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Insurance Companies Stemming the Tide In UM/UIM Class Actions

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The insurance industry has faced several well-publicized challenges in recent years, including global warming's effect on climate change, the economy's impact on automobile ownership and the housing market, and the stock market collapse's impact on insurers' own investments. However, the insurance industry is beginning to stem the tide against a less publicized but equally significant threat – class action lawsuits. A recent string of court rulings in Alabama, Delaware, and Ohio in putative class action lawsuits are representative of evolving strategies which insurers are utilizing to win more class actions. In the cases discussed below, the plaintiffs challenged insurers' failures to disclose allegedly illusory uninsured/underinsured motorist (UM/UIM) coverage, but the outcomes demonstrate that the insurance industry is gaining momentum by structuring defenses based on local regulatory commissions' approvals of rates and contract language pursuant to the "filed rate doctrine," applicable statutes of limitations, and the insurers' limited duties to disclose.

Class Actions Transform Allegations of Nominal Damages into Significant Threats

Plaintiffs' lawyers are increasingly using class action lawsuits to target the insurance industry's claims handling procedures, policy wording, and premium allocations. For example, in two of the cases discussed below, the plaintiffs' lawyer's practice is devoted almost entirely to prosecuting claims against the insurance industry. By filing a class action, plaintiffs' lawyers can bring multimillion-dollar causes of action against insurance companies for allegedly illegal practices that would generate nominal damages, if any at all, if raised only by an individual insured. The class action lawsuit is thus a powerful tool for plaintiffs' counsel to attempt to prosecute claims they would otherwise not pursue, but for the potential of a class-wide recovery.

Although only a small percentage of class actions are successful, those that are can generate large monetary settlements and attorney fee awards. Moreover, when a class action is successful against one insurer, the same theory of liability is likely to be pursued against multiple insurers.

The mounting threat of class actions may force insurers to charge higher insurance premiums to citizens and businesses and to act more affirmatively, perhaps even beyond the scope of their obligations under the policies as written, creating the potential for more class actions based on alleged misrepresentations. However, as the cases discussed below indicate, plaintiffs' lawyers are beginning to find that their theories are not without limits.

Ex parte The Cincinnati Insurance Company

A common practice known as "stacking" permits insureds who suffer a single loss to obtain benefits under multiple UM/UIM coverages. In Alabama, however, the Motor Vehicle Safety-Responsibility Act limits "stacking" so that an injured insured may obtain benefits by "stacking" a maximum of three UM coverages per policy.[1]

In *Ex parte The Cincinnati Insurance Co. (In re Ray Peacock v. The Cincinnati Insurance Co.)*,[2] the plaintiff claimed he (and others similarly situated) had been overcharged for unnecessary and illusory coverage for UM/UIM premiums charged for vehicles in excess of three listed in a policy. The plaintiff claimed that UM coverage for more than three vehicles provided no benefit to insureds. The plaintiff sought damages in the form of restitution or the return of monies paid for the allegedly illusory coverage. Cincinnati Insurance Company filed a mandamus action with the Alabama Supreme Court, and claimed the plaintiff failed to pursue his administrative remedies through the Insurance Commissioner and the Department of Insurance. The plaintiff countered he was not challenging the insurer's rates, but its "business practices" of applying those rates.[3]

On June 11, 2010, the Supreme Court of Alabama held the plaintiff was, in fact, directly challenging the premiums and rates Cincinnati applied to UM coverage pursuant to rates approved by the Insurance Commissioner. The Supreme Court determined that the plaintiff's claim that Cincinnati was overcharging for UM coverage was a matter "squarely within the exclusive jurisdiction of the commissioner."[4] The Supreme Court acknowledged the argument raised by amicus curiae insurers that ownership of more than three vehicles increases the risk of a claim for UM benefits, but determined that the question whether the coverage provided is indeed illusory was not at issue. The Supreme Court concluded, however, that Cincinnati's rates were *per se* reasonable and that Alabama's judiciary lacked jurisdiction to hear the plaintiff's claim because the "filed-rate doctrine" required the plaintiff to exhaust his administrative remedies with the commissioner and the Department of Insurance before filing a lawsuit against a defendant insurer.

Davis et al. v. State Farm Mutual Automobile Insurance Company

In *Davis et al. v. State Farm Mutual Automobile Insurance Company*,[5] a consolidation of ten proposed class actions against nine insurance companies, the plaintiffs claimed the defendant insurers were improperly "double-dipping" by charging premiums for "greater-than-minimum" UM/UIM coverage when two or more vehicles within the same household are insured under the same policy. All of the plaintiffs were represented by the same counsel, who advertises on his website that he has been "cheerfully suing insurance companies since 1986," and has secured more than $22 million against insurance companies and other corporate entities since 1999. On behalf of the plaintiffs, counsel sought a declaratory judgment that the defendant insurers' charging practice ran afoul of Delaware law and constituted a breach of contract, bad faith, breach of the duty of fair dealing, consumer fraud, and violated public policy. The plaintiffs' counsel claimed that under Delaware law, it was unnecessary for insurers to offer "greater-than-minimum" coverage on vehicles other than the first vehicle because an insured could recover the highest limits provided under the policy in any UM/UIM claim regardless of the vehicle involved in the accident. Accordingly, the plaintiffs' counsel claimed insurers should only offer, and charge premium reflecting, Delaware's minimum required limits on secondary vehicles. The plaintiffs sought damages based on the difference between such minimum coverage and the premiums actually charged by each defendant insurer.

On February 15, 2011, Resident Judge T. Henley Graves of the Superior Court of Delaware, Sussex County, granted summary judgment in favor of the defendant insurers, finding that the plaintiffs'

claims were barred by the "filed-rate doctrine" and the defendant insurers were not violating Delaware law by charging insureds for "greater-than-minimum" UM/UIM coverage. The Delaware Insurance Commissioner regulates rates charged for UM/UIM coverage. Every insurer in Delaware is required to file their rates and policy forms with the Insurance Commissioner for approval. Judge Graves relied on *Ex parte The Cincinnati Insurance Co.* to conclude that summary judgment was appropriate because the "filed-rate doctrine" required plaintiffs to exhaust their administrative remedies by filing a complaint regarding their UM/UIM rates with the Insurance Commissioner prior to suing the defendant insurers. Only after the Insurance Commissioner had issued a decision denying the plaintiffs' claim could the plaintiffs bring an appeal in the Delaware Chancery Court challenging the rate. Moreover, Judge Graves rejected the plaintiffs' argument that charging additional premium for "greater-than-minimum" limits on secondary vehicles violates Delaware law. Citing "common business sense," Judge Graves found a policy that provides "greater-than-minimum" limits on secondary vehicles in a household provides greater coverage to the insureds and greater risk to the insurer than one that offers minimum limits on those vehicles.

Beck v. Westfield National Insurance Company

In *Martin v. Midwestern Group Insurance Co.,*[6] the Ohio Supreme Court held UM/UIM coverage followed the insured, not the vehicle, resulting in an insured's need to pay only one premium to receive UM/UIM coverage for themselves and their family members driving in any vehicle. Although *Martin* was superseded by statute passed by the Ohio Legislature in 1997, plaintiffs' counsel developed the theory that in the interim, all insurers were obligated to act affirmatively and inform their insureds directly that multiple premiums for UM/UIM coverage were only necessary if the insured wanted to cover non-family members or "guest" passengers in secondary vehicles. Plaintiffs' counsel struck gold in 2007 when they settled one such class action with an insurer for $52 million.

Plaintiffs' counsel recently attempted to extend this theory on behalf of additional plaintiffs against several other insurance companies, even though the cases were filed beyond Ohio's four-year statute of limitations for claims based on fraud. Plaintiffs' counsel contended such claims are not time-variable and the statute of limitations does not begin to toll until the plaintiff is told about his potential cause of action by counsel.

On December 3, 2010, in *Beck v. Westfield National Insurance Company*,[7] Judge Richard J. McMonagle of the Cuyahoga County Court of Common Pleas granted summary judgment in favor of Westfield National Insurance Company, finding the plaintiff's putative class action was barred by the statute of limitations and not saved by the discovery rule. Judge McMonagle also found Westfield National, which contracts with independent agents, was under no obligation to act affirmatively and inform its insureds directly about changes in the law and did not make any misrepresentations to its insureds.

The plaintiff, who had paid a $41 premium for UM/UIM coverage on his second vehicle in 1994, argued the statute of limitations was tolled until 2009, when he was informed by counsel about his potential cause of action. Had the court ruled in the plaintiff's favor, class certification would have permitted plaintiff's counsel to assert damages based on a multiplication of the $41 UM/UIM premium, the number of insureds who purchased UM/UIM coverage for their secondary vehicles, and the number of years the insurer charged and collected the premium from each insured for UM/UIM coverage for the insureds' secondary vehicles, turning $41 into potentially millions of dollars. Moreover, plaintiff's counsel would have been able to use this theory and similar claims based on fraud against other insurers without fear of the expiration of the statute of limitations. Judge McMonagle, however, found the statute of

limitations is triggered not by the discovery of the law, but by the constructive discovery of the facts, which were available to the plaintiff in 1994 upon review of his policy following the *Martin* decision. In Ohio, every citizen is required to know the law, and the law existed in 1994, nearly 15 years before the plaintiff had a conversation with his attorney.

The plaintiff relied on court decisions in prior class actions that were timely filed to argue that other insurance companies were obligated to inform their insureds directly about changes in the law. Judge McMonagle, however, noted insurers ordinarily owe no such duty, and, perhaps unlike other insurers, Westfield National had not undertaken any affirmative duty to inform its insureds directly about substantive changes in insurance law. Thus, the court found the practices of one insurer cannot be used to implicate another. On February 22, 2011, plaintiff's counsel voluntarily withdrew an appeal of Judge McMonagle's ruling, which is likely to impact the other companion cases plaintiff's counsel filed that are currently pending in Ohio.

Conclusion

The insurance industry, just like numerous other business segments, is likely to remain a target for class action lawsuits across the country. But where before this was a threat that carried a perceived weight against the insurance industry's favor, the recent court rulings on UM/UIM coverage demonstrate the judiciary will often require plaintiffs to exhaust their administrative remedies prior to filing suit by challenging insurers' rates, claims handling procedures, and policy wording first with their State's Department of Insurance. Just as successful claims can potentially create a theory of liability, the group of cases discussed here may begin to offer a basis for defeating future class actions. Even where the plaintiffs get past the "filed-rate doctrine," courts will require plaintiffs to bring timely claims that meet "common sense" standards and demonstrate breaches of affirmative duties.

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1 Ala. Code § 32-7-23(c)
2 51 So. 3d 298 (Ala. 2010).
3 *Id.* at 302.
4 *Id.* at 309.
5 C.A. No. S09C-09-012 (Del. Super. Ct., Feb. 15, 2011) (mem.).
6 70 Ohio St. 3d 478, 639 N.E.2d 438 (1994).
7 Case No. 09-cv-691286 (Ohio. Ct. Comm. Pl., Dec. 1, 2010).