Insurance Litigation Trends to Watch in 2016

INSURANCE AND FINANCIAL SERVICES LITIGATION – WEBCAST SERIES

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Introductions

Thomas W. Curvin
Atlanta, GA
404.853.8314
tom.curvin@sutherland.com

Kymberly Kochis
New York, NY
212.389.5068
kymberly.kochis@sutherland.com

Phillip E. Stano
Washington, DC
202.383.0261
phillip.stano@sutherland.com

Lewis S. Wiener
Washington, DC
202.383.0140
lewis.wiener@sutherland.com

Wilson G. Barmeyer
Washington, DC
202.383.0824
wilson.barmeyer@sutherland.com

Valerie Strong Sanders
Atlanta, GA
404.853.8168
valerie.sanders@sutherland.com
COST OF INSURANCE LITIGATION

Phillip E. Stano
COI Litigation: The Volatile Setting

Perpetual (seemingly) low interest rate environment

- Past year: Almost a dozen insurers increased UL COI rates
- Policyholders: No mood for rate increases
  - Expectations:
    - High interest rates illustrated at point of sale
  - Realities:
    - Low interest rates credited by insurers

Perpetual (seemingly) low interest rate environment
“Universal Life Insurance is like buying a mobile home in a mobile home park . . . With such a mobile home, you buy the home at a fixed cost, but rent the land underneath; which means, as time goes by, you build equity but you can still have a rent increase on the space beneath. Similarly, universal life insurance usually has an element of equity build-up (cash value) but does not have guaranteed forever fixed internal policy costs and those costs may vary or increase over time.” *Hayes v. Hartford Life and Accident Ins. Co.*, 2008 WL 4544440, *5 (W.D. La. 2008),* quoting *Walker v. Metropolitan Life Ins. Co.*, 2008 WL 747105 (D. Or., 2008).
COI Inclusive of What?

Insurers’ Position

- COI includes:
  - Expectations of mortality
  - Non-mortality factors, including
    - Risk
    - Expenses
    - Profit

- “Based on” policy provisions include
  - Issue Age
  - Sex
  - Face amount
  - Premium class

- Impact of maximum guaranteed COI rate provision
Plaintiff’s Position

- “Based on”
  - Exclusive list of factors
  - Limitation/qualifier

- Ambiguous policy language construed against the insurer

- Breach of contract – impermissible factors considered when raising rates
Favorable Insurer Rulings

COI Rate Cases: Favorable to Insurers

- “[W]hen the policy says that the … COI rate will be ‘based on’ specified factors, it does not mean that the rate will be based exclusively on those factors … Rather, it signifies that the named factors will have a significant, foundational role in determining the rate.”
  - *Thao v. Midland Nat’l Ins. Co.* (7th Cir. 2013)

- “[N]o one would suppose that a cake recipe ‘based on’ flour, sugar, and eggs must be limited *only* to those ingredients. Thus, neither the dictionary definitions nor the common understanding of the phrase ‘based on’ suggest that [the insurer] is prohibited from considering factors beyond [the enumerated factors of] sex, issue age, policy year, and payment class when calculating its COI rates.”
  - *Norem v. Lincoln Benefit Life Co.*, 737 F.3d 1145 (7th Cir. 2013)
Unfavorable Insurer Rulings

COI Rate Cases: Unfavorable to Insurers

- **Yue v. Conseco Life** (2011 WL 210943 C.D. Cal 2011) (clause stating that cost of insurance rates will be determined by the Company based on its “expectation as to future mortality experience” did not permit insurer to include lapse rates/other factors that affected mortality expenses)
- **Fleisher v. Phoenix Life** (18 F. Supp. 3d 456 S.D.N.Y. 2014) (insurer must only consider six factors specifically enumerated in the policy)
Settlements

- Full Rate Rollback – early cases

- Partial Rate Rollback – later cases
  - 50% rate rollback (5 years); 30% rate rollback thereafter
Aggrieved Investor Litigation

Institutional Longevity Markets Association
Life Insurance Settlement Association

- Encourage Regulator investigations
  - Lawsuits follow adverse findings
- Focus on Defective Product Design/Interpretation
  - Unfair discrimination
  - Improper risk classification
  - Negligent actuarial assumptions
  - Unfair trade practice allegations
  - Fraudulent pricing methodologies
  - Alleged violations of ASOP
DATA BREACH LITIGATION, DATA ANALYTICS, AND PREDICTIVE MODELING

Thomas W. Curvin
Data Breach Litigation

Data Breaches 2015-2016

- Over 640 publicly reported in the I&FS sector since 2005
- 39 publicly reported since January 1, 2015
- Recent targets
  - Health insurers
  - Retirement plan service providers
  - Insurance brokers
  - Insurance Services Office (ISO)
Data Breach Litigation

Key Issues

- Injury and Standing to Sue
  - Remijas v. Neiman Marcus Group
  - Impact of Spokeo “no injury” class action ruling

- Coverage for data breaches
  - Travelers v. Portal Healthcare Solutions

- Impact of Pending EU – US Privacy Shield
Data Analytics and Predictive Modeling

Litigation & Regulatory Developments

- Price Optimization
  - NAIC Task Force White Paper
  - State DOI actions: 18 and counting
  - Pending class action litigation challenging price optimization
- Disparate Impact Claims?
- Usage Based Insurance
CLASS ACTION DEVELOPMENTS

Valerie Strong Sanders
Class Action Developments

**Tyson Foods v. Bouaphakeo**

Claims by workers at a Tyson pork-processing plant that they were not compensated for overtime work in violation of FLSA and Iowa law

Plaintiffs’ experts calculated “average” donning and doffing times and corresponding claimed damages but conceded that actual times varied, and some employees would not reach 40 hours (and entitlement to overtime) even after application of the average figure.
Class Action Developments

Tyson Foods v. Bouaphakeo

District Court certified 23(b)(3) class and conditionally certified a FLSA collective action, and refused to decertify after Wal-Mart v. Dukes

Denial of motion for decertification: “whether the defendant has paid its production workers for all ‘work’ performed prior and subsequent to ‘gang time,’ particularly the time spent donning, doffing, and cleaning [equipment]. . . Unlike Dukes, there is a common answer available to this question because, unlike Dukes, the instant case involves a company wide compensation policy that is applied uniformly throughout defendant’s entire Storm Lake facility.”
Class Action Developments

**Tyson Foods v. Bouaphakeo**

Jury verdict for class (≈ $2.9 million) based on experts’ testimony from averages (but not in the full amount requested)

Eighth Circuit – no abuse of discretion: “True, applying . . . expert testimony to ‘generate . . . answers’ for individual overtime claims did require inference, but this inference was allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)” – an FLSA case shifting burden to employer, and allowing reasonable inferences, “where the employer’s records are inaccurate or inadequate and the employee cannot offer convincing substitutes . . . The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of [the FLSA].”
Cert granted in June:

I. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

II. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

Tyson Foods v. Bouaphakeo
Class Action Developments

*Tyson Foods v. Bouaphakeo*

Argued Nov. 10

A class action question or an FLSA question?
Class Action Developments

Spokeo, Inc. v. Robins

9th Circuit, reversing dismissal:

– “Although he asserted that Spokeo’s website contained false information about him, Robins’s allegations of injury were sparse.”

– “The scope of the cause of action determines the scope of the implied statutory right. . . . When, as here, the statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages.”

– “[T]he interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress can elevate them.”
Class Action Developments

**Spokeo, Inc. v. Robins**

Cert granted in April: “Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.”

Argued Nov. 2

An Article III question or a Rule 23 question?
An Ascertainable Circuit Split?

*Carrera v. Bayer Corp.*, 727 F.3d 300 (3rd Cir. 2013) (“administrative feasibility”)

*EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014) (reversing; “significant administrative barrier”)

*Karhu v. Vital Pharm.*, 621 Fed. App’x 945 (11th Cir. 2015) (affirming denial and referring to administrative feasibility; but note concurrence re self-identification)

*Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), petition for cert. filed Dec. 30, 2015 (affirming certification, rejecting *Carrera*, and noting evidence relevant to the inquiry)

*Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), petition for cert filed Oct. 28, 2015 (adequacy of definition, not difficulty of identification)
RETIREMENT PLAN LITIGATION

Wilson G. Barmeyer
Retirement Plan Litigation

Revenue Sharing and Excessive Fee Litigation

Revenue Sharing

Excessive Fee

Propriety Product

Stable Value Fund

Subadviser Excessive Fee

Multiple new cases filed in late 2015
Plan Sponsor Cases

- **Tibble v. Edison, 135 S. Ct. 1823 (2015).**
  - Plaintiffs/participants alleged breach of duty of prudence by offering retail class mutual funds instead of less expensive institutional class
  - Alleged revenue sharing used to offset plan administration costs in violation of ERISA
  - U.S. Supreme Court – So long as alleged breach of the continuing duty occurred within six years of suit, claim is timely

- **Tussey v. ABB, Inc.**
  - District court held ABB liable at trial for fiduciary breach in investment selection and negotiating/monitoring of recordkeeping fees
  - 746 F.3d 327 (8th Cir. 2014) – Affirmed in part, reversed in part
  - 2015 – District court reconsiders damages theories
Service Provider Cases

Alleging breach of fiduciary duties and prohibited transactions in receipt of revenue sharing

**Examples**

- **Haddock v. Nationwide**
  - Settlement finalized after 13 years of litigation
- **Santomeno v. John Hancock, 768 F.3d 284 (2014)**
  - Affirmed dismissal, holding that insurer was not a fiduciary with respect to fees
- New cases filed in 2015
Retirement Plan Litigation

Proprietary Fund Litigation

- Challenging a financial institution’s use of propriety funds for its own retirement plan
  - Cases brought by participants/employees of the financial institution
  - Allegation
    - Breaches of fiduciary duties
    - Prohibited transactions
    - Excessive fees
    - Failure to monitor/negotiate
  - New cases filed in 2015
Stable Value Fund Litigation

- Stable value funds offered in connection with group annuity contracts as retirement plan funding vehicle
  - Several cases filed against insurers in late 2015
  - Brought on behalf of a putative class of plans
  - Allegations under ERISA
    - Insurer is a fiduciary in managing assets of SVF
    - Fiduciary breach in setting compensation/rates
    - Unreasonable spread and expense charges
THE “SHARING ECONOMY” AND AUTONOMOUS TECHNOLOGY

Kymberly Kochis
What is the “sharing economy”?  
- e.g., Airbnb, Uber, Lyft, HomeAway

Insurance Implications

Litigation Risks
Autonomous Technology

Overview

- Today; Future
- Advantages
- Risks

Impact on Auto Insurance

Legal Implications
TELEPHONE CONSUMER PROTECTION ACT

Lewis S. Wiener
What is the Telephone Consumer Protection Act (TCPA)?

Prohibits telemarketing (specifically to cell phones) and requires consumer consent for the use of:

- automatic dialing systems
- prerecorded voice messages
- text messages
- faxes

Imposes statutory damages of $500 per violation (and up to $1,500 if willful or knowing)
- No cap on damages
TCPA and the Insurance Industry

Why should insurance companies care?
- Second most filed type of case in federal courts across the country for the last two+ years

Class actions being filed specifically against insurance companies
- 12+ class actions filed against insurance companies since January 2015
- Targeted because of:
  - direct contact with customers
  - through agents/representatives
  - third-party liability
- Unsolicited fax cases and opt-out message
Prevent threat of litigation by obtaining requisite customer consent

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Best Practices & Recommendations

Revocation of consent: honor requests to stop calling
Consent runs with the consumer, not the phone number
Calls with both non-marketing and marketing components = marketing calls
Use common sense: do not call during off hours
Check the Do Not Call (DNC) registry and maintain a company-specific DNC list
  “Existing Business Relationship” exception
Include an opt-out option in any prerecorded message, fax or email
Keep records (written/electronic)
FEDERAL DISCOVERY REFORM

Valerie Strong Sanders
“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1)

If ESI “that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) Upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) Only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation … [adverse inference instruction/dismissal/default]”

Fed. R. Civ. P. 37(e)
Rule 34:

– Requests served before the 26(f) conference? Responses are due 30 days after the conference.

– Objections must be specific and responses must state whether documents are being withheld based on the objection.

– Responding party may state that it will produce copies rather than allow inspection, and response should state time for production (otherwise time included in the request will apply).

Rule 4: time for service reduced from 120 days to 90 days