

Insurance

2016 Insurance-Related Class Actions Filed In Or Removed To Federal Court

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Commentary

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[Editor's Note: Charlotte E. Thomas practices in the area of complex business litigation in Duane Morris LLP's Philadelphia office. Her practice promotes client involvement and control over litigation strategy and goals. Thomas has an active mediation practice that complements her emphasis on cost-effective solutions to business disputes. She has served as lead trial counsel in numerous jury and nonjury trials and in arbitrations in venues throughout the country. Any commentary or opinions do not reflect the opinions of Duane Morris LLP or LexisNexis[®] Mealey Publications[™]. Copyright © 2017 by Charlotte E. Thomas. Responses are welcome.]

This report analyzes 210 insurance-related class actions¹ filed in or removed to federal court in 2016. In many respects, the results are predictable. The greatest percentage of the insurance-related class actions involve coverage or claims handling decisions, although there were a few interesting pockets of recurring class claims, such as inflated drug prices and cost of insurance ("COI") increases for life insurance policies. The predominant forum choices were on the American coasts, California and Florida being the preferred locations. One notable result was the frequency of voluntarily dismissals by the plaintiff and individual settlements reached with the named plaintiff only. It can only be surmised that either these cases never were intended to be consummated as class actions or that impediments arose after filing that prevented a cost-effective resolution on a class-wide basis.

Description of the "Insurance-Related Class Actions" Reviewed

The category of "insurance-related class actions" filed or removed to federal courts that were reviewed is

purposely broad. It includes class claims that relate directly or indirectly to insurance products, insurers or insurance-related issues. Certainly class actions arising out of insurance coverage, claims handling and bad faith all fall within the definition, but the category also includes non-insurance class claims, such as wage and hour and Telephone Consumer Protection Act ("TCPA") litigation, brought against an insurer or insurance producer. Class claims that did not name an insurer or producer, but were indirectly related to an insurance product – such as a class action against a lender for forced placed insurance or against an employer for collectively-bargained retiree rights to health and life insurance – also fall into the pool of 210 insurance-related class actions.

Forum Selection

The assumption underlying forum selection for class actions is that counsel representing the putative class will choose the most receptive forum for the claims to be heard, subject to other considerations, such as jurisdiction, venue, convenience and the possibility of removal.

The two big federal district court winners come as no surprise. California had the greatest number of insurance-related class actions, followed in second place by Florida. In fact, 25 insurance-related class actions were filed in the Central District of California alone – more than in the combined federal districts for any state other than Florida. The federal district courts in New York, Pennsylvania, New Jersey and Washington state followed Florida. Chart 1 shows the complete distribution.

Chart 1

State	State Total	District	No. of Filings	Removed	State Total Removed
Alabama	4				1
		MD	2	1	
		ND	2	0	
Arizona	3		3	1	1
Arkansas	3				3
		ED	3	3	
California	41				14
		CD	25	7	
		ED	1	1	
		ND	9	5	
		SD	6	1	
Colorado	2		2	1	1
Connecticut	8		8	0	0
Florida	35				13
		MD	14	4	
		ND	1	0	
		SD	20	9	
Georgia	5				0
		MD	2	0	
		ND	3	0	
Hawaii	1		1	0	0
Idaho	1		1	1	1
Illinois	9				2
		CD	1	0	
		ND	8	2	
Indiana	2				1
		ND	2	1	
Iowa	3				0
		SD	3	0	
Kentucky	2				1
		ED	1	1	
		WD	1	0	
Louisiana	2				0
		ED	1	0	
		MD	1	0	
Massachusetts	4		4	1	1
Michigan	2				1

State	State Total	District	No. of Filings	Removed	State Total Removed
		WD	2	1	
Minnesota	4		4	0	0
Mississippi	1				0
		ND	1	0	
Missouri	3				1
		ED	3	1	
Montana	1		1	1	1
New Jersey	10		10	0	0
New York	15				0
		ED	3	0	
		ND	1	0	
		SD	9	0	
		WD	2	0	
Nevada	1		1	1	1
North Carolina	1				0
		ED	1	0	
Ohio	6				4
		ND	6	4	
Oklahoma	1	WD	1	1	1
Oregon	1		1	0	0
Pennsylvania	12				3
		ED	9	1	
		MD	2	2	
		WD	1	0	
Rhode Island	2		2	0	0
South Carolina	4		4	0	0
Texas	3				0
		ND	1	0	
		SD	1	0	
		WD	1	0	
Utah	1		1	0	0
Virginia	3	ED	3	0	0
West Virginia	4				4
		ND	1	1	
		SD	3	3	
Washington	10				5
		WD	10	5	

Just under 30 percent (60) of all of the insurance-related class actions were removed to federal district courts, of which nine were remanded. This suggests that in over 70 percent of class actions, plaintiff's counsel had some degree of confidence in the ability of federal courts to handle and resolve the case. In some jurisdictions, however, this confidence was more profound than in others. In New York district courts, all of the class actions reviewed were originally filed in federal court. By contrast, in some locales, there was a clear preference for the class action to be heard in state court. By way of example, in Florida, 13 out of 35 class actions were removed and in Washington state, five out of ten were removed.

Equally important was the number of federal venues where no insurance-related class actions were filed

in 2016. Federal districts in 15 jurisdictions were unrepresented (Alaska, Delaware, District of Columbia, Kansas, Maine, Maryland, Nebraska, New Hampshire, New Mexico, North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming). One possible explanation is the comparatively small population size and density of most of these jurisdictions.

Types of Cases

As noted, the insurance-related claims reviewed were intended to include all cases touching on and of interest to the insurance industry. Chart 2 shows the incidence and the nature of the claims asserted in the reviewed class actions.

Chart 2

Type of Class Action	No of Filings	Percentage
Insurance coverage, including claims handling, underpayment of claims and subrogation issues	59	28%
Premium-related claims, cost of insurance, pricing; hidden commissions (including life insurance COI claims)	25	12%
Force placed insurance	15	7%
Data breach, privacy	9	4%
Policy solicitation or inception fraud and misrepresentation	11	5%
Fraud or deception in health coverage insurance and billing	6	3%
Wrongful rescission	2	1%
Wage and hour claims	22	10%
Inflated drug pricing under health policy	10	5%
Retiree health insurance	7	3%
ERISA	15	7%
TCPA/Sales/Solicitation	20	10%
COBRA	1	.5%
Electronic Funds Transfer Act	1	.5%
Medical Provider Coverage Claims	3	1%
Fair Credit Reporting Act	1	.5%
PMI/Default Insurance	2	1%
Securities	1	.5%

Some results were anticipated. Certainly, it was expected that the greatest percentage (28 percent) of cases would involve coverage and claims handling matters. A good number also included claims that are

encountered by all businesses, but were asserted against insurers or insurance producers. For example, the number of TCPA and wage and hour lawsuits combined represent about one-fifth of all of the claims. Data

breach is a somewhat youthful litigation field and, while the percentage of the whole may be low, the number of filed cases suggest that it is an issue for insurers as it is for other businesses. Certain other class claims recurred in such a way as to suggest the “claim du jour,” such as class actions for COI increases in premium for life insurance and inflated prices through clawbacks on prescription drugs.

Methods and Speed of Resolution

Because the insurance-related class actions reviewed were commenced or removed at various points in the 2016 calendar year, the extent to which each case progressed is in part a function of when the review occurred in juxtaposition to its filing date. For example, one case might be filed in January 2016, while yet another was filed in December, 2016. Obviously, less is likely to be accomplished in the latter instance by the date the lawsuit was reviewed. Certain markers that present

in mature class actions – such as class certification or class settlements – predictably would be affected by the filing date for the litigation.

Still, some numbers and trends are of interest: 1) the number of cases that took less than six months and those that took less than 12 months until termination; 2) the number of cases that were voluntarily dismissed without prejudice by the plaintiff in a way that suggested that no settlement took place; and 3) the number of cases dismissed with prejudice in a manner suggesting a non-class settlement with the named plaintiff only.

A substantial number of insurance-related class actions were terminated within a year of initial filing or removal as shown in Chart 3. Approximately one-third of all insurance-related class actions were terminated within 180 days, while short of half were terminated within one year of the initial federal court filing.

Chart 3

Class actions terminated in less than 180 days	67	32%
Class action terminated in less than 365 days	94	45%

A relatively sizable number of cases (17) were terminated by means of a notice or other Rule 41 filing dismissing claims without prejudice with some indicia that no settlement had occurred. More interesting is the significant number of class actions (41) that were settled with the named plaintiff only prior to moving for class certification. Over one-quarter of the 210 class actions reviewed were terminated by either voluntary dismissal or named plaintiff only settlements. This suggests that in a significant number of cases, class treatment was not intended or that some impediment (*e.g.*, cost) to litigating on a class basis outweighed the potential benefits of a large class-wide settlement and attorney’s fees award. Dispositive motions resulted in termination in 20 cases, of which 11 were appealed.

By contrast, the incidence of class-wide settlements was relatively low. To be sure, the negotiation and approval of class settlements is more time-consuming than settlement with the named plaintiff. Class settlements often occur after discovery or mediation, and thus many of the class actions reviewed may not have been sufficiently ripe for classwide settlements to have been achieved. Indeed, final approvals of classwide settlements were achieved in only five cases, and each of those five lawsuits had been pending more than a year (between 392 and 528 days) at the time of review. Still, the number of approved settlements and pending settlements (four) is significantly less than the number of settlements achieved with named plaintiffs only. See Chart 4.

Chart 4

Class settlements approved	5	2%
Class settlements pending	4	2%
Settlements with named plaintiff only	41	20%
Voluntary dismissal by plaintiff without prejudice	17	8%
Dispositive motion granted	20	10%
Remand	9	4%

Class Certification

The incidence of traditional class certification for purposes of maintenance of a class action – as opposed to for effectuating a class settlement – also was low. As with classwide settlements, it is likely that this was due at least

in part to the relative immaturity of each lawsuit at the time of review, as class certification motions typically are filed after some discovery has taken place, although notably some motions were filed as “placeholder” motions, shortly after the litigation was initiated. See Chart 5.

Chart 5

Motions for class certifications pending	7	3%
Motions for class certification denied without prejudice	3	1%
Motions for class certification mooted	2	1%
Motions for class certification withdrawn	1	.5%
Class certification granted	3	1%
Class certification denied	0	N/A
Collective action conditionally certified	3	1%
Motion to strike class allegations pending	1	.5%
Orders granting motion to strike class allegations	1	.5%

Classes were certified in only two cases, although courts conditionally certified three collective actions in wage and hour lawsuits. The denial without prejudice and withdrawal of class certification motions may reflect a judicial response to early “placeholder” motions.

numbers of class settlements and certified classes would be expected for non-mature litigation, the numbers of early terminations are sufficiently high to conclude that many cases were not destined for conclusion as a certified class action.

Conclusion

The review of insurance-related class actions shows that coverage and claims handling fields are the predominant areas of class action filings, and that California and Florida are the preferred venues. A substantial number of the insurance-related class actions are terminated relatively quickly – many within one year of filing in federal court. Many of the terminated lawsuits were voluntarily dismissed without prejudice or settled with the named plaintiff only, prior to filing any sort of class certification motion. These terminations suggest that some of cases may never have been intended to be pursued as class actions. Perhaps they were filed as class actions as an aggressive stance, only to retreat to dismissal or non-class settlement when a defense was mounted. Or, perhaps early on in the litigation, class counsel learned something that prevented pragmatic class treatment for the litigation. While higher numbers of early non-class dismissals and settlements with lower

Endnotes

1. The 210 class actions are intended to include all insurance-related class actions that were filed or removed to federal court in 2016.
2. Termination does not necessarily mean the case was completed. For example, a case might be terminated on the PACER docket by virtue of a remand to state court. Although terminated on PACER, the case proceeds in state court.
3. Some of the numbers involve an educated leap of faith. Where a dismissal did not differentiate between the named plaintiff and the class, but there was no judicial approval of a class-wide settlement, the assumption was made that only the named class member settled. ■

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