Coverage-Related Class Actions and MDLs: Recent Developments and What Is On the Horizon

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Part 1: **Recent Developments in Insurance Class Actions**

This paper provides an overview of recent developments in class actions brought against insurance companies in recent years, involving homeowners and commercial property insurance policies, and auto insurance policies. The focus is on appellate decisions over the last several years, and issues on which there have been multiple class action filings across various jurisdictions. While there are also class action filings that are unique to a specific jurisdiction, those are not a main focus of this paper.

Homeowners and Commercial Property Insurance

Labor Depreciation: One of the most heavily litigated issues in class actions against homeowners' and commercial property insurers in recent years is "labor depreciation," i.e., whether insurers may depreciate the labor cost component of estimated replacement cost value in estimating actual cash value. These policies usually provide for an initial payment on an actual cash value (ACV) basis until repair or replacement is completed, at which point a supplemental payment issued on a replacement cost value (RCV) basis. If, however, the insured declines to make the repairs, the policy provides coverage only on an ACV basis. By holding back the depreciation until the replacement is completed (or at least in progress), this incentivizes the insured to retain a contractor to repair the damage. Completing the repairs in a timely manner helps to protect the property from further damage that could be caused by leaving a roof unrepaired, for example. This process reduces blight and protects property values. Actual cash value is typically estimated by applying depreciation to the estimated RCV. This approach to property valuation is used not only for insurance purposes, but also for some property tax assessments, real estate appraisals and other purposes. When this approach is used to estimate

ACV, insurers maintain that depreciation is properly applied to the full cost of replacement, not merely a portion of that cost.

Plaintiffs' attorneys across the country have asserted that, where an insurance policy provides for payment of ACV, the policyholder is entitled, as a matter of law, to be paid an amount calculated by estimating the RCV and subtracting only the portion of the depreciation attributable to the cost of materials. The argument made is that only the cost of building materials depreciates, not the labor to install them. There is no support for the proposition that this approach is an accurate method of depreciation. It is the full value of property—or a component thereof, such as a roof—that depreciates over time, not merely the materials. For example, it is the value of the roof that depreciates, not just the shingles and nails.

There is a deep split of authority on this issue nationwide. Five state supreme courts and two federal courts of appeals have ruled in favor of insurers.[1] Four state supreme courts, the Missouri Court of Appeals and two federal courts of appeals have ruled in favor of policyholders.[2] Plaintiffs also had recent success at the federal district court level in Texas.[3] The trend in appellate decisions since 2020 has not been favorable to insurers. Plaintiffs' attorneys have tried to limit the decisions unfavorable to their position on the ground that they are based on the "broad evidence rule" or market value approach (which measures difference in pre-loss vs. post-loss market value) to ACV that is followed in some jurisdictions, while other jurisdictions require, and insurers often use, a replacement cost less depreciation approach to estimating ACV. The "broad evidence rule" is "a flexible approach that allows the trier of fact to consider 'every fact and circumstance which would logically tend to the formation of a correct estimate of the loss.'" *Wilcox*, 874 N.W.2d at 784 (quoting *McAnarney v. Newark Fire Ins. Co.*, 159 N.E. 902 (N.Y. 1928)). A careful reading of the cases, however, demonstrates that the decisions in favor of insurers are not based exclusively on a "broad evidence rule" or market value approach. The Supreme Courts of North Carolina and South Carolina, for example, addressed the replacement cost less depreciation approach. *Accardi*, 838 S.E.2d at 456; *Butler*, 858 S.E.2d at 409-11. Similarly, the Tenth Circuit did not apply a market value or broad evidence rule approach. The policy defined ACV as replacement cost "less allowance for physical deterioration and depreciation, including obsolescence." *Graves*, 686 Fed. Appx. at 537. The Tenth Circuit persuasively rejected the plaintiffs' arguments, explaining that "*Black's Law Dictionary* describes ten different depreciation methods, none of which involves distinguishing materials from labor costs. Rather, its descriptions focus on the asset itself and various approaches to determining its value as a whole. Based on the plain and ordinary meaning of 'depreciation,' a reasonably prudent insured would not expect the insurer to apply such an unorthodox depreciation method when determining actual cash value." *Id.* at 540. Even in those jurisdictions that have well-established market value or broad evidence rule standards for ACV, the courts' reasoning was *not*

[1] *Butler v. Travelers Home and Marine Insurance Co.*, 858 S.E.2d 407 (S.C. 2021); *Accardi v. Hartford Underwriter Ins. Co.*, 838 S.E.2d 454 (N.C. 2020); *Henn v. American Family Mut. Ins. Co.*, 894 N.W.2d 179 (Neb. 2017); *Wilcox v. State Farm Fire & Cas. Co.*, 874 N.W.2d 780 (Minn. 2016); *Redcorn v. State Farm Fire & Casualty Co.*, 55 P.3d 1017 (Okla. 2002); *In re State Farm Fire & Cas. Co.*, 872 F.3d 567 (8th Cir. 2017) (Missouri law); *Graves v. Am. Family Mut. Ins. Co.*, 686 Fed. Appx. 536, 539 (10th Cir. 2017) (Kansas law).

[2] *Walker v. Auto-Owners Ins. Co*., 517 P.3d 617 (Ariz. 2022); *Sproull v. State Farm Fire & Cas. Co.*, 184 N.E.3d 203 (Ill. 2021); *Lammert v. Auto-Owners (Mut.) Ins. Co.*, 572 S.W.3d 170 (Tenn. 2019); *Adams v. Cameron Mut. Ins. Co.*, 430 S.W.3d 675 (Ark. 2013); *Franklin v. Lexington Ins. Co.*, 652 S.W.3d 286 (Mo. App. 2022); *Mitchell v. State Farm Fire & Cas. Co.*, 954 F.3d 700 (5th Cir. 2020) (Mississippi law); *Perry v. Allstate Ins. Co.*, 953 F.3d 417 (6th Cir. 2020) (Ohio law); *Hicks v. State Farm Fire & Cas. Co.*, 751 Fed. App'x 703 (6th Cir. 2018) (Kentucky law).

[3] *Sims v. Allstate Fire & Cas. Ins. Co.*, 2023 WL 175006 (W.D. Tex. Jan. 11, 2023).

limited to market value or the broad evidence rule.[4] Moreover, making a distinction between the market value approach and the replacement cost less depreciation approach does not make sense because the replacement cost less depreciation approach (also known as the "cost approach") is simply a method of measuring difference in market value. As the Eighth Circuit explained, "[a] 'depreciation' deduction is the most common, but not the only acceptable *method of estimating the reduced fair market value* of damaged property." *Labrier*, 872 F.3d at 574 (emphasis added). As the Nebraska Supreme Court similarly explained, "[d]epreciating the whole is merely one way to arrive at a value that represents the depreciated value of the property to which the insured is entitled." *Henn*, 894 N.W.2d at 185; *see also Hicks*, 751 F. App'x at 714 (Griffin, J., dissenting) (explaining that majority's attempt to distinguish cases in other jurisdictions based on broad evidence rule was a "distinction without a difference" because "Kentucky's replacement cost minus depreciation formula is the method to calculate the economic value of damaged property at the time it was damaged").

Given the split of authority that has developed, some insurers have implemented new policy forms that eliminate any dispute on the issue by expressly providing for labor depreciation. This has led policyholders to argue that the change in policy language demonstrates ambiguity in the "old" language. While this may have some superficial appeal, most courts have rejected this line of argument. As the Seventh Circuit has explained, "revising language in an insurance policy does not constitute an admission that an alternative interpretation of the original language was correct." *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, 20 F.4th 303, 311 (7th Cir. 2021). "[S]uch belt-and-suspenders modifications to policy language simply do not compel the inference that prior policy language did not require the same result." *Id.*; *see also Wilcox*, 874 N.W.2d at 784 n.2 (Minnesota Supreme Court declined to consider new policy form addressing labor depreciation "[b]ecause we do not rely on extrinsic evidence to establish contractual ambiguity").

General Contractor Overhead and Profit: Years ago, a series of putative class actions were filed asserting that insurers were improperly failing to pay general contractor overhead and profit (GCOP) on homeowner's and commercial property insurance claims. These cases typically relied on a "three trade rule," asserting that GCOP was required whenever three or more trade contractors were required to make repairs. Most courts rejected this approach and held that GCOP was required, on a case-by-case basis, only when a general contractor was reasonably likely to be needed in making the repairs. Based on this standard, courts generally denied class certification. *See*, *e.g.*, *Mills v. Foremost Ins. Co.*, 269 F.R.D. 663, 676 (M.D. Fla. 2010) ("[T]he Eleventh Circuit established a clear standard in which GCOP was to be paid, that is, in circumstances where the policyholder would be reasonably likely to need a general contractor in repairing or replacing of their damaged property. Thus, in order to determine whether or not a policy holder is entitled to the withheld payments, it is likely that the putative class plaintiffs will need to introduce evidence specific to their claim in order to argue that the use of a general contractor

[4] *See*, *e.g.*, *Labrier*, 872 F.3d at 574 (explaining that depreciation has a "well understood meaning," and that dictionary definitions of depreciation consistently "deduct depreciation from the initial full cost of the damaged asset, because that was the insured's investment"); *Henn*, 894 N.W.2d at 190 (reasoning that "absent specific language in the policy, the insured does 'not pay for a hybrid policy of actual cash value for roofing materials and replacement costs for labor'" because "[t]he property is a product of both materials and labor"; also reasoning that "[t]he unambiguous definition of actual cash value is a depreciation of the whole"); *Redcorn*, 55 P.3d at 1021 (reasoning that the policy "insured a roof surface, not two components, material and labor," the plaintiff "did not pay for a hybrid policy of actual cash value for roofing materials and replacement costs for labor," and "[t]o construe the policy in such a manner would unjustly enrich the policy holder").

was indeed, reasonably likely. As the Eleventh Circuit has not established a 'three trade rule' standard as the [plaintiffs] have averred, the likelihood that a putative class member plaintiff will need to argue what was reasonable under the circumstances given his or her specific claim, creates a lack of predominance."). The Montana Supreme Court, however, found class certification appropriate, without much analysis. In *Kramer v. Fergus Farm Mut. Ins. Co.*, 474 P.3d 10 (Mont. 2020), the Montana Supreme Court held that the predominance requirement for class certification was satisfied because "a threshold question here is whether [the insurer's] internal practices are themselves consonant with the policy … or whether they constitute a breach of the policy," and "[t]hat is a question of law shared by all class members, regardless of whether their individual repairs required three trades or otherwise reasonably necessitated a general contractor." *Id.* at 496. It appears this holding was based on a dispute over whether the insurer's internal policy included consideration of a "three trade rule." *Id.* at 493.

Automobile Insurance

Valuation of Total Loss Vehicles: One issue that has been the focus of extensive class action litigation in recent years is the valuation of total loss vehicles. A significant recent appellate decision on class certification in one of these cases is *Lara v. First National Insurance Company of America*, 25 F.4th 1134 (9th Cir. 2022). In this case, the plaintiffs sued Liberty Mutual-affiliated companies and CCC Intelligent Solutions, a vendor that assists insurers in valuing vehicles, alleging breach of contract as to Liberty Mutual and an unfair trade practices claim against all defendants. The insurance policy required payment of the "actual cash value" of the vehicle, which was defined by a Washington regulation as "fair market value." CCC researches the prices at which used vehicles sell at car dealers, and then makes adjustment based on the pre-loss condition of the insured vehicle and the difference between prices paid for vehicles purchased from private parties rather than dealerships. The insurance adjuster then in some cases adjusts the value shown on the CCC report. The plaintiffs claimed that the "condition adjustments" on the CCC reports violated a Washington regulation. The case survived a motion to dismiss, but the district court denied class certification under Rule 23(b)(3), based on lack of predominance of common issues and because a class action would not be a superior method of resolving the dispute.

In affirming, the Ninth Circuit concluded that whether the condition adjustment violated the regulation was a common question, but liability and injury would require individualized adjudication of each claim. The court explained that "[b]ecause Liberty owed each putative class member the actual cash value of his or her car, if a putative class member was given that amount or more, then he or she cannot win on the merits," and determining that "would involve looking into the actual pre-accident value of the car and then comparing that with what each person was offered." In other words, there would have to be a mini-trial on the value of each vehicle.

As plaintiffs often do in these cases, the plaintiffs here argued that the value of the vehicles involved "damages issues," and some courts have said that if the only individualized issues involve damages, that should not defeat class certification. But, as the Ninth Circuit explained here, "if there's no injury, then the breach of contract and unfair trade practices claims must fail," and "[t]hat's not a damages issue; that's a merits issue." In other words, if the ultimate amount paid was sufficient, it doesn't matter how you get there. As the court put it, "the district court was correct to apply 'the old basketball phrase, 'no harm, no foul.'" The court also agreed with the district court that the superiority requirement was not satisfied because individual trials would be preferable given the nature of the

issues to be decided. *But see Drummond v. Progressive Spec. Ins. Co.*, 2023 WL 5181596 (E.D. Pa. Aug. 11, 2023) (certifying class in case focused on challenging projected sales adjustments); *Smith v. S. Farm Bureau Cas. Ins. Co.*, 18 F.4th 976, 980-81 (8th Cir. 2021) (reversing district court decision granting motion to dismiss in case involving projected sold adjustments, finding that complaint adequately alleged that valuations used were not consistent with fair market values).

In *Prudhomme v. Government Employees Insurance Company*, No. 21-30157, 2022 WL 510171 (5th Cir. Feb. 21, 2022) (per curiam), the plaintiffs claimed that their insurer undervalued their vehicles that were deemed total losses, in violation of Louisiana statutes. Sidestepping questions about commonality and predominance, which are usually the focus of class certification decisions, the Fifth Circuit affirmed the denial of class certification because the adequacy of representation requirement was not met. This was because "a portion of the proposed class members received payments above (that is, benefitted from) the allegedly unlawful valuation." According to the district court opinion, an expert witness opined that approximately one-fifth of the class would have received less on the plaintiffs' theory than they received from GEICO. While the plaintiffs argued that class members who were overpaid on their theory might still be entitled to some damages under Louisiana law, that would likely create a typicality problem. Class representatives cannot adequately represent a class if they offer "a theory of liability that disadvantages a portion of the class they allegedly represent."

In *Gautreaux v. Louisiana Farm Bureau Casualty Insurance Co.*, 362 So. 3d 896 (La. Ct. App. 3d Cir. 2022), a Louisiana appellate court held in a class action that an insurer's use of the Michell Work Center Total Loss software failed to comply with a Louisiana statute. The statute required that total loss vehicles be valued based on a "fair market value survey using qualified retail automobile dealers in the local market area as resources," "[t]he retail cost as determined from a generally recognized used motor vehicle industry source," or an agreed-upon qualified expert appraiser. The evidence indicated that the software relied on some sources other than local automobile dealers, made adjustments to list prices to account for negotiations, and cited sources 50 to 150 miles away. The software did not qualify as a "generally recognized used motor vehicle industry source" because it was created for use by insurers and there was no evidence that it was used in the used motor vehicle industry.

Tax, Title and Registration Fees on Total Loss Vehicles: There has also been extensive class action litigation in recent years over whether insurers are required to pay sales tax, title transfer fees and registration fees where a vehicle is a total loss. Auto policies often do not expressly address this issue but provide for payment of "actual cash value." These cases have often turned on subtle differences in policy wording and on applicable statutes/regulations that may be incorporated as a matter of law into the policy. Some courts have held that these taxes and fees are required to be paid as part of actual cash value. *See*, *e.g.*, *Sos v. State Farm Mut. Auto. Ins. Co.*, No. 21-11769, 2023 WL 5608014, at *19 (11th Cir. Aug. 30, 2023) ("First, we've previously held that a Florida actual cash value policy included any charges the policyholder would be reasonably likely to incur in replacing the damaged property. And under Florida law, sales tax and title transfer fees are mandatory costs necessarily incurred in the replacement of a total loss vehicle. And it is fundamental that the laws of Florida are a part of every Florida contract.") (cleaned up); *Davis v. GEICO Cas. Co.*, No. 2:19-CV-2477, 2023 WL 2330234, at *9 (S.D. Ohio Mar. 2, 2023) ("The Court finds GEICO's Policy ambiguous as to whether ACV includes the disputed fees. The Court also finds that Plaintiffs' reading of the Policy is reasonable, as have numerous other courts under materially similar circumstances."). Other courts have held that under the terms of the policy or applicable statutes or regulations, payment of fees associated

with title and registration are not required. *See*, *e.g.*, *Wilkerson v. Am. Fam. Ins. Co.*, 997 F.3d 666, 671 (6th Cir. 2021) (applying Ohio law, holding that "the phrase 'actual cash value' is 'clear and unambiguous' when interpreted in the full context of American Family's policy: [i]t refers to the market value of the damaged car," and "[i]t thus unambiguously excludes the taxes and fees that [plaintiff] seeks in this suit"); *Singleton v. Elephant Ins. Co.*, 953 F.3d 334, 338 (5th Cir. 2020) (same result under Texas law); *Sigler v. GEICO Cas. Co.*, 967 F.3d 658, 660-61 (7th Cir. 2020) (applying Illinois law, holding that policy did not require payment of taxes and fees because actual cash value was only a limit of liability, and Illinois regulation, incorporated into policy as a matter of law, provided for payment of taxes and fees only when incurred and substantiated); *Hawley v. Liberty Mut. Gen. Ins. Co.*, No. 2184CV00155BLS2, 2021 WL 5630819, at *4 (Mass. Super. Ct. Aug. 26, 2021) ("While Section 133.05(1)(d) requires Liberty to base ACV, in part, on 'the actual cost of purchase of an available motor vehicle,' the actual cost of 'purchas[ing]' a car does not include Regulatory Fees, which are costs incurred following a purchase. While [plaintiff] is correct that such fees are necessarily incurred in lawfully operating a car on Massachusetts roadways, Section 133.05 does not require reimbursement of the cost of operation; it only requires reimbursement of purchase cost.").

In *Angell v. GEICO Advantage Insurance Co.*, 67 F.4th 727 (5th Cir. 2023), the Fifth Circuit affirmed an order certifying a class of Texas policyholders in a case involving this issue. The court held that sales tax, title fees and registration fees did not need to be treated separately for purposes of the named plaintiffs' standing to sue (or their typicality) where the named plaintiffs were not owed all of these fees. The court also rejected the insurer's challenge to the adequacy of class representation on the basis that class members might have more valuable claims relating to vehicle valuation that they would give up if they remained in the class. The court also found that the predominance requirement was satisfied, rejecting the insurer's argument that the court would need to determine vehicle values where the plaintiffs were not challenging them. The court also found that there was little need for individualized damages calculations. The court also found class certification appropriate under a Texas bad faith statute.

COVID-19 Premium "Givebacks": A series of class actions was filed against insurers alleging that COVID-19 "stay home" orders resulted in a substantial reduction in driving and automobile accidents, and that insurers were required to refund excessive premiums. The Second Circuit affirmed dismissal of such a case based on the filed rate doctrine. *Grossman v. GEICO Cas. Co.*, No. 21-2789, 2022 WL 1656593, at *2 (2d Cir. May 25, 2022) ("Plaintiffs' claims are barred under the filed rate doctrine because, fundamentally, they each seek a recalculation of the insurance rates that GEICO charged during the relevant period. These rates were approved by the New York Department of Financial Services."); *see also*, *e.g.*, *Rose v. GEICO Cas. Co.*, No. 3:21-CV-385-DPJ-FKB, 2022 WL 1438551, at *3 (S.D. Miss. Mar. 16, 2022) (dismissing similar case based mainly on filed rate doctrine). In California, however, some of these cases have survived motions to dismiss. *E.g.*, *Day v. GEICO Cas. Co.*, 580 F. Supp. 3d 830, 837, 844-45 (N.D. Cal. 2022) (denying motion to dismiss, in part, finding that claims were not within exclusive jurisdiction of insurance commissioner under California law, and that plaintiff adequately alleged a claim under California's Unfair Competition Law); *Day v. GEICO Cas. Co.*, 2022 WL 16556802 (N.D. Cal. Oct. 31, 2022) (granting class certification).

Statutory/Regulatory Issues: Compliance with state statutes and regulations continues to be an active area of class action litigation. In *Bellshaw v. Farmers Insurance Company of Oregon*, 533 P.3d 40 (Or. Ct. App. 2023), the Oregon Court of Appeals recently upheld, in large part, a decision awarding

damages to a class based on the insurer's failure to strictly comply with notice requirements regarding customers' rights to choose their own auto repair shop. This was despite the fact that the insurer's notice was approved by the state insurance regulator. The statutory penalty was $100 per class member. The total award was over $26 million, to be reduced on remand based on a misapplication of the statute of limitations. The appellate court also instructed the trial court, on remand, to reevaluate whether the size of the award complied with due process requirements.

Part 2 – The Future of MDLs and Proposed Rules:

PROPOSED AMENDMENT TO THE FEDERAL

RULES OF CIVIL PROCEDURE1

Rule 16.1. Multidistrict 1 **Litigation**

(a) Initial MDL Management Conference. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions, the transferee court should schedule an initial management conference to develop a management plan for orderly pretrial activity in the MDL proceedings.

(b) Designating Coordinating Counsel for the

Conference. The transferee court may designate coordinating counsel to:

(1) assist the court with the conference; and

(2) work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).

(c) Preparing a Report for 15 **the Conference.** The transferee court should order the parties to meet and

prepare a report to be submitted to the court before the conference begins. The report must address any matter designated by the court, which may include any matter listed below or in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

(1) whether leadership counsel should be appointed, and if so:

(A) the procedure for selecting them and

whether the appointment should be reviewed periodically during the MDL proceedings;

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

(C) their role in settlement activities;

(D) proposed methods for them to regularly communicate with and report to the court and nonleadership counsel;

(E) any limits on activity by nonleadership counsel; and

(F) whether and, if so, when to establish a means for compensating leadership counsel;

(2) identifying any previously entered scheduling or other orders and stating whether they should be vacated or modified;

(3) identifying the principal factual and legal issues likely to be presented in the MDL proceedings;

(4) how and when the parties 49 will exchange information about the factual bases for their claims and defenses;

(5) whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;

(6) a proposed plan for discovery, including methods to handle it efficiently;

(7) any likely pretrial motions and a plan for addressing them;

(8) a schedule for additional management conferences with the court;

(9) whether the court should consider measures to facilitate settlement of some or all actions before the court, including measures identified in Rule 16(c)(2)(I);

(10) how to manage the filing of new actions in the MDL proceedings;

(11) whether related actions have 67 been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

(12) whether matters should be referred to a magistrate judge or a master.

(d) Initial MDL Management Order. After the conference, the court should enter an initial MDL management order addressing the matters designated under Rule 16.1(c) – and any other matters in the court's discretion. This order controls the MDL 78 proceedings until the court modifies it.