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Property And Casualty Insurance Class Action Update

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By Mark A. Johnson and Mathew G. Drocton

Total loss valuation cases and labor depreciation cases dominated the past quarter. Courts continued the trend of rejecting challenges to condition adjustments in total loss valuation cases but allowing challenges to the projected sale adjustment to proceed. In labor depreciation class actions, the trend in favor of insureds continued, with a Texas putative class allowed to proceed to the merits. Both sets of claims also saw new theories cropping up.

Total Loss Vehicle Valuation Cases Continue To Divide

On August 19, in *Jama v. State Farm Mut. Auto. Ins. Co.*, the U.S. Court of Appeals for the Ninth Circuit delivered an important opinion in the vehicle total loss valuation line of cases.[1] There, the insurer used a vehicle valuation product that employed a condition adjustment and a negotiated discount adjustment to determine a vehicle's value. Previously, in *Lara v. First Nat'l Ins. Co. of Am.*, the Ninth Circuit had held that a class could not be certified because determining the appropriateness and amount of the first type of adjustment (for condition) was rife with individualized issues.[2] The *Jama* district court applied *Lara* and denied class certification and granted summary judgment in the insurer's favor.[3] On appeal, the Ninth Circuit affirmed the denial of class certification for the condition adjustment claim but reversed the denial of class certification for the negotiation discount adjustment claim.[4] The court distinguished the negotiation discount claim because the parties disputed whether any discount was proper, whereas with the condition adjustment claim the parties agreed that some adjustment was proper.[5] So the existence of a negotiation discount adjustment, under the plaintiff's theory, might be inappropriate in *all* claims.[6] The Ninth Circuit also vacated the order granting summary judgment in the insurer's favor, finding that the district court misapplied *Lara*.[7]

Earlier this year, on March 4, the U.S. District Court for the District of Arizona denied class certification in a case challenging an insurer's use of a projected sales adjustment.[8] That case, however, is now on appeal to the Ninth Circuit, and the recent *Jama* ruling may prove trouble for the district court's order.[9] Following the appeal, on July 22, the U.S. District Court for the District of Oregon stayed ruling on a similar class certification motion in *Taxer v. Progressive Universal Ins. Co.*[10]

Outside the Ninth Circuit, insurers did not fare any better in projected sales adjustment cases. On August 21, the U.S. District Court for the Northern District of Illinois denied an insurer's motion to dismiss in a case challenging the use of a typical negotiation adjustment to total loss valuation claims.[11]

On August 5, in *Kronenberg v. Allstate Ins. Co.*, the U.S. District Court for the Eastern District of New York followed the logic of *Lara* and denied class certification of claims challenging the use of a condition adjustment to value total loss vehicles.[12] In doing so, the court rejected the plaintiffs' attempt to distinguish *Lara*: "Plaintiffs contend that *Lara* is unpersuasive because in that case[] '[p]laintiffs did not present classwide proof that condition deductions were wrong and unsupported because they were based on a fraudulent inspection scheme,' but rather that 'the deduction was unlawful only because it was not itemized.' That is a distinction without a difference because while Plaintiffs here might have a more robust theory of breach, the relevant legal issue is the absence of harm required by the cause of action."[13]

Insurers Receive Wins in Total Loss Vehicle Tax and Fee Cases

The total loss tax and fee cases have generally swayed in favor of the plaintiffs. But on July 24, in *Taylor v. Root Ins. Co.*, the U.S. Court of Appeals for the Fifth Circuit delivered a rare win to insurers, affirming that an insurer does not owe sales tax as part of an actual cash value payment for a total loss vehicle claim under Texas law.[14] Because the policy required payment of "applicable sales tax," the Fifth Circuit reasoned that sales tax only applies to *sales,* and a totaled vehicle does not concern a vehicle sale.[15]

On August 9, in *Porcu v. Geico Ins. Co.*, the U.S. District Court for the Southern District of California rejected a newer theory that an insurer breached the policy by making a total loss payment to the lessor of a totaled vehicle instead of to the named insured.[16] In granting the insurer's motion to dismiss, the court reasoned that the policy permitted payment either to the owner or "an insured," and the lessor was listed as an additional insured.[17]

Labor Depreciation Cases Continue

On August 21, in *Sims v. Allstate Fire and Cas. Ins. Co.*, the U.S. District Court for the Western District of Texas continued the trend in favor of insureds in labor depreciation cases.[18] The court denied the insurer's motion to dismiss, finding that Texas and Mississippi law are materially the same and, therefore, found persuasive the Fifth Circuit's opinion applying Mississippi law in *Mitchell v. State Farm Fire and Cas. Co.*, 954 F.3d 700, 703, 707 (5th Cir. 2020).[19]

Insured Seeks All Depreciation Under Replacement Cost Policy, Despite Policy Language

On August 23, in *Graber v. Westfield Ins. Co.*, the U.S. District Court for the Eastern District of Pennsylvania considered a new theory trying to gain traction: An insurer owes full depreciation on a replacement cost policy before repairs are complete and regardless of whether the cost of repairs are less than the full replacement cost value.[20] The court ultimately did not reach the merits and instead dismissed the case as premature since the insured had not yet completed repairs and submitted a claim for unreimbursed depreciation.[21]

Estimating Software Class Action Ordered to Appraisal

In 2022 and 2023, we reported on a pair of class actions – *Han v. State Farm Fire and Cas. Co*. and *Belotti v. State Farm Fire and Cas. Co.* – challenging the use of new construction price settings in estimating software rather than using an allegedly higher price setting for restoration, service and remodel.[22] The insurer succeeded in compelling appraisal in *Han*, after which the case was settled and dismissed.[23] However, in *Belotti*, motions for class certification and summary judgment remain pending.[24] A few months ago, on August 12, in *Young v. State Farm Fire and Cas. Co.*, the U.S. District Court for the Southern District of Mississippi issued an order compelling appraisal of claims challenging the use of the new construction price setting, further validating the defense strategy of seeking appraisal.[25]

Spyware Class Action Dismissed for Lack of Standing

In quarter four of 2023, we reported on *Vonbergen v. Liberty Mut. Ins. Co.*, where the Eastern District of Pennsylvania denied a motion to dismiss a complaint alleging that an insurer's website tracking violated anti-wiretapping statutes.[26] Earlier this year, the court entered a stay of proceedings pending the U.S. Court of Appeals for the Third Circuit's resolution of a challenge to standing in a case with similar allegations, *In re BPS Direct, LLC*.[27] That appeal itself was stayed by the Third Circuit pending decisions in two other cases.[28]

On September 26, in *Arndt v. Gov. Empls. Ins. Co.*, the U.S. District Court for the District of Maryland dismissed a similar challenge to website tracking for lack of standing.[29] The court reasoned that none of the information collected – name, address, marital status and more – "is sufficiently 'intimate or personal' to justify a legitimate expectation of privacy."[30] And "mouse movements, keystrokes and clicks, search terms[] or content viewed" are not sufficient to "establish a concrete injury."[31]

Takeaways

1. Condition adjustment challenges continue to founder in total loss class actions, while projected sales adjustment cases drive forward.
2. A new theory regarding paying vehicle total loss claims to a lessor was shut down.
3. A Texas federal court signals that insurers might not be allowed to depreciate labor under Texas law.
4. Plaintiffs' counsel continue to advance new theories regarding reimbursing depreciation in replacement cost policies and use of the new construction labor efficiency setting in Xactimate.
5. Spyware class actions against insurers stumble over standing challenges.

Endnotes

1 *Jama v. State Farm Mut. Auto. Ins. Co.*, 113 F.4th 924 (9th Cir. 2024).

2 *Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134 (9th Cir. 2022).

3 *Jama*, 113 F.4th at 930.

4 *Id.* at 934-37.

5 *Id.* at 935.

6 *Id.*

7 *Id.* at 937.

8 *Ambrosio v. Progressive Preferred Ins. Co.*, No. CV-22-00342-PHX-SMB, 2024 WL 915184 (D. Ariz. Mar. 4, 2024).

9 *Ambrosio v. Progressive Preferred Ins. Co.*, No. 24-1633 (9th Cir.).

10 *Taxer v. Progressive Universal Ins. Co.*, No. 3:22-cv-01255-HZ, 2024 WL 3706411 (D. Ore. Jul. 22, 2024).

11 *Williams v. State Farm Mut. Auto. Ins. Co.*, No. 22 C 1422, 2024 WL 3888832, at *7 (N.D. Ill. Aug. 21, 2024).

12 *Kronenberg v. Allstate Ins. Co.*, No. 18-CV-06899 (HG) (TAM), 2024 WL 4126306 (E.D.N.Y. Aug. 5, 2024).

13 *Id.* at *17.

14 *Taylor v. Root Ins. Co.*, 109 F.4th 806 (5th Cir. 2024).

15 *Id.* at 809.

16 *Porcu v. Geico General Ins. Co.*, No. 23cv2302-LL-BJC, 2024 WL 3746271 (S.D. Cal. Aug. 9, 2024).

17 *Id.* at *3.

18 *Sims v. Allstate Fire and Cas. Ins. Co.*, No. SA-22-CV-00580-JKP, 2024 WL 3908739, at *5 (W.D. Tex. Aug. 21, 2024).

19 *Id.*

20 *Graber v. Westfield Ins. Co.*, No. 21-3313, 2024 WL 3927211 (E.D. Pa. Aug. 23, 2024).

21 *Id.*

22 *Han v. State Farm Fire and Cas. Co.*, No. 2:21-cv-04219 (D.N.J.); *Belotti v. State Farm Fire and Cas. Co.*, No. 3:22-cv-01284 (M.D. Pa.).

23 *Han v. State Farm Fire and Cas. Co.*, No. 2:21-cv-04219 (D.N.J.) (Doc. Nos. 38, 60, 63).

24 *Belotti v. State Farm Fire and Cas. Co.*, No. 3:22-cv-01284 (M.D. Pa.) (Doc. No. 88).

25 *Young v. State Farm Fire and Cas. Co.*, No. 2:23-cv-175-KS-MTP, 2024 WL 3949962, at *6 (S.D. Miss. Aug. 12, 2024).

26 *Vonbergen v. Liberty Mut. Ins. Co.*, No. 2:22-cv-04880, 2023 WL 8569004, (E.D. Pa. Dec. 11, 2023).

27 *Vonbergen v. Liberty Mut. Ins. Co.*, No. 2:22-cv-04880, 2024 WL 1660537 (E.D. Pa. Apr. 17, 2024); *In re BPS Direct LLC*, No. 23-3235 (3d Cir. 2024).

28 *In re BPS Direct LLC*, No. 23-3235 (3d Cir. 2024) (Doc. No. 25); *Hasson v. FullStory, Inc.*, No. 23-2535 (3d Cir. 2024); and *Schnur v. Papa John's Int'l*, No. 23-2573 (3d Cir. 2024). On Sept. 5, the Third Circuit issued an opinion affirming dismissal for lack of personal jurisdiction in *Schnur* and vacated dismissal for the same reason in *Hasson*, remanding for the district court to also apply a traditional test of personal jurisdiction. *Hasson v. FullStory, Inc.*, 114 F.4th 181 (3d Cir. 2024).

29 *Arndt v. Gov't Empls. Ins. Co.*, No. MJM-23-2842, 2024 WL 4335644 (D. Md. Sep. 26, 2024).

30 *Id.* at *5.

31 *Id.*

CONTACTS

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

Mathew G. Drocton
Associate | Columbus
T +1.614.462.4746
mdrocton@bakerlaw.com

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