

# Insurance Class Action Update

2019 2Q

By Mark A. Johnson

Insurance class actions have continued to bloom this spring with more vehicle total loss tax and fee class actions around the country, more labor depreciation class actions, and increases in other class actions. Some specialty class actions against insurers, including under the Medicare Secondary Payer Act, are getting more attention.

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## Vehicle Total Loss Class Actions for Taxes and Fees Sprout Like Weeds

As first reported last year and [last quarter](#), class actions for vehicle total loss sales tax and registration fees have sprouted around the country, started by favorable Florida district court decisions. These cases assert claims based on failure to pay sales taxes and title transfer and registration fees with payment of first-party total loss vehicle claims, regardless of whether the vehicle is replaced. In most cases, plaintiffs allege that taxes and title fees are part of the actual cash value of the loss, which is not defined in the policy to exclude those items or to condition their payment on replacement of the totaled vehicle. As previously reported, a Florida class of these claims was certified in *Jones v. Govmt. Employees Ins. Co.*, 2019 WL 1490703 (M.D. Fla. April 4, 2019).

At least 20 of these class actions have been filed in a number of states, most by the same plaintiffs' counsel. One court recently dismissed these claims, holding that "[n]othing in the plain language of the policy can reasonably be construed as an express promise to insureds that they will be reimbursed for sales tax, title transfer fees, and tag transfer fees without first incurring such costs." *Sigler v. GEICO Casualty Co.*, 2019 WL 2130137 (C.D. Ill. May 15, 2019). Another court concluded that the definition of actual cash value in the policy was sufficiently clear that tax and title fees were not required to be paid. *Singleton v. Elephant Insurance*, Case no. 6:19-cv-00200 (W.D. Tex. May 10, 2019).

Policy language defining actual cash value can sometimes decide these claims. Additionally, some states have adopted regulations requiring payment of tax and title fees only if a totaled vehicle is replaced or under certain time parameters. As dispositive motions are addressed in these cases, expect further state-specific direction from the courts on whether these claims proceed.

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## Labor Depreciation Class Actions Keep Rolling

The labor depreciation class actions that began in Arkansas in 2013 continue to persist. Following the Tennessee Supreme Court's ruling that an insurer may not deduct labor depreciation from actual cash value payments when the policy does not explicitly define depreciation (*Lammert v. Auto-Owners (Mut.) Ins. Co.*, 2019 WL 1592687 (Tenn. April 15, 2019)), at least three other labor depreciation cases are now pending in Tennessee. *Holmes v. LM Insurance Co.*, Case no. 3:19-cv-00466 (M.D. Tenn.); *Koester v. USAA General Indemnity Co.*, Case no. 2:19-cv-02283 (W.D. Tenn.); *Wade v. Foremost Insurance Co.*, Case no. 2:18-cv-02120 (W.D. Tenn.). More are likely to follow.

Last month's report addressed the class certification decision following remand in *Hicks v. State Farm Fire and Cas. Co.*, 2019 WL 846044 (E.D. Ky. Feb. 21, 2019), after the court of appeals ruled that Kentucky law prohibited deduction of labor depreciation. However, that case is going directly back to the Sixth Circuit. On July 3, the court granted a Rule 23(f) discretionary appeal by the insurer of the class certification decision. The court of appeals noted that other circuits have addressed class certification of similar cases, but the Sixth has yet to do so, and that the certification decision may place undue burden on the defendant to settle. Overlaying the court's review of class certification in *Hicks* will be pending appeals in *Perry v. Allstate Indem. Co.* and *Cranfield v. State Farm Fire and Cas. Co.* of whether Ohio law permits deduction of labor depreciation. Those appeals are fully briefed and awaiting scheduling of oral argument.

Meanwhile, on June 13, the Ohio state court in *Parker v. American Family Mut. Ins. Co.* granted the insurer's motion to dismiss labor depreciation claims. The Cuyahoga County Common Pleas Court adopted the district court's decisions in *Cranfield* and *Perry* to allow labor depreciation in determining the actual cash value of an Ohio loss. The court also distinguished the Sixth Circuit's labor depreciation decision in *Hicks* as involving Kentucky law and as a nonbinding unpublished decision.

And, the defendant in *Schulte v. Liberty Insurance Corp.*, Case no. 3:19-cv-00026 (S.D. Ohio), has asked that court to certify the question to the Ohio Supreme Court, which a few years ago had refused to accept the same question. However, new justices and a more developed legal landscape may bring about a different answer this time.

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## Kentucky PIP Claims Update

The [last two quarterly reports](#) discussed the impact of the Kentucky Supreme Court's decision in *Government Employees Ins. Co. v. Sanders*, Case no. 2018 WL 5732087 (Ky. Nov. 1, 2018). That decision held that insurers could not deny claims for PIP medical expenses based on a "paper" medical review.

Motions for leave to add class allegations based on the same claim have now been filed in state courts against at least two other insurers. Meanwhile, the Jefferson County, Kentucky, Circuit Court granted the insurer's motion for summary judgment on similar claims in *Thomas v. Allstate Property and Cas. Ins. Co.*, Case no. 16CI00691. The court found that the insurer had properly petitioned the court to order an examination under oath, the path recommended by the *Sanders* decision.

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## Vehicle Total Loss Class Actions

In an update to the [4Q 2018 report](#), the court in *Relf v. State Farm Mutual Automobile Ins. Co.* dismissed claims against the insurer as untimely, not having been filed within the one-year limitations provision in the policy. 2019 WL 2552770 (M.D. Ga. June 20, 2019). Claims against third-party vendors were also dismissed, for lack of subject matter jurisdiction.

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## Diminished Value Class Action Fails

A district court refused to certify a “bilateral” class of Washington insureds asserting first-party vehicle diminished value claims. *Kleinsasser v. Progressive Direct. Ins. Co.*, 2019 WL 2567351 (W.D. Wash. June 21, 2019). The plaintiff was insured by one entity, but sought certification of a class against his insurer and another related company based on the juridical link doctrine. The court rejected application of the doctrine, finding that the plaintiff failed to show a common agreement or system that standardized factual underpinnings of claims, and denied certification on lack of typicality alone.

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## Pennsylvania to Decide Overhead and Profit Class Action

The Pennsylvania Supreme Court agreed to accept an appeal of a decision holding that state law does not require inclusion of general contractor overhead and profit in actual cash value payments. *Kurach v. Truck Ins. Exchange*, 2018 WL 4041707, 2019 WL2280136. The insurer had determined that a general contractor’s services would be necessary, but withheld overhead and profit from an actual cash value payment until those services were incurred. The intermediate appellate court held that the policy excludes payment of those costs until they are actually incurred, and the Supreme Court agreed to hear an appeal of that decision.

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## Medicare Secondary Payer Act Class Actions

In the past few years, over 70 (and counting) class actions have been filed against several insurers and healthcare entities by a third-party non-health care entity, asserting reimbursement of claims under the Medicare Secondary Payer Act on behalf of or that were owed to Medicare Advantage Organizations. In short, the Act makes Medicare secondary to other insurers for healthcare services, including auto insurers under medpay and PIP claims, and creates a cause of action for which the government can seek reimbursement. However, plaintiffs’ claims are on behalf of or belong to Medicare Advantage Organizations, which are private entities that contract with Medicare to deliver privately managed Medicare services. The plaintiffs are a south Florida group using a variety of Delaware entities that enter into agreements with Medicare Advantage Organizations to pursue the claims and share any proceeds.

Gray areas in the statutory and regulatory scheme, though, create uncertainty over whether the right to recover applies to Medicare Advantage Organizations and whether a statutory notice period applies to bar or limit many of the claims, among many other legal questions raised by these cases. Two circuit courts have allowed the claims, and one has not. *Humana Med. Plan, Inc. v. W. Heritage Ins. Co.*, 832 F.3d 1229, 1238 (11th Cir. 2016); *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 685 F.3d 353, 367 (3d Cir. 2012); *Parra v. PacifiCare of Ariz., Inc.*, 715 F.3d 1146 (9th Cir. 2013).

The early cases were clustered in the Southern District of Florida, but have since been filed in district courts around the country. Several early cases were dismissed for inadequately plead injury, but the later filed complaints have sometimes added facts in attempts to avoid the injury arguments. These claims involve a host of Medicare-centric issues not easily summarized here and are at various stages in the courts. Expect more activity and more cases against P&C insurers in the next few years.



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