunction at all," and the declaratory request was minimal and disconnected from class members. The injunction would mandate that claims be reprocessed based on outside determinations, a ruse for damages under past claims that the district court already held could not be certified. In short, the injunction did not operate to prevent future harm, as the claims presented retrospective harm – "an ongoing interest in getting paid for past claims that have been rejected." Because the case was about damages, the only proper mechanism for class certification was under Rule 23(b)(3), which had already been rejected based on individualized issues in proof of liability and damages.

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