Notable Q1 Updates In Insurance Class Actions

By **Mark Johnson and Mathew Drocton** (May 6, 2024)

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The first quarter of this year witnessed further development of existing theories underlying several types of property and casualty insurance class actions, as well as a few new claims.

Below we summarize activity in class actions involving claims for labor depreciation, total-loss vehicle valuation, salvage vehicle titling, premiums for uninsured motorist coverage, COVID-19 premium refunds, rate discrimination based on premium-setting software and use of databases to measure reasonableness of healthcare providers' charges.

Mixed Results in Labor Depreciation Class Actions

Multistate labor depreciation class actions continue to be tested.

On March 8, the U.S. District Court for the District of Massachusetts denied a motion to dismiss for lack of standing in Fassina v. Liberty Mutual Insurance Co. when plaintiffs with insured properties in two states were asserting class claims on behalf of insureds in 15 other states.[1]

While declaring that First Circuit principles preclude analysis of Article III standing using Rule 23 considerations, the court merged analysis of standing and a separate motion to strike class allegations and concluded that the named plaintiffs had standing to assert claims on behalf of class members in other states because the laws where their claims arose "are sufficiently parallel to the laws of fifteen states where their claims did not arise."[2]

In so holding, the Fassina court departed from the approach of the U.S. District Court for the Middle District of Tennesee in another multistate labor depreciation class action, Generation Changers Church v. Church Mutual Insurance Co., which declined to certify a class that included insureds from states in which the issue of labor depreciation had not been definitively resolved because the analysis for the unsettled states would necessitate interpreting varying state-specific contract laws, rendering a class action unworkable.[3]

The Fassina court also denied a motion to dismiss the named plaintiffs' claims, concluding that they plausibly alleged that labor depreciation is a component of the actual cash value analysis for structural claims under Alabama and Maryland law. Therefore, the policy could be ambiguous and interpreted in the plaintiffs' favor.[4]

The court also allowed Arizona plaintiffs to be added, finding that to enforce a one-year limitation clause in policies, under Arizona law the insurer had to show prejudice from delay in filing suit.[5] Consider how that standard will work at the class certification phase when applied to multiple Arizona putative class members.

In Goble v. Trumbull Insurance Co., the U.S. District Court for the Southern District of Ohio ended resuscitation of a multistate labor depreciation class action after the court had

denied class certification because of lack of adequacy of the named plaintiffs.[6] On April 10, the court rejected a motion to intervene by a new plaintiff, refused to allow for precertification notice to putative class members and refused to give the plaintiffs time to find new class representatives.[7] The court was influenced in part by Grawe v. Trumbull Insurance Co., a multistate labor depreciation class action pending in the U.S. District Court for the District of Connecticut against the same insurer with some overlapping class claims.[8]

In Brown v. State Farm Fire and Casualty Co., the U.S. District Court for the Western District of Missouri agreed in January to reconsider its August 2023 decision to rely on a Missouri intermediate appellate court decision, which held that the lack of reference to labor depreciation in a policy was ambiguous under Missouri law, contrary to a 2017 U.S. Court of Appeals for the Eighth Circuit opinion in In re: State Farm.[9]

But the district court then came to the same conclusion — that the plaintiff had stated a plausible claim for relief under the state court decision.[10] While the court granted the insurer leave to file a petition for interlocutory appeal of the interplay between the court of appeals' interpretation of state law and that of an intermediate state court of appeals, the Eighth Circuit promptly denied the petition to appeal in March.[11]

Finally, a Texas labor depreciation alleged class action, Yount v. Travelers Personal Insurance Co., came to an end in January after the insurer had invoked the appraisal process.[12] By tendering payment of an appraisal award that did not deduct labor depreciation, the insured's breach of contract claim for failure to pay labor depreciation was barred, according to the U.S. District Court for the Western District of Texas.

Unlike tender of a settlement offer payment that is not accepted, which does not moot a claim under the U.S. Supreme Court doctrine set out in 2016 in Campbell-Ewald Co. v. Gomez,[13] payment of the claim after the contractually required appraisal process does bar the claim, even if the process has the effect of continually evading class action review.[14]

Total Loss Valuation Class Actions Continue

The insurance industry received a big win in a long line of cases challenging vehicle valuation software.[15] In Lewis v. Geico, the plaintiff alleged that the negative comparable vehicle condition adjustment in third-party valuation reports results in an undervaluation.[16]

The U.S. District Court for the District of New Jersey granted certification of a class of insureds whose claims were adjusted with a third-party valuation report containing the adjustment, but the U.S. Court of Appeals for the Third Circuit vacated the order on April 2 for lack of standing.[17]

The Third Circuit noted that the plaintiff received a positive condition adjustment for his vehicle and also negotiated a higher settlement during the adjustment process.[18] Together, these two amounts exceeded the complained-of condition adjustment, and thus the plaintiff did not suffer a financial injury.[19]

In the same order, the Third Circuit affirmed certification of a second class: one of insureds that did not receive taxes and fees with their total loss settlement payment.[20] The court rejected the argument that the need for a file-by-file review renders a class administratively unfeasible, noting that "matching of records is precisely the sort of exercise we have found

sufficiently administrable to satisfy ascertainability in other cases."[21]

A trio of district courts, including the U.S. District Court for the Northern District of Alabama, the U.S. District Court for the Southern District of Indiana and the U.S. District Court for the District of Colorado, continued the trend of certifying classes of insureds whose valuations were affected by projected sales adjustments.[22] But not all courts have uniformly granted certification.

Most recently, the U.S. District Court of the District of Arizona denied certification of a projected sales adjustment class on predominance grounds.[23] In its March 4 decision, Ambrosio v. Preferred Progressive Insurance Co., the court reasoned that "determining whether Plaintiffs were paid less than [actual cash value will be] difficult to determine on a class wide basis" because there are numerous valuation methodologies and the insurer "is not bound to use any one ACV methodology."[24]

On the merits side, insurers suffered a setback on Feb. 1: The U.S. District Court for the Northern District of Georgia denied an insurer's motion for summary judgment and allowed the plaintiff's theory that projected sales adjustments are not a proper element of actual cash value to move forward in Brown v. Progressive Mountain Insurance Co.[25]

Appraisal clauses continue to be a useful tool for insurers in defending class actions challenging valuation methodology. In Schmidt v. State Farm Mutual Auto Insurance, a case challenging the methodology of a third-party valuation tool, the U.S. District Court for the District of Eastern Michigan ordered the parties on April 5 to appraisal and stayed proceedings.[26]

Salvage Vehicle Titling Class Action Rejected

In an interesting theory, an automobile consumer filed a class action against an insurer for alleged mistitling of totaled vehicles.[27] In Vogt v. Progressive Casualty Insurance Co., the plaintiff alleged that the insurer purchased the salvage vehicle of its insured, instructed its salvage company to obtain a clean title and then sold the vehicle to a vendor, from whom the consumer plaintiff ultimately purchased the vehicle.[28]

On theories of fraud and negligence, the plaintiff sought to certify a class of Missouri consumers who purchased salvage vehicles previously sold by the insurer.[29] The U.S. District Court for the Eastern District of Missouri rejected class certification on March 14, finding that proving reliance for the fraud claim and causation for the negligence claim was rife with individualized issues.[30]

Certification Denied for Uninsured Motorist Class Action

In Sharp v. State Farm Mutual Automobile Insurance Co., the U.S. Court of Appeals for the Tenth Circuit rejected a theory challenging an insurer's practices of accepting premiums for multiple uninsured motorist policies but disallowing stacking of UM coverage.[31]

State Farm had issued tripartite UM coverage, which covered the insureds, guest passengers and resident relatives.[32] The insured and resident relative received the highest UM coverage available — regardless of the vehicle being operated at the time of accident — while the guest passenger received UM coverage only while the vehicle was being operated.[33] The plaintiffs argued that the insurer breached the policy by accepting premiums while providing "different, less valuable" coverage" for guest passengers.[34]

But, on Feb. 16, the Tenth Circuit rejected the notion that a bad bargain amounts to a breach of contract: "At bottom, claimants agreed to pay the separate premiums despite State Farm's 'disclos[ure]' that the UM coverage would not stack. State Farm may have offered claimants a bad deal, but they agreed to it."[35]

COVID-19 Premium Refund Class Actions Flagging

The past few years have seen several class actions claiming that insurers' pandemic-era premium refunds because of lower risks were insufficient, but two more were finally resolved in the insurers' favor.

The U.S. District Court for the Northern District of California in Day v. Geico Casualty Co. had previously rejected arguments that claims seeking refunds of premiums were barred by the filed rate doctrine and had certified a class.[36] With only a California Unfair Competition Law claim pending,[37] on March 21, the court granted the insurer's renewed motion for summary judgment and dismissed the remaining claim asserted by the class.[38]

While the court rejected an argument that the insurer was entitled to rely on an Unfair Competition Law safe harbor because it was required to use a rate approved by the insurance commissioner, the court concluded that according to either a tethering or balancing test under the UCL, the refund amounts were not unfair and thus did not violate the statute.[39]

In Boobuli's LLC v. State Farm Fire and Cas. Co., the Northern District of California had also previously rejected application of the filed rate doctrine in denying a motion to dismiss.[40] On Jan. 22, that court granted the insurer's motion for summary judgment, holding that the "essential defect in [the plaintiff's] case is that it cannot show that State Farm's conduct was unfair or inequitable."[41]

Because the insurer presented evidence that it incurred underwriting losses, not profits, on business owners' policies during the pandemic, and that the plaintiff had received a 40% adjustment of its rated liability exposure for coverage, the insured's claims failed.[42]

On March 12, the U.S. District Court for the Northern District of Illinois denied class certification for claims for excessive auto insurance premiums during the pandemic in Thomas v. GEICO.[43]

After allowing a claim for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act to proceed, based in part on alleged statements by the insurer about savings,[44] the court found that the plaintiffs had not established how they could prove a common injury.[45] And the plaintiffs' damages model failed to meet predominance under Rule 23(b)(3) since their expert incorrectly calculated purportedly correct rates based on past returns rather than estimated future costs, the latter of which comports with insurance industry norm.[46]

Class Certification Denied for Rate Discrimination Claims

Shannon v. Allstate Insurance Co. challenged as unfairly discriminatory under Texas statute the insurer's use of algorithms that allegedly projected "whether and how much premium each policyholder will tolerate being charged and still remain" as a customer.[47] In an extensive analysis, U.S. Magistrate Judge Mark Lane for the Western District of Texas recommended denying the plaintiffs' motion for class certification, relying in part on

the Texas Department of Insurance's extensive review of retention models in the insurer's rating program.[48]

The court found that the statute sued under clearly required comparators, but because the plaintiffs failed to present evidence that they or any other policyholder had essentially the same risk as another who was charged different premiums, or the premiums such other insureds were charged, commonality under Rule 23(a)(2) was lacking.[49]

For similar reasons, predominance under Rule 23(b)(3) was not met because the core issue of whether similarly situated policyholders were charged different premiums for similar risks would require individual analysis, and the plaintiffs' damages methodology incorrectly assumed that a rate other than what was charged was available.[50]

The court concluded that the filed rate doctrine led to a lack of superiority under Rule 23(b)(3), as the Department of Insurance had already reviewed the insurer's use of retention models in rating factors and did not declare them to be unfairly discriminatory.[51]

Washington Approves Use of Healthcare Database To Measure Reasonableness of Bills

In Schiff v. Liberty Mutual Fire Insurance Co., an alleged class action brought by a healthcare provider, the Washington Supreme Court held on Feb. 15 that measuring the reasonableness of providers' charges by not exceeding the 80th percentile of a database of healthcare charges is not unfair under the Washington Consumer Protection Act.[52]

In doing so, the court criticized a 2018 contrary holding of the Washington Court of Appeals, Division One, in Folweiler Chiropractic PS v. American Family Insurance Co., which had fueled class actions by providers against insurers challenging similar use of objective measurements of charges compared with those in databases.[53]

The Schiff court concluded that the trigger for liability under the statute was reasonableness and the burden was on insurers to create their own reasonable standards for investigation of claims. Because comparing charges for the same treatment in the same geographic area was relevant to determining reasonableness using an "objective formulaic review process," the 80th percentile practice was not universally unfair under the statute.[54]

Takeaways

1. More multistate labor depreciation class actions will continue to be filed and challenged, with varying results depending on venue.

2. Total loss valuation cases continue to sway in favor of insurers, with the exception of PSA cases.

3. Plaintiffs are testing new theories regarding the titling process for totaled vehicles and the scope of UM coverage.

4. Remaining class actions challenging sufficiency of pandemic premium refunds are ending in favor of insurers.

5. Prior regulatory review of software used to assess premiums can be an important tool to defend against challenges to rates as discriminatory.

6. Washington courts now follow those of other states in approving use of databases to objectively measure reasonableness of healthcare providers' charges.

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[1] Fassina v. Liberty Mut. Ins. Co., No. 22-cv-11466-DJC, 2024 WL 1018440 (D. Mass. Mar. 8, 2024); see also Glasner v. American Economy Ins. Co., No. 21-cv-11047-DJC, 2024 WL 1018449 (D. Mass. Mar. 8, 2024) (parallel case).

[2] Id. at *4-8.

[3] Generation Changers Church v. Church Mut. Ins. Co., No. 3:21-cv-00764, 2023 WL 6206152 (M.D. Tenn. Sept. 22, 2023).

[4] Fassina, at *8-10.

[5] Id. at *11.

[6] Goble v. Trumbull Ins. Co., No. 2:20-cv-5577, 2023 WL 9050956 (S.D. Ohio Dec. 29, 2023).

[7] Goble v. Trumbull Ins. Co., No. 2:20-cv-5577, 2024 WL 1549456 (S.D. Ohio Apr. 10, 2024).

[8] Grawe v. Trumbull Ins. Co., No. 3:23-cv-160 (D. Conn.).

[9] Brown v. State Farm Fire & Casualty Company, No. 2:23-cv-04002-MDH, 2023 WL 5599630, at *3 (W.D. Mo. Aug. 29, 2023); In re State Farm Fire & Cas. Co., 872 F.3d 567, 576 (8th Cir. 2017); Franklin v. Lexington Ins. Co., 652 S.W.3d 286, 297, 303 (Mo. Ct. App. 2022), motion for rehearing and/or transfer to Supreme Court denied (July 26, 2022) & application for transfer denied (Oct. 4, 2022).

[10] Brown v. State Farm Fire & Casualty Company, No. 2:23-cv-04002-MDH, 2024 WL 377830, at *2 (W.D. Mo. Jan. 31, 2024).

[11] Id. at *3; Appeal No. 24-8002 (8th Cir. Mar. 13, 2024).

[12] Yount v. Travelers Personal Ins. Co., No. SA-23-CV-00150-JKP, 2024 WL 131380, at *8 (W.D. Tex. Jan. 11, 2024).

[13] Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016).

[14] Id. at *8-10.

[15] Lewis v. Government Employees Insurance Company, No. 22-3449, 2024 WL 1611865

(3rd Cir. April 2, 2024).

[16] Id. at * 1.

[17] Id. at *4-5.

[18] Id.

[19] Id.

[20] Id. at *6.

[21] Id.

[22] Reynolds v. Progressive Direct Ins. Co., No. 5:22-cv-503-LCB 2024 WL 1551226, at *1 (N.D. Ala. April 3, 2024); Schroeder v. Progressive Paloverde Ins. Co., No. 1:22-cv-00946-JMS-MKK, 2024 WL 308330 (S.D. Ind. Jan. 26, 2024); Curran v. Progressive Direct Ins. Co., 345 F.R.D. 498, 510 (D. Colo. 2023).

[23] Ambrosio v. Progressive Preferred Ins. Co., No. cv-22-00342-PHX-SMB, 2024 WL 915184 (D. Ariz. Mar. 4, 2024).

[24] Id at *7.

[25] Brown v. Progressive Mountain Ins. Co., No. 3:21-cv-175-TCB, 2024 WL 399479, at *3 (N.D. Ga. Feb. 1, 2024).

[26] Schmidt v. State Farm Mutual Auto. Ins. Co., No. 22-12926, 2024 WL 1494741, at *4 (E.D. Mich. Apr. 5, 2024).

[27] Vogt v. Progressive Cas. Ins. Co., No. 4:22-cv-00385-SRC, 2024 WL 1140932, at *1 (E.D. Mo. Mar. 14, 2024).

[28] Id.

[29] Id. at *2.

[30] Id. at *5-6.

[31] Sharp v. State Farm Mutual Automobile Insurance Company, No. 23-6067, 2024 WL 657980, at *1 (10th Cir. Feb. 16, 2024).

[32] Id. at *1.

[33] Id.

[34] Id. at *4.

[35] Id. at *6.

[36] Day v. Geico Casualty Co., 580 F.Supp.3d 830 (N.D. Calif. 2022); No. 21-cv-02103-BLF, 2022 WL 16556802 (N.D. Calif. Oct. 31, 2022).

[37] No. 21-cv-02103-BLF, 2022 WL 2022 WL 2135746 (N.D. Calif. June 14, 2022).

[38] No. 21-cv-02103-BLF, 2024 WL 1244481 (N.D. Calif. Mar. 21, 2024), appeal pending, 9th Cir. No. 24-2201.

[39] Id. at *4-9.

[40] Boobuli's LLC v. State Farm Fire and Cas. Co., 562 F.Supp.3d 469 (N.D. Calif. 2021).

[41] No. 20-cv-07074-WHO, 2024 WL 269147, at *5 (N.D. Calif. Jan. 22, 2024).

[42] Id. at *4-12.

[43] Thomas v. GEICO, No. 20-cv-04306, 2024 WL 1075151 (N.D. Ill. Mar. 12, 2024).

[44] Siegal v. GEICO Casualty Co., 523 F. Supp.3d 1032 (N.D. Ill. 2021).

[45] 2024 WL 1075151, at *5.

[46] Id. at *3-4, 6.

[47] Shannon v. Allstate Ins. Co., No. 1:20-cv-448-ADA-ML, 2024 WL 1080915 (W.D. Texas Jan. 31, 2024).

[48] Id. at *3-4.

[49] Id. at *6-8.

[50] Id. at *9-11.

[51] Id. at *12-14.

[52] Schiff v. Liberty Mut. Fire Ins. Co., 542 P.3d 1002 (Wash. 2024).

[53] Folweiler Chiropractic, PS v. American Family Insurance Co., 5 Wash. App. 2d 829, 429 P.3d 813 (2018).

[54] Schiff v. Liberty Mut. Fire Ins. Co., 542 P.3d 1002, ¶¶ 12, 19, 24.