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Insurance Class Action Update

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By Mark A. Johnson

The past quarter has seen several new types of class actions against insurers and new twists on the well-worn theory of total loss claims, as well as some new life breathed into long-running labor depreciation class actions.

Labor Depreciation Class Actions Get New Life

Since last quarter's report, the Sixth Circuit rescued labor depreciation class actions against insurers based on structural damage homeowners claims, at least in Kentucky. In *Hicks v. State Farm Fire and Casualty Co.*, 2018 WL 4961391 (6th Cir. Oct. 15, 2018), the court accepted an interlocutory appeal from a decision of the Eastern District of Kentucky, to answer whether Kentucky law permits deduction of labor depreciation from actual cash value payments. A two-judge panel held that it does not.

The *Hicks* court first held that the policy was ambiguous because it did not define actual cash value but incorporated a state regulatory definition found to be ambiguous. Because the court found that a layperson could reasonably interpret depreciation to include only materials, the policy was construed in favor of the insured to prohibit labor depreciation from being deducted from actual cash value payments. The court admitted that its decision departed from the substantial weight of authority, including that of two sister circuit courts. *In re State Farm Fire and Casualty Co.*, 872 F.3d 567 (8th Cir. 2017); *Graves v. Am. Family Mut. Ins. Co.*, 686 F. App'x 536 (10th Cir. 2017). However, the panel decision justified its departure based on differing state laws measuring actual cash value, particularly Kentucky's acceptance of the "broad evidence rule" in establishing value, a distinction roundly condemned by the dissent. Meanwhile, the insurer filed a petition for en banc rehearing on Oct. 29.

Barely a month later, the Northern District of Ohio refused to follow the nonbinding decision in *Hicks*, holding under Ohio law that the plain and ordinary meaning of "ACV cannot reasonably be interpreted to exclude labor from a depreciation calculation." *Perry v. Allstate Indem. Co.*, Case no. 1:16-CV-1522, Case no. 2018 WL 6169311 (N.D. Ohio Nov. 26, 2018); *Cranfield v. State Farm Fire and Cas. Co.*, Case no. 1:16-CV-1273, 2018 WL 6169200 (N.D. Ohio Nov. 26, 2018). The district court found *Hicks* unpersuasive because a "reasonable insured individual should conclude that labor is included in depreciation." Rather, the *State Farm* and *Allstate* court followed "the current majority view among state and federal courts that labor should be included in depreciation."

Time will tell whether these decisions impact any remaining labor depreciation class actions outside Ohio and Kentucky.

Kentucky PIP Class Actions Based on Claims Denied After Medical Review

Staying with the Kentucky theme, that state's Supreme Court held that insurers could not deny claims for PIP medical expenses based on a "paper" medical review. *Government Employees Ins. Co. v. Sanders*, Case no. 2018 WL 5732087 (Ky. Nov. 1, 2018). In a paean to its Kentucky roots, the court quoted Davy Crockett on raccoon hunting to find that the trial court and attorneys were "barking up the wrong tree."

Kentucky statute requires payment of basic reparations benefits without regard to fault, up to a maximum of $10,000. The statute expresses when insurers may deny benefits, but because it says nothing about denying claims based on review of medical records or even on an exam, the *Sanders* court held that claims for medical expenses could not be denied based on that review. The Kentucky Supreme Court was careful to identify several other reasons expressed in the statute for denying claims.

The *Sanders* court held that the statute establishes a "legal presumption" that any medical bill submitted is reasonable, which the court stated also includes a presumption that services were necessary as well. This presumption could be overcome only by an insurer filing an action in circuit court. The court held that if an insurer receives claims that mispresent the reasonableness of or need for medical services, the insurer's only recourse, except in rare circumstances, is to bring an action against the provider.

The claim in *Sanders* was filed as a class action and certified by the trial court, and is also present in at least one federal case, *Thomas v. Allstate Property and Cas. Ins. Co*., in the Western District of Kentucky, and leave to add class allegations was recently sought in a state court case against another insurer. No crystal ball is necessary to foresee that more of these class actions will be filed in Kentucky against insurers.

Kentucky UM/UIM Household Coverage Class Action

On Oct. 16, yet another class action was filed against an insurer in Kentucky, this one based on an alleged failure to disclose available household coverages. *Stinson v. State Farm Mutual Automobile Ins. Co*., Jefferson Circuit Court (removed to the Western District of Kentucky, Case no. 3:18-cv-00752-DJH). In *Stinson*, the insured claimed agents forged signatures on UM/UIM rejection forms without insureds' consent and engaged in other conduct relating to rejection of UM/UIM coverages.

However, the core of the claims alleges a systemic failure with first-party claims to disclose household coverages available under other policies. The insurer issues policies by vehicle rather than by household. The insured alleges that claims are opened under the policy relating to the vehicle at issue, and that because of how policy information is stored, there is a scheme to preclude finding other policies in the same household with available coverage, and that other household policies are not disclosed to claims personnel. The insured alleges a class of Kentucky residents who were injured in an accident that was the fault of another and were not provided information on all available coverages.

Ohio Class Action for Claims Denied Under Voided Policies

A class action was filed last summer against an insurer that denied claims for a loss after voiding the policy because of misrepresentations by the insured. *Green v. Nationwide General Ins. Co*., Case no. 2018 cv 01284 (Cuyahoga Cty. C.P. Ct.). In *Green*, the insured was in an auto accident, but failed to disclose that her son, and not the insured, was the title owner of the insured vehicle. After submitting a claim, the insured received notice that the insurer was rescinding the policy because of this misrepresentation on her application and denied coverage for the loss.

The insured alleges a difference under Ohio law between warranties and representations, the former of which renders the policy void ab initio, while only the latter makes the policy voidable, and then only if the misstatement was fraudulent and material. This theory has its genesis in some Ohio appellate decisions that cite to an Ohio Supreme Court for this distinction, but that may not necessarily contain that holding. The insured in *Green* seeks to represent a class of Ohio insureds whose claims were denied because their policies had been rescinded for misrepresentations in the applications.

The legal issue is of a type that may over time percolate upward for a definitive ruling, but that will take time. Meanwhile, the plaintiffs' bar has been looking for other insureds to file other class actions against insurers based on the same claims, so expect more of these.

Total Loss Vehicle Class Actions

Handling of total loss vehicle claims continues to spawn class actions.

In Florida, seven alleged class actions have been filed since June against insurers that use CCC or Mitchell software and databases to assist in valuing total loss vehicles. In suits against Allstate, GEICO, Esurance, USAA and Progressive American, and two suits against Progressive Select, insureds claim that Florida law allows the use of a "recognized used motor vehicle industry source" database to determine the value of a total loss vehicle, but claim CCC and Mitchell are used only by the insurance industry, not the used motor vehicle industry, so use of their databases violates the statute. None of the complaints address the provision of the same statute that allows insurers to use any other method to determine value so long as it is disclosed to the insured. Though several carriers have moved to compel appraisal, there have been no rulings on the merits in any of the cases to date.

In another total loss vehicle class action, a California district court refused to dismiss claims that an insurer improperly used salvage titled vehicles as comparables to determine the value of an insured's total loss vehicle. The insured had purchased a 16-year-old car for $3,250, and was paid $2,800 by his insurer when he totaled it less than a month later. Not answered in the decision, which was limited on a motion to dismiss to only the allegations of the complaint, is whether comparable values that were not salvaged vehicles even existed for a 16-year-old car. The court dismissed claims against the vendor that provided the vehicle value reports. *Jones v. Progressive Cas. Ins. Co*., Case no. 2018 WL 4521919 (N.D. Calif. Sept. 19, 2018).

Also, an insured filed class claims in a Pennsylvania state court a month ago, alleging that his insurer did not include sales tax in determining the replacement value of his total loss vehicle. That case was removed to federal court. *Erby v. The Allstate Corp*., Case no. 2:18-cv-04944-PBT (E.D. Pa.).

Auto Body Shop Antitrust Litigation

As reported last quarter, the vitality of auto body shop antitrust claims against a large number of property and casualty insurers is being reviewed en banc by the Eleventh Circuit. *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indemn. Co*., 870 F.3d 1262 (2017). Oral argument was held Oct. 23 before the full court, although with recusals, the case was heard before only nine judges. A decision should indicate whether the claims were properly dismissed by the district court, or whether enough facts were pleaded to permit the cases consolidated on appeal to proceed to discovery.

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