BakerHostetler

Insurance class action update

2022 Q2-Q3

By Mark A. Johnson

We saw more of the same in the past six months in total loss, tag and title, and labor depreciation class actions, in both merits and class certification decisions. A few state-specific claims appeared in class actions, along with new structural damage claims based on estimating software settings that insurers should watch.

Total Loss Valuation Claims in Full Swing

Class actions challenging the valuation of vehicles under total loss claims continue to develop. [link to 2021 4Q 2022 1Q report]

A Mississippi federal court denied an insurer's motion for judgment on the pleadings, finding that whether an auto policy requires payment of sales tax, title and license fees for a total loss vehicle is ambiguous. *Thompson v. USAA*, 2022 WL 2980694 (N.D. Miss. July 27, 2022). Reliance on a Mississippi Department of Insurance Bulletin alone was insufficient to resolve the ambiguity for the court. Only a few weeks later, the case was voluntarily dismissed based on an individual settlement.

And another court dismissed some but not all claims of a Georgia class of policyholders with total loss valuation claims. *Brown v. Progressive Mountain Insurance Co.*, Case no. 3:21-cv-00175, Doc. no. 43 (N.D. Ga. Aug. 15, 2022). The *Brown* court dismissed breach of contract claims predicated on compliance with a total loss regulation but let stand a breach of contract claim based on the meaning of actual cash value under the policy. The court also dismissed all claims against the software vendor that provides total loss valuations.

One Washington federal court applied the U.S. Court of Appeals for the 9th Circuit's ruling in *Lara v. First Nat'l Ins. Co. of America*, 25 F.4th 1134 (2022), which affirmed denial of class certification and granted the insurer's motion to dismiss, finding that the plaintiff failed to allege injury beyond a mere regulatory violation. *Sharawe v. Indian Harbor Ins. Co.*, 2022 WL 2755930 (W.D. Wash. July 14, 2022). The court also denied the plaintiff's request to certify questions to the Washington Supreme Court regarding injury, concluding that the *Lara* decision "squarely addressed" those questions.

In stark contrast to *Lara* and *Sharawe*, one judge in the Western District of Louisiana certified two classes of insureds, alleging the use of CCC and Audatex solutions violates a Louisiana total loss statute. *Shields v. State Farm Mut. Automobile Ins. Co.*, 2022 WL 37347 (W.D. La. Jan. 3, 2022); *Sampson v. United Servs. Auto. Ass'n.*, 2022 WL 1415652 (W.D. La. May 3, 2022). In granting certification, the district court ruled that the common issue of whether the valuation products violated a Louisiana total loss statute predominated over individual issues of injury, which the 9th Circuit had ruled precluded certification. The 5th Circuit has since granted interlocutory review of both class certification orders. *Bourque v. State Farm Mut. Auto. Ins.*, No. 22-90002 (5th Cir. Mar. 13, 2022); *Sampson v. United Servs. Auto. Ass'n*, No. 22-90023 (5th Cir. June 10, 2022).

Tax, Tag and Title Class Action Update

Meanwhile, a Georgia class of policyholders was certified for claims that the insurer underpaid total loss claims by understating the ad valorem tax. *Ewing v. Geico Indemnity Co.*, 2022 WL 1597824 (M.D. Ga. May 19, 2022). From 2013 to 2019, Georgia law required that an ad valorem tax for used vehicle purchases be based on a percentage of the vehicle's fair market value, defined as an average of the current fair market value and the current wholesale value in a manual used by the state revenue commissioner. The insurer allegedly used a different methodology to calculate the tax, resulting in underpayments.

The court had little problem finding predominance, finding that it could remove leased vehicle claims from the class definition if the insurer succeeds on summary judgment in showing that they are not subject to the administrative manual. But that sounds a bit like a fail-safe conclusion – heads I win, tails you lose. And the court found that an insured's ability to challenge valuation in the manual is a merits argument that doesn't preclude class certification.

A New York federal court also certified a class of insureds who allege the insurer owes sales tax for their total loss claims. *Buffington v. Progressive Adv. Ins. Co.*, 2022 WL 3598310 (S.D.N.Y. Aug. 23, 2022). The court found that the claims met all the class certification requisites for a Rule 23(b)(3) class even though the plaintiff did not produce a damages expert. The court accepted the plaintiff's common measure of damages – multiplication of the sales tax rate by the vehicle's actual cash value – as sufficient.

New Estimating Software Class Actions Based on Pricing

A newer claim based on how estimating software calculates structural damage losses has appeared, based on the selection of new construction pricing in measuring repair and replacement costs rather than remodeling pricing. *Belotti v. State Farm Fire and Casualty Company*, Case no. 3:22-cv-01284, Luzerne Cty., Pa., Common Pleas Ct. (filed Aug. 16, 2022). The Pennsylvania plaintiffs allege that the insurer adjusted claims using the software's new construction pricing model when the insured loss only required repair or remodeling. Allegedly, repair and remodeling pricing models are higher than new construction pricing. The plaintiffs allege a nationwide class of insureds and a Pennsylvania subclass.

A similar alleged class action based on the same claims and theory of adjusting claims under estimating software was filed last year in New Jersey state court and removed to federal court. *Han v. State Farm Fire and Cas. Co.*, Case no. 2:21-cv-04219 (D. N.J.) (filed Feb. 4, 2021). *Han* alleges separate classes for insureds in New Jersey, New York, Pennsylvania and all other states except Texas, California and Florida. The subclasses alleged are further divided based on whether insureds were or were not aware of the impact of using new construction pricing in adjusting their claims or claims that went through appraisal.

However, this summer, the *Han* court granted the insurer's motion to compel appraisal and stay the action. June 30, 2022 (Doc. 38). The court rejected the plaintiff's argument that his claims relate to the scope of the work, finding that "this is a pricing dispute that falls within the scope of an appraisal." Application of the appraisal clause to such claims makes class certification much more difficult. Regardless, insurers should carefully assess how they use structural damage estimating software.

Still More Labor Depreciation Class Actions

Filing of alleged multistate labor depreciation class actions has become the norm, raising standing issues. The Northern District of Illinois dismissed claims alleged on behalf of out-of-state policyholders, finding that the Illinois plaintiffs have no connection with other states and have not suffered the same injury as putative class members from other states. *Brown v. Auto Owners Ins. Co.*, 2022 WL 2442548 (N.D. Ill. June 1, 2022). While the plaintiffs argued that the issue should be decided at class certification, the court concluded that "a single class is not manageable" if it must be adjudicated under five different states' laws.

But the opposite conclusion was reached by another court, which held that whether an Ohio plaintiff has standing to represent non-Ohio putative class members is an adequacy question to be resolved at class certification. *Goble v. Trumbull Ins. Co.*, 2022 WL 1186207 (S.D. Ohio Apr. 21, 2022).

One Louisiana federal court concluded that depreciation of labor is permissible under state law. *Shahan v. Allstate Vehicle & Property Insurance Co.*, 2022 WL 3022057 (W.D. La. July 29, 2022). The court rejected the plaintiffs' policy interpretation argument that labor depreciation was akin to "future" labor costs that should be paid with actual cash value: "This would be an absurd and illogical interpretation of the policy. Simply put, depreciation is the actual value of the damaged property reduced by a time factor depending upon the life expectancy of the property. ... Plaintiff's attempt to dissect and remove components of depreciation distorts the plain, ordinary and generally prevailing meaning of depreciation." *Id* at *4.

However, Missouri appears to be reversing course. The 8th Circuit had held that Missouri law does not support labor depreciation claims, and some district courts dismissed labor depreciation class claims as a result. *In re State Farm Fire and Casualty Co.*, 872 F.3d 567 (8th Cir. 2017) (*LaBrier*). But some plaintiffs' lawyers behind many recent labor depreciation class actions were successful in convincing a Missouri state trial judge otherwise in an individual case that would not otherwise garner much attention. *Franklin v. Lexington Insurance Co.*, 2021 WL 7286386 (Mo. Cir. Ct. Aug. 6, 2021).

That decision was recently affirmed by a state court of appeals, which concluded that the *LaBrier* court was wrong in its interpretation of Missouri law, but disingenuously found that "[b]ecause there is no conclusive controlling Missouri authority on this specific issue, we can look to persuasive authority from other jurisdictions." 2022 WL 2310031, *8 (Mo. Ct. App. June 28, 2022). Relying on decisions in other jurisdictions prohibiting labor depreciation, the court "interpreted" Missouri law to now prohibit labor depreciation. The court of appeals also denied leave to file an appeal with the Missouri Supreme Court, and on October 4 a separate petition to appeal was denied by the Missouri high court.

This about-face on Missouri law is impactful because of the longer statute of limitations (10 years) and invalidity of limitations clauses in policies. The state court's rejection of the 8th Circuit's interpretation of state law on labor depreciation is ironic given how claims of insureds in other jurisdictions have heavily relied on labor depreciation decisions by the 5th and 6th circuits, interpreting states' laws in insureds' favor.

As previously reported, the Arizona Supreme Court had accepted certified questions of whether labor depreciation was permissible and whether the broad evidence rule applies. [link to Q4 2021-Q1 2022] That court recently issued an opinion prohibiting labor depreciation under Arizona law when a policy defines actual cash value as replacement cost value less depreciation. *Walker v. Auto Owners Ins. Co.*, 2022 WL 4476282 (Ariz. Sept. 27, 2022). The court also found that the broad evidence rule doesn't apply to such policies either. However, when the policy does not provide a methodology for determining actual cash value, market value should be used, and if unavailable, replacement cost, and in the absence of that cost, the broad evidence rule should be applied, in that order.

Pennsylvania UM/UIM Class Actions Stacking Up

This summer, a series of class actions have been filed in Pennsylvania state courts alleging claims seeking recovery of underinsured motorist insurance benefits that were denied based on application of the other owned vehicle exclusion when the insured was injured while operating a vehicle not insured under the applicable policy. The plaintiffs allege that the policies define insured as "one occupying an insured vehicle," which is contrary to Pennsylvania statute. It appears, though, that this precise issue falls within a gap of state court decisions and may be fact-dependent on type of policy and whether a waiver was offered. The cases allege a Pennsylvania class. *See*, e.g., *Ferri v. American Modern Prop. and Cas. Ins. Co*., Case no. 220801710 (Philadelphia Cty., Pa., Common Pleas Ct.) (filed Aug. 15, 2022).

On the opposite side of the spectrum, a class action alleging that single vehicle owners don't benefit from stacked uninsured motorist/underinsured motorist (UM/UIM) coverage with no other household policies was dismissed. *Berardi v. USAA General Indemnity Co*., 2022 WL 2109193 (E.D. Pa. June 10, 2022). The plaintiffs argued that they and the class they represent shouldn't have to pay premiums for stacked coverage and that the insurers should have advised them that they would not benefit from stacked coverage. But the court stated that they "merely alleged that they elected coverage that they later realized was less applicable to their personal circumstances than they had understood at the time of purchase. ..." And a single vehicle owner without other household policies may still benefit from stacked coverage.

Coinsurance Penalty Class Certified for Tornado Claims

In a somewhat isolated case, an Arkansas federal court certified an Arkansas-only class based on claims that the insurer improperly included the value of the commercial plaintiff's building foundation when calculating a coinsurance penalty, even though the foundation was not insured. *Mason's Automotive Collision Center LLC v. Auto Owners Ins. Co*., 2022 WL 2713552 (W.D. Ark. July 13, 2022). The claims follow from a 2019 tornado that damaged the plaintiff's building.

While most of the insurer's policies exclude the foundation from coverage, an adjuster has to manually select a box in estimating software to exclude the foundation from a valuation. Like labor depreciation claims, the identity of class members is dependent on property damage estimating software defaults and whether what are universal principles are unchangeable or require individual actions by adjustors. The court refused to certify a 20-state class of plaintiffs outside Arkansas, though, because of differences among states' laws.

Homeowners Diminished Value Class Action Post-Mortem

Previously, we reported on denial of class certification of claims asserting vehicle diminished value claims under Georgia law. [insert link to 2021 1Q-3Q] The 11th Circuit, in a per curiam opinion, held that the district court didn't err in finding that the class definition did not meet the predominance requirement of Rule 23(b)(3). *Baker v. State Farm Mut. Auto. Ins. Co*., 2022 WL 3452469 (11th Cir. Aug. 18, 2022).

Rather than argue that the insurer failed to pay diminished value, the plaintiffs had argued breach of contract solely from the failure to properly assess vehicles for diminished value: "Appellants argue that proof of underpayment is not a prerequisite to the class claim; instead, it is the very fact that all putative class members were subjected to a flawed assessment methodology violative of State Farm's contractual duty to assess that creates the harm." *Id*. at *4. Because the central liability question of breach requires individual "finding[s] that each putative class member received a lower reimbursement for his diminished value claim than the contract entitled him to" (e.g., injury), class certification was inappropriate.

Contact

Mark A. Johnson
Partner | Columbus
T +1.614.462.2698
F +1.614.462.2616
mjohnson@bakerlaw.com

11.10.22.11.58_p02