Lawyer Insights

Purported COVID-19 Class Actions Face Big Hurdles

A Georgia court will find it difficult to grant class certification for these claims, especially on a nationwide basis.

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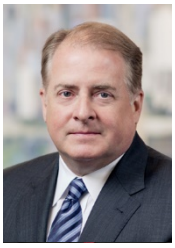
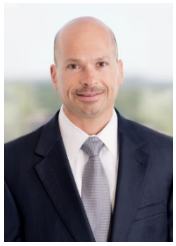


As the wave of COVID-19 litigation builds, swimming in Georgia's COVID-19 litigation waters are several purported class action suits brought on behalf of policyholders. In one of the earliest-filed cases, class representative Windy Hill Dentistry sued eight Hartford subsidiaries, claiming The Hartford wrongfully denied the dental practice and other similarly situated business owners' claims for lost income resulting from the coronavirus pandemic. *Windy Hill Dentistry, LLC, et al. v. The Hartford Fin. Servs. Grp., Inc., et al.*, No. 1:2020cv02000 (N.D. Ga. filed May 8, 2020). The complaint alleges that the class consists of: all natural persons and/or dental practice groups in the United States who purchased from Defendants a Business Owner policy of insurance, with Business Income, Civil Authority and/or Extra Expense coverage, who were subject to federal recommended guidelines or state directives to limit, suspend or cancel non-emergent and elective procedures during the COVID-19 pandemic. *Id.* at ¶ 84.

Other COVID-19 insurance actions filed in Georgia as putative class actions do not seek to certify a nationwide class. For instance, another dental practice, Gilreath Family & Cosmetic Dentistry, filed suit against The Cincinnati Insurance Co., identifying only dental practices groups *in Georgia* as members of the proposed class. *Gilreath Family & Cosmetic Dentistry, Inc. et al. v. The Cincinnati Ins. Co.*, No. 1:2020cv02248 (N.D. Ga. filed May 26, 2020).

In either case, the dental practice plaintiffs allege that a class action is warranted because the policies contain "uniform" provisions, the interpretation of which would require a court to resolve common questions of law and fact. In the abstract, class actions would seem to provide an efficient way for Georgia courts to manage their increasing COVID-19 litigation dockets. In practice, however, it is not clear that these claims are eligible for class action treatment or that it would be practical or equitable to the putative class members to certify these proposed classes.

Both *Windy Hill* and *Gilreath* were filed in federal court in the Northern District of Georgia. Under the Federal Rules, the named class member must satisfy Rule 23(a)'s four requirements: numerosity, commonality, typicality and adequacy of representation. Although there is reason to question whether these cases fulfill any of these requirements (or those requirements in FRCP 23(b)), commonality may be insureds' biggest hurdle in seeking to certify a class.

In the United States, insurance law has been developed on a state-by-state basis; there is no national law of insurance. Even assuming all policyholders in a certain industry have "uniform" policies with identical

relevant coverage language and exclusions—which is unlikely—different states interpret and apply many key policy terms and phrases differently. Moreover, states differ even in their respective rules for interpreting insurance policies and contracts in general. The substantive and procedural variations in state law militate strongly against certifying a nationwide class or attempting to manage the claims of policyholders from dozens of jurisdictions.

It is a basic principle of insurance law that insurance policies are contracts and that the specific language of a policy drives whether there is coverage for a policyholder's particular claim or loss. Even if a class were limited to Georgia policyholders and the only applicable law was Georgia's, the facts and policy terms underpinning each insured's claim will vary significantly. These variations are evident in many of the recently decided COVID-19 insurance coverage lawsuits, where outcomes in cases alleging damage to property caused by the actual presence of COVID-19 were markedly different from the outcomes in cases that merely alleged governmental orders resulted in a loss of use of property. *Compare Studio 417, Inc. v. The Cincinnati Ins. Co*., No. cv-03127-SRB (W.D. Mo. Aug. 12, 2020) (alleging the presence of virus on the insured property) *with Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-cv-461-DAE (W.D. Tex. Aug. 13, 2020) (plaintiffs affirmatively plead the lack of virus on their property). Some insureds will make this showing, while others may not.

For those insureds who allege only civil authority orders affected their operations, those orders might vary based on locality. Athens-Clarke County, for example, issued much stricter stay-at-home mandates than the surrounding counties. *Compare* Athens-Clarke County, *Second Ordinance Declaring Local Emergency* (Mar. 19, 2020) (instituting a mandatory "shelter in place" policy) *with* Oconee County, *Local Emergency Order No. 1* (Mar. 26, 2020) ("strongly encouraging" residents to remain at home). Another critical question is whether certain material exclusions, such as a virus or pandemic exclusion, are common to every class member's policy, and whether the exclusionary language is materially identical in each policy. Overall, given the specificity of policy language and the frequency with which identical policy forms are modified by endorsement, it will be difficult to find commonality among the policy terms covering all policyholders that purchased a particular insurance product.

Historically, class action certification in the insurance context involves numerous, low value claims. *See, e.g.*, *Thompson v. State Farm Fire & Cas. Co.*, No. 5:14-CV-32 (MTT), 2016 WL 951537 (M.D. Ga. Mar. 9, 2016) (certifying class of homeowners bringing breach of contract claims against State Farm based on insurer's alleged failure to pay for the diminished value of a home after it suffers water damage). That is not the case here, as many insureds' lost income claims not only are likely to be substantial, but also may involve significant accounting issues, which will further decrease the commonality arguments.

Given these hurdles, a Georgia court will find it difficult to grant class certification for these claims, especially on a nationwide basis. If the Judicial Panel on Multidistrict Litigation's **decision** is any indication, however, the policyholders in *Windy Hill Dentistry* were wise to target their class definition on a single insurance group, as a court may find commonality in the language of policies issued by a particular insurer or insurance group.

Disclosure: The authors currently represent policyholders in COVID-19 business income litigation, but none of those referenced in this article.

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