

Schiff Hardin LLP Class Action Alert

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THIRD CIRCUIT REVERSES CLASS CERTIFICATION, JOINS OTHER FEDERAL COURTS IN CALLING FOR A MORE “RIGOROUS ANALYSIS” OF PLAINTIFF’S PROOF ON CLASS CERTIFICATION, INCLUDING EXPERT TESTIMONY

SUMMARY

The Third Circuit has joined the growing chorus of federal courts requiring a more “rigorous analysis” of the proof submitted by class action plaintiffs in support of class certification. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2009).

The Court vacated certification of a nationwide antitrust class action alleging a price fixing conspiracy among manufacturers of hydrogen peroxide. The Third Circuit held that the district court had applied too lenient a standard in its Rule 23(b)(3) predominance analysis of whether the “antitrust impact” was susceptible to classwide proof at trial.

The Court clarified “three key aspects of class certification procedure”:

- “First, the decision to certify a class calls for findings by the court, not merely a ‘threshold showing’ by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence.”
- “Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits-including disputes touching on elements of the cause of action.”
- “Third, the court’s obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it.”

The District Court Proceedings

In the district court, the plaintiffs proffered the testimony of an expert who opined that “conditions in the hydrogen peroxide industry favored a conspiracy that would have impacted the entire class.” 552 F.3d at 312. The defendants countered with their own expert, and moved to exclude the testimony of the plaintiff’s expert under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The district court certified the class, holding that, for purposes of certification, the opinion of the plaintiff’s expert was admissible and proposed a reliable method for proving antitrust impact and damages. The court did *not* require the plaintiffs to show that this method would *actually work* at trial. The court held that it would be improper at this stage to “weigh the relative credibility” of the parties’ experts. 552 F.3d at 322.

The Third Circuit’s Decision

The Third Circuit granted the defendants’ Rule 23(f) petition and reversed.

While acknowledging the Supreme Court’s requirement that courts engage in a “rigorous analysis” of the elements of Rule 23, the Court observed that there is “little guidance . . . on the subject of the proper standard of ‘proof’ for class certification.” *Id.* at 315.

In reaching its decision, the Third Circuit engaged in an extensive analysis of a number of hot-button issues in class certification:

- **Delving “Beyond the Pleadings”**

The Court squarely rejected the notion that a court must apply a Rule 12(b)(6) standard on class certification and accept the plaintiff’s factual allegations as true:

[T]he requirements set out in Rule 23 are not mere pleading rules. The court may delve beyond the pleadings to determine whether the requirements for class certification are satisfied.

Id. at 316 (internal quotations and citations omitted).

- **The Relationship Between “Merits” and Class Certification: The *Eisen* Issue**

The Court also rejected the argument that, in determining whether class certification is appropriate, a court may not consider any issue that even approaches the “merits” of the case.

Many courts have justified this approach by citing language in the Supreme Court’s decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that there is “nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”

The Third Court held this was an incorrect interpretation of *Eisen*.

An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met. . . . [T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action. . . . *Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement. . . . Because the decision whether to certify a class requires a thorough examination of the factual and legal allegations, the court’s rigorous analysis may include a preliminary inquiry into the merits, and the court may consider the substantive elements of the plaintiffs’ case in order to envision the form that a trial on those issues would take.

552 F.3d at 316-17 (internal quotations and citations omitted).

The Court concluded that the district court erred in requiring only a “threshold showing” from the plaintiffs that they will meet their burden at trial: “A party’s assurance to the court that it intends or plans to meet the requirements is insufficient.” *Id.* at 318.

- **Expert Testimony and the Class Certification Inquiry**

Finally, the Third Circuit concluded that the district court erred in failing to consider the expert testimony of the defendant’s expert, and instead deferring to the testimony of the plaintiff’s expert merely because it was “admissible”:

Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis. It follows that opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason. . . . *Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.*

Id. at 323 (emphasis added; internal quotations and citations omitted).

FIRST CIRCUIT HOLDS THAT INSURER FAILED TO SATISFY CAFA'S AMOUNT-IN-CONTROVERSY REQUIREMENT IN CLASS ACTION FOR REFUNDS OF PREMIUMS FOR CREDIT INSURANCE POLICIES

SUMMARY

Defendants seeking to remove a class action to federal court are often faced with difficult decisions regarding the nature and level of detail of the evidence they submit to establish that the "amount in controversy" exceeds the federal jurisdictional minimum. They are understandably reluctant to proffer affirmative evidence that the plaintiff might later contend (however improperly) was an admission of the amount of *actual liability*, rather than the amount "in controversy."

A recent decision by the First Circuit is an object lesson for defendants seeking to remove class actions under the Class Action Fairness Act of 2005 ("CAFA"). *Amoche v. Guarantee Trust Life Ins. Co.*, No. 08-2094, ___ F.3d ___, 2009 WL 350898 (1st Cir. Feb. 13, 2009).

In a case of first impression for the First Circuit, the Court articulated the burden on a removing defendant to establish CAFA's \$5 million amount-in-controversy requirement. The Court held that when a complaint does not contain specific damages allegations, the defendant "must show a reasonable probability that the amount in controversy exceeds \$5 million" — a formulation the Court believed was "substantively the same as . . . the standards adopted by several circuits." *Id.* at *1.

The Court carefully scrutinized the evidence that the defendant life insurance company submitted, and concluded that the insurer did not establish that the amount in controversy exceeded \$5 million.

CAVEAT: Courts are not uniform in their approach to the evidence a removing defendant may submit to establish the jurisdictional minimum. The Eleventh Circuit, for example, has held that in evaluating timely motions to remand, "the court considers the document received by the defendant from the plaintiff A district court has before it only the limited universe of evidence available when the motion to remand is filed — i.e., the notice of removal and accompanying documents." *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1213-14 (11th Cir. 2007), *cert. denied sub nom. Hanna Steel Corp. v. Lowery*, 128 S. Ct. 2877 (2008); *see, e.g., Innovative Health & Wellness LLC v. State Farm Mut. Auto. Ins. Co.*, No. 08-60786-CIV, 2008 WL 3471597, at *4 (S.D. Fla. Aug. 11, 2008) (rejecting insurer's attempt to submit its own affidavits to support CAFA's \$5 million minimum: "[W]here, as here, the damages are unspecified in the Complaint, the factual information establishing the jurisdictional amount must come from the plaintiff.>").

The District Court Proceedings

The plaintiffs filed a class action suit against the insurer in New Hampshire state court, contending that the insurer owed them and a 17-state class refunds of the unearned portions of their credit insurance premiums. 2009 WL 350898 at *1-3. The operative complaint alleged that the insurer "failed to refund over a million dollars in unearned premiums." *Id.* at *2. The plaintiffs obtained certification, then sought to expand the class to "10 to 20 other states," but before the state court could rule on that motion, the insurer removed the case to federal court.

The insurer argued that "it was apparent from the face of the . . . complaint that more than \$5 million was at stake": the complaint alleged that the insurer had issued "hundreds of thousands" of policies; that a refund was due for "a substantial percentage" of those policies; that the class surely contained more than 25,000

persons; and that the individual refund owed was “about \$200.” *Id.* at *3. The insurer provided evidence that more than \$450,000 in total unearned premium refunds had been either made or requested by New Hampshire class members. *Id.* at *4.

The plaintiffs moved to remand, and represented that, in light of discovery they had received from the insurer, they would not be seeking certification of more than a 13-state class. *Id.*

The district court remanded, rejecting the insurer’s argument that there were more than 25,000 claimants as “based on conjecture,” because “the Complaint does not allege what ‘a substantial percentage’ of ‘hundreds of thousands’ of credit insurance certificates is except for stating that the class includes ‘thousands of members’ and ‘is composed of persons who bought [the insurer’s] credit insurance from motor vehicle dealers throughout New Hampshire and a number of other states.’” *Id.* at *5.

The First Circuit’s Decision

The First Circuit affirmed.

The Court first held that defendants seeking to remove under CAFA have the burden of establishing, by a “reasonable probability,” the existence of CAFA’s \$5 million jurisdictional minimum. *Id.* at *6-7.

The Court concluded that the insurer had not satisfied this burden. The Court noted that the plaintiffs now specifically sought certification of only a 13-state class. Although the Court acknowledged that “plaintiffs’ still-developing class allegations made it difficult to ascertain the amount in controversy,” the insurer had available information regarding those 13 states and therefore “was in a better position than plaintiffs to know who had purchased its policies and where they lived.” The insurer, however, “provided the district court with virtually no information about the potential class size.” *Id.* at *10.

The Court rejected the insurer’s argument that its record-keeping practices hindered it from providing such information. According to the insurer, it did not “keep records of which lender an insured uses and is unaware of which automobile loans are paid off early until it is contacted by the lender.” *Id.* The Court held that “[t]hese explanations only go so far”:

[W]e may consider what information reasonably within [the insurer’s] control it failed to present in addition to any affirmative evidence of the amount in controversy. For example, a statistical analysis involving a sampling of [the insurer’s] credit insurance certificates could have given a rough sense for the class size. And [the insurer] could have come forward with information regarding its market share and revenues from states other than New Hampshire that might have provided some insight to the court into the amount in controversy for a thirteen-state class action.

Id.

The Court also rejected the insurer’s attempt to extrapolate its New Hampshire data (allegedly showing that the requested refunds there totaled more than \$450,000) to the other states:

[T]he \$452,472.29 figure for New Hampshire . . . cannot be translated into an estimate of the amount in controversy by simple multiplication of that sum by thirteen. That sum is not reliable. The [insurer’s] affidavit admits that the \$452,472.29 amount is inflated by including those who do not fit the class definition, and plaintiffs contend that when only those who used one of the nine named lenders are counted, the sum from New Hampshire drops to \$221,912.03. Moreover, the state to

state differences in [the insurer's] business practices . . . make the amount in controversy impossible to ascertain from [the insurer's] figures with any accuracy.

Id.

The Court did hold out one ray of hope: a second removal petition. According to the Court, “[s]uccessive attempts at removal are permissible where the grounds for removal become apparent only later in the litigation It is not unfair that [the insurer] wait until the class allegations are more fully developed before attempting to remove, . . . especially now that class actions under CAFA are exempt from the removal statute’s one-year time limit.” *Id.* at *11.

FOURTH CIRCUIT REMANDS CLASS ACTION, FINDS NO CAFA REMOVAL JURISDICTION BASED SOLELY ON COUNTERCLAIM

SUMMARY

In a case of first impression, the Fourth Circuit has held that a party brought into a case as an additional counterdefendant may not remove a class action to federal court based solely on that counterclaim, even if the counterclaim otherwise satisfies CAFA's jurisdictional requirements. *Palisades Collections LLC v. Shorts*, 552 F.3d 327 (4th Cir. 2008). Judge Neimeyer filed a lengthy dissent, arguing, among other things, that 28 U.S.C. § 1453, CAFA's removal provision, "expanded removal authority" to allow for *any* type of defendant to remove a class action. *See id.* at 338-42.

The District Court Proceedings

A debt collection agency filed suit in West Virginia state court against a consumer to collect unpaid charges for cell phone service. The consumer brought a counterclaim under West Virginia's consumer protection statute, joined the service provider as an additional counterdefendant, and moved for class certification. The service provider removed the action on the basis of the general removal statute and CAFA. The district court remanded the case, and the service provider appealed.

The Fourth Circuit's Decision

The Fourth Circuit affirmed.

The Court first concluded that the case was not removable under the general removal statute, 28 U.S.C. § 1441, which permits removal of a civil action "by the defendant or the defendants." The Court cited a long line of cases holding that third-party defendants may not remove because Section 1441 permits removal only by "defendants in the traditional sense of parties against whom the [original] plaintiff asserts claims." 552 F.3d at 333 (internal quotations omitted). An additional counterdefendant, the Court reasoned, is likewise not a "defendant" within the meaning of the general removal statute. *Id.* at 332-34.

The Court then proceeded to the "question of first impression": "whether a party joined as a defendant to a counterclaim (the 'additional counter-defendant') may remove the case to federal court solely because the counterclaim satisfies the jurisdictional requirements of" CAFA. *Id.* at 328.

The Court analyzed CAFA's removal provision, 28 U.S.C. § 1453(b), which permits removal of a class action subject to CAFA "in accordance with section 1446" The Court concluded that removal by an additional counterdefendant was not authorized, because Section 1453(b) in turn refers to removal under Section 1446(a), which limits removal to the original defendants. 552 F.3d at 334.

The fact that Section 1453(b) uses the phrase "any defendant" did not change the analysis:

Put simply, there is no indication in the language of § 1453(b) (or in the limited legislative history) that Congress intended to alter the traditional rule that only an original defendant may remove and to somehow transform an additional counter-defendant . . . into a "defendant" with the power to remove. Reading § 1453(b) to also allow removal by counter-defendants, cross-claim defendants, and third-party defendants is simply more than the language of § 1453(b) can bear.

Id. at 336.

ILLINOIS FEDERAL DISTRICT DISMISSES ILLINOIS CONSUMER FRAUD ACT CLAIM IN CLASS ACTION BROUGHT AGAINST HEALTH INSURER WHEN CLAIM WAS PREMISED ON BREACH OF CONTRACT

SUMMARY

In a class action brought against a health insurer for allegedly scheming to avoid paying claims under the “false pretense” of requiring additional claim documentation, an Illinois federal district court dismissed the plaintiffs’ claim under the Illinois Consumer Fraud Act (“ICFA”) because the claim was premised on a mere breach of contract, which is not actionable under ICFA. *Langendorf v. Conseco Senior Health Ins. Co.*, 590 F. Supp. 2d 1020 (N.D. Ill. 2008).

This decision is yet another example of how the Illinois Supreme Court’s decision in *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 835 N.E.2d 801 (2005), *cert. denied*, 574 U.S. 1003 (2006), can be employed successfully by class action defendants to fend off ICFA claims in a variety of contexts.

The Court’s Decision

The plaintiff insureds filed a putative nationwide class action in Illinois state court against Conseco Senior Health Insurance Company and affiliated entities, claiming that the defendants had breached their health insurance policies and committed consumer fraud by “systemically declin[ing] to pay” benefits “under the pretense of requiring additional documentation of proof of loss, and/or failing to accept Medicare verifications as documentation of proof of loss.” 590 F. Supp. 2d at 1021. The defendants removed the action to federal court under CAFA and moved to dismiss the ICFA claim.

The Court granted the motion to dismiss and dismissed the ICFA claim with prejudice.

The Court cited *Avery* for the proposition that a “ ‘breach of contractual promise, without more, is not actionable’ ” under ICFA. *Id.* at 1022 (quoting *Avery*, 216 Ill. 2d at 169, 835 N.E.2d at 844). Therefore, “claims that are premised on the language of a policy cannot form the basis for a consumer fraud action.” *Id.* at 1023.

The Court held that the allegations of the ICFA claim here “are essentially the same as the breach of contract claim. . . . Both the ICFA and breach of contract claims are premised on the insurance policy; specifically, whether Defendant denied or delayed claims by requiring proof of loss beyond what was required under the policy language.” *Id.*

The Court concluded:

Plaintiffs deceptive practice allegations are based on Defendant’s alleged failure to fulfil[] its policy obligations—the same exact conduct forming the basis for the breach of contract claim. A deceptive practice “involves more than the mere fact that a defendant promised something and then failed to do it. That type of ‘misrepresentation’ occurs every time a defendant breaches a contract.”

Id. at 1024 (quoting *Avery*, 216 Ill. 2d at 169, 835 N.E.2d at 844).

ILLINOIS FEDERAL DISTRICT COURT REFUSES TO CERTIFY “SILENT PPO” CLASS ACTION

SUMMARY

An Illinois federal district court has denied class certification of a nationwide “silent PPO” class action, focusing particularly on the material variations in the applicable contracts. *Christie Clinic, P.C. v. MultiPlan, Inc.*, No. 08-CV-2065, 2009 WL 175030 (C.D. Ill. Jan. 26, 2009).

The Court’s Decision

The named plaintiff, a medical clinic, alleged that the defendants, a PPO network administrator and two health insurers, engaged in an improper “silent PPO” scheme by taking PPO discounts on providers’ medical bills without “steering” or “channeling” patients by providing them with “financial incentives” (such as reduced deductibles and co-pays) to use network providers. The plaintiff sought certification of a nationwide class of approximately 500,000 providers. *Id.* at *1-2, 5.

The Court denied the motion for class certification because the plaintiff failed to demonstrate typicality, adequacy of representation, predominance, and superiority.

Central to the Court’s decision was the fact that the providers’ contracts with the PPO network administrator varied materially with respect to, among other things,

(1) provisions governing the use of in and out-of-network benefit levels; (2) provisions addressing required incentives or steerage; and (3) provisions regarding provider-specific defenses to liability such as dispute resolution provisions (including provisions requiring binding arbitration) and forum-selections clauses which could preclude proposed class members from participation in this litigation.

Id. at *11. As a result, the Court held that “the issues common to the class members do not predominate over questions affecting individual members.” *Id.*

Notably, the Court also found that a class action would not be the “superior” method of adjudicating the class members’ claims: because the case involved “substantial individual claims,” it was “unnecessary to certify a class because class members have an important interest in bringing individual actions.” *Id.* at *12.

**ARKANSAS FEDERAL DISTRICT COURT DENIES
NATIONWIDE CLASS CERTIFICATION OF UNJUST ENRICHMENT CLAIM**

SUMMARY

An Arkansas federal district court has denied nationwide class certification of an unjust enrichment claim because the plaintiffs did not satisfy their burden of proving that there were no material variations in the unjust enrichment laws of the various states. *Thompson v. Bayer Corp.*, No. 4:07CV00017 JMM, 2009 WL 362982 (E.D. Ark. Feb. 12, 2009).

It should be noted that the district court's approach is in stark contrast to that of the Arkansas Supreme Court in *General Motors Corp. v. Bryant*, 374 Ark. 38, ___ S.W.3d ___, 2008 WL 2447477, at *4 (June 19, 2008), *cert. denied*, 129 S. Ct. 901 (2009), which held that Arkansas state courts need not engage in a choice-of-law analysis before certifying nationwide classes.

The Court's Decision

The plaintiffs alleged that the defendants fraudulently marketed a weight-loss product; that consumers purchased the product based on false representations; and that the defendants were "unjustly enriched" by the sale of the product.

The Court held that the putative class representatives had the burden of proving that there were no material variations in the states' unjust enrichment laws. 2009 WL 362982 at *2-3.

The Court stated that, under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), it must determine whether (1) Arkansas had a "significant aggregation of contacts" to the claims of all putative class members such that application of Arkansas law to their claims would not be arbitrary or unfair; and (2) Arkansas law conflicts "in any material way with any other law that would apply." 2009 WL 362982 at *3.

The Court held that Arkansas law could not be applied to the claims of nonresident class members because (1) Arkansas did not have the requisite contacts with out-of-state class members' claims, and (2) Arkansas law on unjust enrichment conflicted in several material respects from the laws of other states.

In reaching this second conclusion, the Court engaged in a detailed analysis of unjust enrichment laws (singling out the 50-state surveys submitted by the parties) and found material variations regarding (1) the disparity in proof required to prove that an enrichment was "unjust" or "wrongful"; (2) the requirement in some states that there be no adequate remedy at law; and (3) differences regarding whether the unjust enrichment must have come *directly* from the plaintiff, as opposed to a third party. *Id.* at *4-6.

As a result, the Court concluded that common legal issues did not predominate, and a class action would not be the superior method of adjudicating the claims. The Court denied without prejudice the plaintiffs' alternative request for certification of an Arkansas-only class because the issue had not been adequately briefed. (On March 11, 2009, the plaintiffs filed a motion to certify an Arkansas class.)

TEXAS FEDERAL DISTRICT COURT DISMISSES CLASS ACTION CHALLENGE TO STATE FARM'S WITHHOLDING FOR DEPRECIATION IN PAYMENTS ON HOMEOWNER'S POLICIES

SUMMARY

A Texas federal district court has turned back a class action challenge to State Farm's withholding for depreciation in its payments on homeowner's policies. *Drought v. State Farm Fire & Cas. Co.*, No. SA-07-CA-0068 (W.D. Tex. Jan. 7, 2009). (The plaintiff's appeal is currently pending.)

The Court held:

- Under a homeowner's policy providing for an initial loss settlement payment of the "actual cash value" of the damaged property, State Farm was entitled to deduct an amount for depreciation.
- To the extent State Farm changed the terms of the original policy in the renewal policies, State Farm had provided adequate notice of the changes, and was not required to pay "additional consideration" or a reduced premium for its allegedly reduced risk under the new policy.

The Allegations

The plaintiff purchased a homeowner's policy from State Farm in 1985 and renewed the policy every year thereafter. In May 2006, he submitted a claim for damage to his roof caused by hail. State Farm withheld an amount for depreciation, and also applied the plaintiff's deductible. According to the plaintiff, State Farm told him that it would pay the amount withheld as depreciation upon completion of the roof's repair or replacement. Slip op. at 2.

The plaintiff refused State Farm's offer and instead filed a class action suit, consisting of no fewer than five putative classes — three of persons with property insured in Texas, and two of persons with insured property throughout the United States. *Id.* at 2-3.

The plaintiff argued (1) that under his original policy, as well as the policy in place at the time of loss, State Farm could not withhold any amount for depreciation, but instead was required to pay the entire cost of repairing or replacing the roof; (2) that even if the policy applicable to the loss permitted State Farm to withhold for depreciation, State Farm did not provide adequate notice of this alleged change from the terms of his original policy; (3) that State Farm failed to provide adequate notice of a change in the policy regarding the method for calculating his deductible; and (4) that State Farm allegedly provided no additional consideration to the plaintiff (in the form of reduced premiums) in return for State Farm's decreased risk under the renewed policy. *Id.* at 3-4.

State Farm moved to dismiss the complaint pursuant to Rule 12(b)(6) (later converted by the Court to a summary judgment motion) on the grounds that the claims were barred under Texas contract law, and the plaintiff's challenge to his insurance premium was precluded by the filed-rate and primary jurisdiction doctrines. State Farm also moved to dismiss pursuant to Rule 12(b)(1) on the ground that the plaintiff did not have Article III standing to bring the suit because he had suffered no "injury in fact." *Id.* at 4, 11-12.

The Court's Decision

- **"Actual Cash Value" and Depreciation**

The policy in place at the time of the loss provided that State Farm would "pay the cost to repair or replace with similar construction," subject to the following conditions:

(1) until actual repair or replacement is completed, [State Farm] will only pay the actual cash value at the time of the loss of the damaged part of the property, . . . ; [and] (2) when the repair or replacement is actually completed [State Farm] will pay the covered additional amount [the insured] actually and necessarily spend[s] to repair or replace the damaged part of the property, or an amount up to the applicable limit of liability . . . , whichever is less.

Id. at 13.

The Court rejected the plaintiff's argument that the term "actual cash value" was ambiguous. But because the policy did not specifically define the term "actual cash value," the Court turned to Texas law, including pronouncements from the Texas Department of Insurance, for guidance.

The Court held that "actual cash value" means "fair market value" (or "the price a willing purchaser who is under no obligation to buy would pay to a willing owner who is under no obligation to sell") and can be quantified in one of three ways: (1) comparable sales; (2) the income capitalization approach; or (3) the cost of repair or replacement *less depreciation*. *Id.* at 14.

The Court also noted that, under Texas law, "[i]t is generally accepted that depreciation is a factor to be considered when an insurer elects to pay the 'actual cash value' of the damaged property." *Id.* (internal quotations omitted).

- **"Injury in Fact" and Changes to Coverage in Renewal Policies**

The Court also rejected the plaintiff's claim that it had suffered an "injury in fact" when, in the renewal policies, State Farm allegedly changed the terms of the original policy regarding the method for calculating the deductible, and the withholding of depreciation, without reducing his premium.

The Court first held that State Farm had provided adequate notice of any changes made to the plaintiff's original insurance policy, and had complied with all applicable laws and regulations. *Id.* at 7-9.

The Court also held that State Farm was not obligated to provide the plaintiff with any "additional consideration" for the alleged reduction in coverage in the renewed policies. The Court agreed with State Farm that a renewal policy (as opposed to a mid-term contract change) does not constitute a contract modification, but rather a separate and distinct contract, for which no additional consideration is required. *Id.* at 9.

Finally, the Court stated that even if the plaintiff had a valid contract claim under Texas law, "the filed rate and primary jurisdiction doctrines could preclude the Court from determining whether the consideration the parties provided to each other was reasonable." *Id.* at 11.



Schiff Hardin Class Action Litigation Group

Schiff Hardin LLP has an active and experienced team of litigators who concentrate their practice in defending corporations against class actions and other complex civil litigation. Our attorneys have defended our corporate clients in class action cases in both state and federal courts throughout the United States.

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