Insurance Class Actions

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INSURANCE CLASS ACTIONS

I. Introduction

A. Requirements for Class Certification

Class certification under Hawai‘i law is a two-step process set forth in Rule 23 of the Hawai‘i Rules of Civil Procedure ("HRCP"). First, the class must satisfy the four prerequisites established by Rule 23(a) and second, the class must satisfy one of the subdivisions of Rule 23(b).[2]

Rule 23(a) subpart (1) requires the class to be "so numerous that joinder of all members is impracticable." To satisfy this "numerosity" prong, the court must be able to identify the class members.[3] Subpart (2) requires the existence of "questions of law or fact common to the class." Under this subpart, the court looks to whether "common claims or defenses extending throughout the class" are present.[4] This "commonality" requirement is "concerned with the establishment of predictable economies of time, effort, and expense and uniformity of decision."[5]

Rule 23(a)'s third subpart provides that a class action is only maintainable where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The main inquiry under this prerequisite is that the named plaintiff's "claim

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[2] Life of the Land v. Land Use Comm'n, 63 Haw. 166, 181, 623 P.2d 431, 443 (1981).

[3] Id. at 181, 623 P.2d at 444.

[4] Id. at 182, 623 P.2d at 444.

[5] Id. at 183, 623 P.2d at 445.

or defense be essentially similar to the claims or defenses throughout the class."[6] Pursuant to this "typicality" requirement, Hawai'i courts ensure that no conflicts of interest exist between the class members and the representative.[7] Finally, subpart (4) requires that "the representative parties will fairly and adequately protect the interests of the class."

If the class satisfies the requirements of Rule 23(a), the court next determines whether the "presence of a suitable situation for the maintenance of a class action" exists under HRCP Rule 23(b).[8] Rule 23(b) contains three subdivisions, the satisfaction of any one providing grounds to certify a class. "Generally, if declaratory and injunctive relief is sought, class actions are processed under Rule 23(b)(2). If monetary relief is sought, they are processed under Rule 23(b)(1) or (3)."[9]

"Rule 23(b)(1) provides for certification in cases where individual adjudication of the proposed class members' cases would either impose incompatible standards of conduct on the party opposing the class or would, as a practical matter, be dispositive of the interests of potential class members not party to an individual adjudication."[10] Certification under Rule23(b)(2) is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making

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[6] Id. at 182, 623 P.2d at 444.

[7] Id. at 183, 623 P.2d at 445.

[8] Kemp v. State of Hawai'i Child Support Enforcement Agency, 111 Hawai'i 367, 385, 141 P.3d 1014, 1032 (2006) (quoting Life of the Land, 63 Haw. at 180-81, 623 P.2d at 443).

[9] Jacober v. Sunn, 5 Haw. App. 20, 25, 674 P.2d 1024, 1027 (1984).

[10] Yokoyama v. Midland Life Ins. Co., 239 F.R.D. 607, 608 n.2 (D. Haw. 2006).

appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Finally, Rule 23(b)(3) provides for certification where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3) enumerates four factors to take into account when deciding issues of predominance and superiority:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.[11]

"The Rule 23(b)(3) predominance inquiry tests whether [the] proposed classes are sufficiently cohesive to warrant adjudication by representation."[12] Under the predominance inquiry, "courts weigh issues common to the class against issues individual to class members."[13]

The Yokoyama court also discussed Rule 23(b)(3)'s superiority requirement:

> Rule 23(b)(3) also requires that a class action be superior to any other available form of adjudication. Under Rule 23(b)(3)'s superiority standard, the court considers economies of time, effort and expense as to both the judiciary and the parties; whether a class action would promote uniformity of decisions as to questions of law or fact; whether a class action would protect the rights of persons who might not otherwise be able to bring individual claims; whether a class action would compromise the fairness or truth-seeking process of trying each member's

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[11] HRCP 23(b)(3).

[12] Yokoyama v. Midland Nat'l Life Ins. Co., NO. 05-00303, 2007 U.S. Dist. LEXIS 45318, at *24 (D. Haw. 2007) (quoting Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 623 (1997)).

[13] Id. at *25.

claim individually; and what difficulties might be encountered in the management of the case as a class action.[14]

B. Overview of Current Trends

In the last two years, several class action lawsuits against insurance companies have either been decided or certified. Perhaps most significant is the Supreme Court's ruling on the duties of insurance companies under the Fair Credit Reporting Act ("FCRA" or "the Act"). This case settled a dispute between circuits over when the Act required companies to notify consumers that information in their credit reports was being used to set their premium rates. Another significant decision involving a class action lawsuit against an insurance company was the Illinois Supreme Court's reversal of a one billion dollar damages award to plaintiffs in a case involving the use of aftermarket parts to fix automobiles. This case established certain standards under which classes could be certified, perhaps setting the stage for further conflict between circuits.

Meanwhile, courts around the country are certifying two new classes of plaintiffs in lawsuits against insurance companies. The first suit involves a class of homeowners who, when refinancing their mortgages within a certain period of time, paid full price for title insurance. These plaintiffs claim that they were entitled to discounted rates for title insurance that the companies themselves set but failed to apply. In the second suit, a class of elderly annuities purchasers are suing insurance companies for selling them annuities with unconscionable termination fees or that matured beyond their actuarial life expectancy. The fact that several courts have certified both classes could lead to significant compensation to the plaintiff classes and changes in how the insurance industry conducts business.

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[14] Id. at *42-43.

II. Fair Credit Reporting Act

Many insurance companies base the rates they charge their customers on customer credit scores; the higher a customer's credit score, the lower his rate.[15] One of the recent trends in insurance class actions involves suits against companies that engage in this practice without notifying their customers. These suits allege violations of the FCRA, which requires companies to notify consumers if they are subjected to "adverse action … based in whole or in part on any information contained in a consumer [credit] report."[16] The FCRA defines adverse action as "an increase in any charge for … the terms of coverage or amount of, any insurance, existing or applied for."[17] Negligent violations of the FCRA leave companies liable for actual damages,[18] while willful violations call for actual, statutory, and punitive damages.[19]

Two suits regarding this issue initially brought in federal district court in Oregon recently made their way to the Supreme Court. In the first suit, plaintiffs challenged GEICO's method of determining the rates it charged its customers as a willful violation

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[15] Mike Ivey, Insurance Cost Higher if You Have Bad Credit; Firms: Practice is Fair, MADISON CAP. TIMES, June 14, 2007, at A1. Insurance companies in Hawai'i are not allowed to set rates based on credit scores. H.R.S. § 431:10C-207 (2005) ("No insurer shall base any standard or rating plan, in whole or in part, directly or indirectly, upon a person's race, creed, ethnic extraction, age, sex, length of driving experience, credit bureau rating, marital status, or physical handicap.").

[16] Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201 (2007) (quoting 15 U.S.C. § 1681m(a)).

[17] § 1681a(k)(1)(B)(i).

[18] § 1681o(a).

[19] § 1681n(a).

of the FCRA.[20] GEICO customers with the highest credit scores receive the best rates. GEICO decides when to send customers notice of adverse action by first calculating a customer's rate using his credit score as a factor. Then, it "neutralizes" this score by determining a customer's rate without using his credit score as a factor. If the customer's rate based on his neutral score would have resulted in a lower rate than that based on the rate where the credit score was a factor, GEICO sends the customer notice of adverse action. If the rates are identical, no notice is sent.

A GEICO customer ("Edo") whose rate was determined using the above method, and who received no notice of adverse action, sued GEICO for willful violation of the FCRA.[21] The district court granted summary judgment in favor of GEICO, stating that "the premium charged to him by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history."[22] Thus, no adverse action occurred, and no notice was required.

In the second suit, plaintiffs challenged Safeco Insurance Company ("Safeco")'s lack of notification when relying on information in consumer credit reports to set initial rates.[23] Since most first-time customers have less than perfect credit, Safeco generally charges them a higher rate than what they would be charged if they had perfect credit scores. The plaintiffs in the case, who would have received a lower rate if their credit scores had been better, argued that Safeco had "increased" their rates within the meaning of the FCRA. Thus, Safeco had taken adverse action, which required the company to

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[20] Edo v. Geico Cas. Co., CV 02-678-BR, 2004 U.S. Dist. LEXIS 28522 (D. Or. 2004).

[21] Edo v. Geico Cas. Co., CV 02-678-BR, 2004 U.S. Dist. LEXIS 28522 (D. Or. 2004).

[22] Id. At *12.

[23] Spano v. Safeco Ins. Co. of Am., 215 F.R.D. 601 (D. Or. 2003).

provide notice. Since Safeco did not do this, the plaintiffs argued, the company had willfully failed to comply with the FCRA, making it liable for the associated damages.

SAFECO countered, and the district court agreed, that the term "increase" in the FCRA applied only to actual existing premiums. Since the premiums at issue in the case were merely hypothetical, it was impossible for SAFECO to increase them. Thus, no adverse action occurred, and no notice was required. In addition, Safeco disputed the plaintiffs' claim that its conduct was willful. It argued that a willful failure to comply with the FCRA required a knowing violation, rather than "reckless disregard of statutory duty."

Both cases were appealed to the Ninth Circuit. In GEICO's case, the court held that "whenever a consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him."[24] Thus, the fact that GEICO did not inform Edo that he would have received a lower rate had his credit score been higher violated the Act's adverse action notice requirement. The Ninth Circuit also held that willful failure to comply with the FCRA occurs when an insurer acts with reckless disregard of a consumer's rights under the Act,[25] and remanded the case for a determination of whether GEICO had done so.

In Safeco case, the court rejected the district court's ruling that "offering a single, initial rate for insurance cannot be adverse action."[26] According to the Ninth Circuit, the notice requirement did in fact apply to single, initial rates for insurance. The Ninth

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[24] Reynolds v. Hartford Fin. Servs. Group, Inc., 435 F.3d 1081, 1084 (9th Cir. 2006).

[25] Reynolds, 435 F.3d at 1099.

[26] Spano v. Safeco Corp., 140 Fed. Appx. 746 (2005).

Circuit remanded for a determination of whether, consistent with its holding in the Reynolds, Safeco's conduct was a willful violation.

The Supreme Court granted cert, consolidating the cases in Safeco Insurance Co. of America v. Burr.[27]

The Supreme Court Decision

1. A knowing violation of the Act is not a requirement of willful non-compliance; reckless violations can also be willful.

GEICO and Safeco (collectively "the Companies") argued that a willful failure to comply with the FCRA required a knowing violation, rather than "reckless disregard of statutory duty."[28] The Supreme Court disagreed. Citing numerous cases, the Court noted that in the civil context, a willfulness standard is generally taken to cover knowing, as well as reckless, violations of a standard.[29] In addition, the Court looked to the language of the Act itself to refute the Companies' argument that legislative history supported their interpretation of the statute. Section 1681n(a) establishes liability for willful violators of the Act, and sets different damage amounts for willful and knowingly willful violations. According to the Court, this demonstrated that willful violations covered both reckless and knowing violations, with the latter constituting a more serious subcategory of willful violations.[30]

The Supreme Court also defined the standard for reckless conduct as "action entailing an unjustifiably high risk of harm that is either known or so obvious that it

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[27] 127 S. Ct. 2201, Nos. 06-84 and 06-100, 2007 U.S. Lexis 6963 (2007).

[28] Id. at *19.

[29] Id.

[30] Id. at *22-25.

should be known."[31] The Court held that a company's conduct is considered reckless if its action: (1) is a violation under a reasonable reading of the statute's terms; and (2) shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.[32]

2. <u>A quote or charge for new insurance can be an adverse action that requires notice, but only if the adverse action is based in whole or in part on a credit report.</u>

Next, the Court examined the District Court's holding in the Safeco case that "the initial rate for a new insurance policy cannot be an increase because there is no prior dealing." The Court disagreed, citing the example of a gas station owner who charges more than the advertised price to customers he dislikes.[33] Even if these customers had never bought gas there before, it would make sense to say that they paid an increased price. This broader reading, the Court reasoned, comported with expansive language in the Act, which was written to provide no less protection to first-time victims of unfair or inaccurate credit reports than to those with prior dealings.

GEICO also argued, and the Court agreed, "that in order to have adverse action 'based on' a credit report, consideration of the report must be a necessary condition for the increased rate."[34] In other words, the duty to notify arises only if the report has an affirmative effect on the rate charged. This holding, not explicitly contested by the consumers, turned out to carry great weight with the Court's determination of whether or not GEICO violated the FCRA.

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[31] <u>Id.</u> at *39.

[32] <u>Id.</u> at *41.

[33] <u>Id.</u> at *27.

[34] <u>Id.</u> at *30.

3. <u>The baseline for whether an adverse action requiring notice has occurred is the rate that a customer would have been charged with a neutral credit score.</u>

To determine whether an insurance rate has "increased," bringing it within the definition of adverse action under the FCRA, a baseline amount must exist as a starting point. The customers argued that the baseline should be set at the rate they would have received based on the highest possible credit score, while GEICO argued that the baseline should be set at the rate a customer would have received were his score not taken into account (a neutral score).[35] Referring back to its holding as discussed in 2(b), *supra*, that adverse action based on a credit report occurs only if the report affects the rate charged, the Court reasoned that the neutral credit score rate was the sensible baseline.[36]

According to the Court, the majority of new customers would not be eligible for the best rates, because the majority of customers don't have the best credit scores. Therefore, setting the baseline at such a rate would require companies to give notice of adverse action to the majority of its customers. The Court reasoned that this would mean that, contrary to Congress's intent, adverse action notices would become a formality, and would largely be ignored.

These arguments were strong enough to overcome the fact that some "first-time applicants who actually deserved better-than-neutral credit scores" would be kept "from getting notice, even when errors in credit reports saddled them with unfair rates."[37] The definite increase in the amount of adverse action notifications that would occur if the

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[35] <u>Id.</u> at *33-34.

[36] <u>Id.</u> at *36-37.

[37] <u>Id.</u> at *35.

baseline was set at the best possible rates outweighed the possibility of not providing notice to some customers who deserved it.

3. Holding

Because GEICO had not based the rate it charged Edo on his credit report, the Court reversed the Ninth Circuit's judgment against the company.

Safeco, on the other hand, did not provide notice to its customers because it felt that it did not need to provide notice for initial applications. If the customers received higher rates based in whole or in part on their credit reports, such an action would have left it open to liability "on a showing of reckless conduct (or worse)." But, according to the Court, Safeco's action did not fall within the definition of reckless conduct because it was not unreasonable.[38] Safeco's interpretation of the statutory requirements was reasonable because of the paucity, at the time, of any judicial or statutory guidance.

Potential Impact

Although opinion is not unanimous, this case is generally seen as a victory for insurance companies[39] because of its clarification of the FCRA's notice requirement and its heightened standard for proving reckless conduct. This case settled a conflict in the circuits over whether a willful failure to comply with the FCRA required a knowing violation of the statute, or whether the willful standard encompassed reckless violations

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[38] Id. at *42.

[39] Cheyenne Hopkins, High Court's FCRA Ruling Could Ease Suit Threat, AM. BANKER, June 12, 2007; Correy E. Stephenson, Fair Credit Case Makes Waves, June 18, 2007, http://www.lawyersusaonline.com.

as well.[40] Although the Court held that reckless, as well as knowing, violations could constitute willful failure to comply, it set a relatively high standard for proving recklessness. After Burr, plaintiffs will have to show that a company's interpretation of the statute was unreasonable based on available case precedent and statutory language. This leaves insurers with more room to interpret the law, which could lead to an increased reliance on outside counsel for advice.

This ruling will preclude any cases that are brought for lack of notice of an adverse action where a customer's rate would have been the same regardless of whether their credit score was taken into account.

In addition, the Supreme Court has vacated and remanded a Ninth Circuit decision in a similar case back to that court for further deliberation in light of the Supreme Court's holding in Burr.[41] In that case, the Ninth Circuit relied on its holding in Edo to reverse a district court's grant of summary judgment in favor of State Farm Insurance Company.[42]

III. Crash Parts

One important court decision in a class action lawsuit brought against an insurance company in the last two years is Avery v. State Farm Mutual Automobile

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[40] Compare, e.g., Cushman v. Trans Union Corp., 115 F.3d 220, 227 (CA3 1997) (adopting the "reckless disregard" standard), with Wantz v. Experian Information Solutions, 386 F.3d 829, 834 (7th Cir. 2004) (construing "willfully" to require that a user "knowingly and intentionally violate the Act"); Phillips v. Grendahl, 312 F.3d 357, 368 (8th Cir. 2002) (same).

[41] State Farm Mut. Auto. Ins. Co. v. Willes, No. 06-101, 2007 U.S. LEXIS 7515 (2007).

[42] Willes v. State Farm Fire & Cas. Co., 143 Fed. Appx. 64 (9th Cir. 2005) (internal quotations omitted).

Insurance Co.[43] Avery involved a dispute over the parts State Farm used to repair cars damaged in accidents. These "crash parts," "primarily sheet metal and plastic parts that are attached to the outer shell of the car," fall into two categories. In one category are parts made by automobile manufactures, known as Original Equipment Manufacturer ("OEM") parts. In the other are parts made by aftermarket companies not associated with OEMs, commonly called non-OEM crash parts. State Farm uniformly specified the use of non-OEM crash parts to repair its customers' cars whenever these cheaper parts were available.[44]

The plaintiffs argued that State Farm's insurance policy required the company "to restore plaintiffs' vehicles to their pre-loss condition using parts of like kind and quality." They interpreted the contract to mean that its terms could be satisfied if State Farm used only OEM parts for vehicle repairs. One of the plaintiffs' memorandums stated their opposition to State Farm's practice as follows:

> Plaintiffs contend that this policy breaches State Farm's standard contract because it is not designed to restore policyholders' cars to their pre-loss condition by using parts of like kind and quality. Plaintiffs further contend that this practice violates Illinois' consumer law because the practice itself and its economic ramifications constitute a violation of Illinois consumer statutes, which prohibit[] misrepresentations as to the 'standard, quality, or grade' of the goods and services provided under State Farm's policies.[45]

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[43] Avery, 835 N.E.2d 801 (Ill. 2005).

[44] In Hawai'i, non-OEM parts are legal so long as the insured "accepts the use of such parts and signs the estimate acknowledging the use and source of the crash parts." HRS § 437B-15(c).

[45] Avery, 835 N.E.2d at 811. The Supreme Court eventually held that State Farm did not violate the Consumer Fraud Act. This portion of the opinion will not be discussed.

The plaintiffs brought suit in 1997 in Illinois circuit court, arguing that "State Farm's contractual agreement with its policyholders was a uniform 'Policy,' in the singular, with 'the same or common general terms,'"[46] thus qualifying them for class certification. State Farm argued that no uniform nationwide policy existed and that individual contractual issues would predominate, rendering class certification improper.[47] State Farm also argued that substantive conflicts between Illinois' and other states' laws made the application of Illinois law to the class improper.

The circuit court certified the class, declining to address the issue of whether a uniform nationwide policy existed and leaving that issue to be decided at trial.[48] Trial began in 1999, with much of the testimony focusing on whether non-OEM parts were substantially equivalent to OEM parts. The jury found that State Farm breached the terms of the contract, and the court found that the company violated the Consumer Fraud Act. The jury and court awarded the plaintiffs a combined total of nearly $1.2 billion in specification and installation damages.[49]

The court based its award of specification damages on the plaintiffs' theory that they were harmed by State Farm's specification of non-OEM parts for repairs.[50] "According to plaintiffs, this figure constituted the amount that State Farm saved by

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[46] Id. at 812.

[47] Id.

[48] Id. at 813.

[49] Id. at 817.

[50] The damage amount "was calculated as the cost difference between the OEM parts that plaintiffs claimed should have been specified and the non-OEM parts that State Farm listed on the repair estimate." Id. at 830.

specifying cheaper [non-OEM] parts."[51] These damages applied to any members of the class who had non-OEM specified on their policies, regardless of whether non-OEM parts were actually installed.

The award for installation damages was based on the amount it would cost to remove the non-OEM parts from the cars of class members and replace them with OEM parts. These damages applied only to class members who actually had non-OEM parts installed on their cars.

In all substantial respects the Illinois Appellate Court upheld the circuit court's ruling.[52]

State Farm appealed to the Illinois Supreme Court, which reversed the grant of class certification. According to the supreme court, the circuit court erred when it declined "to decide the question of uniform contractual interpretation at the class certification stage"[53] because "had the court answered the question in the negative rather than the affirmative, the class could not have been certified."[54] The court found that there were at least three different types of policies, each with different contractual obligations, meaning that the plaintiffs did not meet the commonality and predominance requirements of class certification.[55] In addition, the court found that none of these "subclasses" would have been properly certified either. In all three of the policies, no breach occurred

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[51] Id.

[52] Avery v. State Farm Mut. Auto. Ins. Co., 746 N.E.2d 1242 (Ill. App. Ct. 2001). The Appellate Court reversed the circuit court's grant of $130 million in "disgorgement damages."

[53] Avery, 835 N.E.2d at 821.

[54] Id.

[55] Id. at 824.

because no language in any one prohibited the use of non-OEM parts.[56] Thus, class certification for a breach of contract suit, when no breach of contract occurred, would have been improper.

In addition, the court held that class certification was improper because the plaintiffs failed to establish damages. With regard to specification damages, the court held that "common sense dictates that any injury resulting from non-OEM parts would be inflicted, not by the mere *specification* of such parts in an estimate, but by the *use* of the parts in the repair of a vehicle."[57] Thus, "[n]o possible damage could come to a policyholder simply because a non-OEM part was listed on his repair estimate."[58] The court also reversed the grant of installation damages based on a lack of proof, as well as potential inaccuracies that existed in the damage estimates of an expert witness for the plaintiff.

The supreme court also reversed the lower courts' ruling in favor of the plaintiffs on their consumer fraud claims. "The named plaintiff failed to prove that he was deceived by State Farm in regards to the use of automobile repair parts or that he suffered any actual harm from the use of aftermarket parts."[59] The court ruled that the plaintiff's failure to establish a cause of action under the Consumer Fraud Act meant that he could not represent an Illinois class on that claim.

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[56] Id. at 829-30.

[57] Id. at 832.

[58] Id. at 832.

[59] Class Action Law Monitor, Billion Dollar Verdict Dismissed In Consumer Fraud Case, Sept. 15, 2005.

IV. **Title Insurance**

When consumers purchase a home, lenders typically require them to purchase title insurance as well. Title insurance is purchased from third party insurance companies, and protects the lenders against blemishes on the title. If a homeowner refinances his mortgage, he is required to purchase a new insurance policy. But since the risk of finding anything adverse on the title is much lower the second time around, it makes little sense to charge the homeowner the same amount for another policy.[60] Recognizing this, insurance companies in some states offer their customers discounted rates if they refinance within a certain period of time.[61]

Despite advertising these discounted rates, however, many companies continue to charge their customers full price when they refinance. In response, consumers around the country have filed several class actions against insurance companies to halt this practice.[62] In at least six of these cases, courts granted class certification, while one court held off on granting certification pending the filing of an amended complaint.[63]

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[60] Kenneth R. Harney, Refinancing's Magic Words: Reissue Rate, Wash. Post, June 8, 2002, at H01.

[61] Connecticut, Minnesota, New York, Ohio, Pennsylvania, and Virginia, are some of these states.

[62] See Cohen v. Chi. Title Ins. Co., NO. 06-873, 2007 U.S. Dist. LEXIS 26137 (D. Pa. 2007); Lentini v. Fid. Nat'l Title Ins. Co., 2007 U.S. Dist. LEXIS 20840 (D. Conn. 2007); Randleman v. Fid. Nat'l Title Ins. Co., 465 F. Supp. 2d 812, 816 (D. Ohio 2006); Mitchell-Tracey v. United Gen. Title Ins. Co., 237 F.R.D. 551, 553 (D. Md. 2006); Dubin v. Sec. Union Title Ins. Co., 832 N.E.2d 815, 820-21 (Ohio Ct. App. 2005); Piscioneri v. Commonwealth Land Title Ins. Co. (In re Coordinated Title Ins. Cases), 2004 N.Y. Slip Op. 50171(U) (N.Y. App. Div. 2004); Mitchell v. Chicago Title Ins. Co., No. CT 02-017299, 2003 WL 23786983 (D. Minn. 2003).

[63] Lentini, 2007 U.S. Dist. LEXIS 20840, at *25-26.

In at least two cases, insurance companies defended on the grounds that plaintiffs had notice that they were required to provide the companies with a copy of their former policy in order to receive the discounted rate.[64] Both courts, however, denied the defendants' motions to dismiss on this point, finding that a dispute existed over whether or not customers were properly notified of this requirement. In some cases, the companies argued that the transaction-by-transaction differences between each customer would cause individual differences to predominate such that class certification would be inappropriate.[65] No court saw this as an impediment to class certification, holding instead that because each plaintiff's claim involved basically the same factual allegations and legal theories, common issues would predominate.[66]

Finally, some companies argued that the plaintiffs were not actually beneficiaries of the title insurance policies because the policies benefited the lenders rather than the plaintiffs.[67] Courts found this logic unpersuasive. One held that the argument failed because the plaintiffs "paid for the policy and could not have received re-financing without it."[68] Another held that "[b]y issuing the policy to the lender, [the company]

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[64] Dubin, 832 N.E.2d at 819; Randleman, 465 F. Supp. 2d at 819-20.

[65] Id.; Piscioneri, 2004 N.Y. Slip Op. 50171(U), at *4.

[66] See, e.g., Dubin, 832 N.E.2d at 820-21.

[67] See Cohen, 2007 U.S. Dist. LEXIS 26137, at *15-16; Randleman, 465 F. Supp. 2d at 818-19.

[68] Cohen, 2007 U.S. Dist. LEXIS 26137, at *15-16.

implicitly assented to the terms of the implied-in-fact contract, which, in turn, implicitly provided that the cost of the insurance would be lawful … ."[69]

V. Elderly Annuities

Another area where litigation has increased in recent years involves the filing of class action lawsuits against insurance companies for improperly marketing annuities to the elderly.[70] The suits claim that insurance companies specifically targeted senior citizens for the sale of annuities that were either prohibitively expensive or expected to mature beyond their actuarial life expectancy. The Minneapolis Star Tribune offers a succinct description:

> The lawsuits focus on an increasingly popular type of product known as a deferred equity-indexed annuity, in which the buyer invests money tax-free in an account tied to a stock market index, such as the Standard & Poor's 500. After a set period of time, the account balance, including the principal and a minimum return guaranteed by the insurer, is converted into an annuity that pays the customer. Experts say that the elderly should not buy deferred annuities, because they tie up money - sometimes long past life expectancy. That type of annuity also is difficult for heirs and beneficiaries to access.[71]

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[69] Randleman, 465 F. Supp. 2d at 819.

[70] See, e.g., Migliaccio v. Midland National Life Insurance Co., CV 06-1007 CAS (MANx) 2007 U.S. Dist. Lexis 8159 (C.D. Cal. 2007) (class certified); Mooney v. Allianz Life Ins. Co., No. 06-545 ADM/FLN, 2007 U.S. Dist. LEXIS 34530 (D. Minn. 2007) (class certified); Iorio v. Asset Marketing Inc., No. 05CV633 IEG (CAB) 2006 U.S. Dist. Lexis (S.D. Cal. 2006) (class certified); Negrete v. Allianz Life, 238 F.R.D. 482 (C.D. Cal. 2006) (class certified); Yokoyama v. Midland Life Insurance Co., 239 F.R.D. 607 (D. Haw. 2006) (class certification denied); In re Conseco Insurance Co., No. C-05-04726, 2007 U.S. Dist. Lexis 12786 (N.D. Cal. 2007) (class certification denied).

[71] Thomas Lee, Judge Allows Allianz Suit to Proceed as Class Action, MINNEAPOLIS STAR TRIB., May 12, 2007, at D1.

Many of these cases base their primary claims on allegations that the companies violated the Racketeer Influenced and Corrupt Organization Act ("RICO").[72]

In Negrete, for example, the court examined the plaintiffs' RICO claim to insure that class certification was proper. Proximate causation is an essential element of a RICO claim.[73] The defendant company argued that individual issues of causation would predominate, because each annuity sale would have to be analyzed to determine whether the company's representations during the sale caused the plaintiffs' injuries.[74] In order to show causation, the company argued, each individual transaction would have to be analyzed to determine the extent to which plaintiffs relied on the alleged misstatements and omissions during the sale.

In response, the plaintiffs argued that "proof of reliance is not required under RICO," and even if it was, class-wide circumstantial proof could establish reliance on the company's fraudulent scheme.[75] These arguments presented a threshold question to the court: "whether and to what extent a private plaintiff must prove reliance to establish a claim under RICO."

The court stated that reliance was "a milepost on the road to causation,"[76] because plaintiffs would need to show that they made investment decisions based on the company's misstatements and omissions to prove proximate cause. The court went on to

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[72] E.g., Negrete, 238 F.R.D. at 482; Migliaccio, 2007 U.S. Dist. Lexis 8159; In re Conseco Insurance Co., 2007 U.S. Dist. Lexis 12786.

[73] Id. at 490.

[74] Id. at 489.

[75] Id. at 490.

[76] Id. at 490 (quoting Poulos v. Caesars World Inc., 379 F.3d 654, 664 (9th Cir. 2004)).

hold that "generalized proof [of] common, uniform written sales marketing materials" could be used to show class-wide reliance.[77] Since the plaintiffs submitted evidence that the company used standardized written marketing materials, and alleged that these materials led to the purchase of "annuity products far less valuable than other comparable products or prices paid for them," the court held that proximate causation was established and went on to certify the class.

Potential Impact

These class actions could lead to regulatory action against the annuity insurance business similar to that faced by property-casualty firms two years ago.[78] Companies in those suits were found to have improperly diverted business to insurers who paid the highest contingent commissions. Settlements in those suits topped two billion dollars.

VI. Conclusion

In the last two years alone, several cases have altered the scene of the insurance landscape. Two new classes of plaintiffs, homeowners who purchased title insurance, and elderly annuities purchasers, could potentially alter the way that insurance companies conduct business.

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[77] Id. at 491.

[78] Gary S. Morel, Equity Index Annuity Insurers Are Facing More Lawsuits; Incentive-laden Production Contracts Are Blamed, INVESTMENT NEWS, May 7, 2007, at 2.