CLASS ACTION LAWSUITS IN THE UNITED STATES AGAINST INSURANCE COMPANIES[1]

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In the United States, it is now somewhat common for an insured-claimant, seeking to be designated as class representative, to initiate a putative class action lawsuit against an insurance company, *i.e.*, seeking monetary damages for alleged underpayment of claims and/or based upon allegations of insurer "bad faith" conduct in evaluating insurance applications, handling insurance claims or in marketing insurance products.[2]

I. Summary of 2022 Class Action Statistics

Carlton Fields[3] has released its 2023 Class Action Survey ("Survey"),[4] which reported on historical trends and included information about significant emerging issues in class action litigation in the United States. Among class action trends identified in the most recent Survey are the following:

- Corporate Defense Spending on Class Actions hit a new record in 2022, with companies spending a record $3.5 billion on class action defense. Spending on Class Actions increased for the eighth straight year, due to two major drivers: (1) class claims are growing larger; and (2) more companies are facing class actions.[5]

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[1] An excellent, up-to-date resource for practitioners regarding class action lawsuits in the United States can be found in the recently updated two-volume publication by the American Bar Association ("ABA") entitled *A Practitioner's Guide to Class Actions* (3d ed. 2021) (hereinafter "*ABA Class Actions Guide*"). Edited by Marcy Hogan Greer and Amir Nassihi, this comprehensive guide provides in-depth information and analysis concerning the many intricacies of a class action lawsuit along with a valuable, state-by-state analysis of the ways in which state-law class action rules differ from the Federal Rule of Civil Procedure 23.

[2] *See* Richard L. Fenton and Jeffrey A. Zachman, Property and Casualty Insurance, Chapter 19.F, p. 615, *ABA Class Actions Guide.*

[3] Carlton Fields, P.A. is a national law firm with offices in major cities throughout the United States.

[4] https://www.carltonfields.com/Libraries/CarltonFields/Documents/Class%20Action%20Survey/2023-carlton-fields-class-action-survey.pdf.

[5] Survey, pp. 4-6.

- Labor and Employment Litigation accounted for almost 35% of class action defense spending as well as 34% of the class disputes managed by in-house legal departments. COVID-19 related class actions dipped below 10% in 2022 and no longer appear at any measurable level. Among pandemic-related class actions that remained pending, Labor and Employment matters dominated.[6]

- Companies anticipated more data-privacy and consumer-fraud class claims, and for such claims to have a measurable bottom-line impact, pointing to claims based on both the use of social media as well as Environmental, Social and Governance ("ESG") disclosures and practices, which were viewed as posing increased reputational, brand, and financial risk.[7]

- A major concern of in-house counsel is the perceived growth of "baseless claims." While they identified potentially effective defenses, top in-house legal decision-makers also viewed courts as becoming more lenient in allowing "baseless" class actions to move forward.[8]

- Class Actions per Company Increased and are Expected to Increase Further. Most companies with class actions, *i.e.*, 92%, have faced them before. Companies facing class actions are seeing the commencement of more class actions over time, which reversed a two-year decline since 2019.[9]

- Class Action Settlements are at the Lowest Level in Five Years. The number of settlements dropped significantly in almost all areas of litigation, including class actions, while settlements of putative class actions on an individual basis rose to almost half of settlements.[10]

- Although in-house lawyers are predicting an incidence of more class actions, companies continue to decrease the number of in-house attorneys dedicated to class actions and to devote fewer hours per attorney to such cases. In-house counsel reported relying more on outside counsel as the preferred approach to controlling the overall costs of class actions.[11]

- Lack of "Actual Injury" has emerged as a highly efficacious Class Action Defense. In addition to the two class action defense strategies reported as most effective, the absence of commonality and the requirement of predominance, commentators now add the defense of lack of "actual injury." Such defenses typically are asserted at the class certification stage of a proceeding, often after an initial round of dismissal

[6] Survey, pp. 7-8, 11 and 36-37.
[7] Survey, pp. 9-10 and 12.
[8] Survey, p. 12.
[9] Survey, pp. 13-16.
[10] Survey, pp. 22-24.
[11] Survey, pp. 17-20.

briefing and some limited discovery. Sixty-four percent of in-house counsel reported that early motions for summary judgment, before class certification, also had proven effective.[12]

- Companies are largely split on Mandatory Arbitration Provisions. Most companies reported using mandatory arbitration provisions in at least some of their contracts, but they are divided concerning whether such provisions should preclude all arbitrations. Class arbitration can occur when the contractual arbitration provisions do not specify that the arbitration shall be on an individual basis. In such circumstances, the arbitration clauses may allow for class claims, consolidation, or joinder.[13]

- Some Companies are Using Class Action Waivers in Contracts. About four in every ten companies reported utilizing class action waivers in their contracts. Although such waivers can be a strong risk management tool, 57% of companies omit class action waivers for reasons that include perceived regulatory resistance or other barriers in some jurisdictions.[14]

II. Overview of Federal Rule 23 Class Actions

The class action is "an exception" to the usual rule that litigation is conducted by and on behalf of the individual named parties only.[15] In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members."[16] To come within the exception, in United States federal court actions, a party seeking to maintain a class action "must affirmatively demonstrate his compliance" with Federal Rule of Civil Procedure 23 ("Rule 23").[17]

For federal court actions, Rule 23(a) provides in part:

> (a) **Prerequisites**. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
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> (1) the class is so numerous that joinder of all members is impracticable;
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> (2) there are questions of law or fact common to the class;

[12] Survey, p. 25.
[13] Survey, p. 26.
[14] Survey, p. 27.
[15] *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013).
[16] *E. Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 1896, 52 L. Ed. 2d 453 (1977).
[17] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class. [18]

Moreover, under Rule 23, in addition to the above requirements of numerosity, commonality, typicality, and adequacy of representation, the court must determine that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[19] Criteria utilized by courts for assessing the predominance and superiority factors include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.[20]

Rule 23(b) pertains to circumstances where a class action would achieve economies of time, effort, and expense, as well as promoting uniformity of outcome or decision regarding persons "similarly situated," *i.e.*, "without sacrificing procedural fairness or bringing about other undesirable results."[21] Another objective of this portion of Rule 23 is to facilitate having numerous claimants with small claims, which might not be financially worth litigating in individual actions, combine their resources and bring a single class action to prosecute their collective common claims.[22]

In order to demonstrate that class action certification is proper, the initiating plaintiff generally must satisfy *all four* threshold Rule 23(a) requirements and *at least one* Rule 23(b)(3) requirement.[23] As the United States Supreme Court has reiterated:

[18] Rule 23(a).
[19] Rule 23(b)(3).
[20] Rule 23(b)(3)(A)-(D).
[21] Rule 23(b)(3) Advisory Committee Notes (1996 Amendment).
[22] *See* Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1777 (3d ed. 2005).
[23] Rand P. Nolen, Predominance and Superiority, Chapter 3.F., p. 114, in *ABA Class Actions Guide*.

> The Rule "does not set forth a mere pleading standard." . . . Rather, a party must not only "be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact," typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a). The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b).[24]

A. Numerosity

To satisfy "numerosity," the class must be so numerous that joinder of all members is impracticable.[25] "Impractical" does not mean "impossible."[26] The numerosity requirement "reflects the general theory behind class action lawsuits, which is to permit a large group of individuals whose interests are sufficiently related to bring one lawsuit, instead of many lawsuits, so as to conserve judicial resources and increase judicial access."[27]

Although typically referred to as "numerosity," the pivotal criterion here is the "impracticality" of joinder. Courts usually take multiple factors into account when determining if joinder of interested parties is "impracticable." Whether or not joinder of all members of the putative class is "practicable" is judicially assessed, not solely based upon the number of class members, but also on taking into account the "judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members."[28] Determination of practicability of joinder can depend upon all the circumstances surrounding a case, not on mere numbers.

Nonetheless, the most important factor in determining numerosity often *is* class size. As some federal courts have observed, "[w]hen class size reaches substantial proportions . . . the impracticability requirement is usually satisfied by the numbers alone."[29] Accordingly, the more prospective numbers in the putative class, the less need exists for the court to examine other "numerosity" factors.

Notwithstanding that an initiating plaintiff is not required to allege the precise number of putative class members, nevertheless, the plaintiff carries the burden of submitting facts or

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[24] *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013).
[25] *Fox v. Equimark Corp.*, CIV. A. 90-1504, 1994 WL 560994, at *3 (W.D. Pa. July 18, 1994) (citing *Weiss v. York Hosp.*, 745 F.2d 786, 807-08 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985)).
[26] 7A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1762 (1986).
[27] *Safran v. United Steelworkers of Am., AFL-CIO*, 132 F.R.D. 397, 401 (W.D. Pa. 1989).
[28] *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993).
[29] *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (citing 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 3.01, at 3-26 (3d ed. 1992)).

demonstrating circumstances to establish a reasonable estimate of class size.[30] A class cannot be certified when the putative class size is based upon mere speculation.[31]

Some federal appellate courts and some commentators have concluded, nevertheless, that "the impracticality of joinder 'is presumed at a level of 40 members.'"[32] At least one federal appellate court has rejected such a presumption, however, reasoning that there is "no set formula to determine if the class is so numerous that it should be so certified."[33] Classes as small as 13 members have been certified,[34] while putative classes of more than about 400 members have been judicially denied.[35]

Furthermore, when only injunctive or declaratory relief is sought, some courts have found the numerosity requirement is relaxed so that even arguably speculative or conclusory allegations regarding "numerosity" are sufficient to permit class certification.[36]

B. Commonality and Typicality

As noted, the "commonality" requirement found in Rule 23(a) directs that a class *may not* be certified unless "there are questions of law or fact common to the class."[37] With respect to "typicality," Rule 23 provides a class may not be certified unless "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[38] The United States Supreme Court reasoned as follows:

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[30] *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267-68 (11th Cir. 2009) (reasoning that while the plaintiff was not required to "show the precise number of members in the class," because the "record [was] utterly devoid of any showing" of class size, the class would be decertified).

[31] *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 541 (6th Cir. 2012) (pointing out that the "impracticability of joinder must be positively shown, and cannot be speculative").

[32] *See* Ruth A. Bahe-Jachna, Numerosity, Commonality, and Typicality, Chapter 3.B, pp. 62-63, in *ABA Class Actions Guide*.

[33] *Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006).

[34] *Dale Elecs., Inc. v. R. C. L. Elecs., Inc.*, 53 F.R.D. 531, 534 (D. N.H. 1971) (finding that a class of 13 members was sufficiently numerous to support a class action, the court explained that "[w]hile it must be conceded that thirteen [members] are not a numerous class judged by normal class action standards, it is not numbers alone, but whether or not the numbers make joinder impracticable that is the test") (citing *Citizens Banking Co. v. Monticello State Bank*, 143 F.2d 261, 262 (8th Cir. 1944) (in an action predating Rule 23, the court held that 12 plaintiffs were sufficient for a class action)).

[35] *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989) (plaintiffs in racketeering action failed to satisfy numerosity requirement for proposed class of 400 to 600 policyholders who were denied indemnity and reportedly failed to take polygraph test).

[36] *See Sueoka v. United States*, 101 Fed. Appx. 649, 653 (9th Cir. 2004) (unpublished) (the federal appellate court overruled the district court and found "numerosity" was satisfied regarding a subclass of plaintiffs who sought injunctive and declaratory relief, for the reason that a "reasonable inference ar[ose] from plaintiffs' other evidence that the number of unknown and future members of proposed subclass . . . [was] sufficient to make joinder impracticable").

[37] Rule 23(a)(2).

[38] Rule 23(a)(3).

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.[39]

Nevertheless, each factor serves a different purpose. Commonality examines the relationship of facts and legal issues common to class members, while typicality focuses on the relationship of facts and issues between the class and its representatives.[40] The commonality requirement is said to be met if the plaintiffs' grievances share at least one common question of law or of fact.[41] Typicality, on the other hand, requires that the claims of the class representative(s) must be typical of those of the class and the typicality requirement is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."[42]

1. Commonality

To meet the requirement of "commonality," the plaintiff must establish that the class members "have suffered the same injury," as well as that the claims "depend upon a common contention."[43] Some courts have explained that a common contention "is one that can be resolved for each class member in a single hearing, such as the question of whether an employer engaged in a pattern and practice of unlawful discrimination against a class of its employees."[44] A question is not "common" if the resolution "turns on a consideration of the individual circumstances of each class member."[45] The "common question (or common questions) need not address every aspect of the plaintiffs' claims, but it must 'drive the resolution of the litigation.'"[46] Courts have noted that "even though individual factual circumstances may be present among class members, the commonality requirement is satisfied where it is alleged that the defendants have acted in a uniform manner with respect to the class."[47] Moreover, while the questions must be targeted to produce common answers,

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[39] *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n. 13, 102 S. Ct. 2364, 2371 n. 13, 72 L. Ed. 2d 740 (1982).
[40] *See* § 3:31. Overlap with commonality, 1 *Newberg and Rubenstein on Class Actions* § 3:31 (6th ed.).
[41] *See Adams Pointe I, L.P. v. Tru-Flex Metal Hose Corp.*, 20-3528, 2021 WL 3612155, at *3 (3d Cir. Aug. 16, 2021) (unpublished) (reasoning that commonality "means 'the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.'") (citing *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)).
[42] *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997).
[43] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).
[44] *See e.g., Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (citing 7A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1763 (3d ed. 2005)).
[45] *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (citing 7A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1763 (3d ed.2005)).
[46] *Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 553 (7th Cir. 2016).
[47] *See e.g., Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 102 F.R.D. 457, 462 (N.D. Cal. 1983).

the plaintiff is not required to establish a likelihood of success on the answers to the common questions.[48]

2. Typicality

Typicality addresses whether or not "'the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.'"[49] One purpose of the typicality requirement is "to ensure that . . . 'the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'"[50] Factual differences do not prevent a finding of typicality "if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory."[51] Typicality relates to a general standard and pertains to "the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought."[52]

A frequent challenge to typicality is the assertion of defenses that are unique to the named plaintiff.[53] In such circumstances, concerns arise when "the representative's interests might not be aligned with those of the class, and the representative might devote time and effort to the defense at the expense of issues that are common and controlling for the class."[54]

C. Adequacy of Representation

A requirement for class certification is that "the representative parties will fairly and adequately protect the interests of the class."[55] Adequacy of representation is vitally important for the maintenance of a class action because a resulting judgment conclusively establishes the rights of the absent class members.[56] Accordingly, the "adequacy" requirement has constitutional implications, under the United States Constitution, because the choice of representatives implicates the due process rights of all members who will be

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[48] *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1053 (9th Cir. 2015) (the plaintiff "need only show that there is a common contention capable of classwide resolution—not that there is a common contention that 'will be answered, on the merits, in favor of the class.'").
[49] *Hassine v. Jeffes*, 846 F.2d 169, 177 (3d Cir. 1988).
[50] *Mazzei v. Money Store*, 829 F.3d 260, 272 (2d Cir. 2016).
[51] *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 923 (3d Cir. 1992), abrogation on other grounds recognized by *White v. Samsung Elecs. Am., Inc.*, 61 F.4th 334 (3d Cir. 2023).
[52] *Maney v. State*, 6:20-CV-00570-SB, 2022 WL 986580, at *9 (D. Or. Apr. 1, 2022) (unpublished).
[53] *See In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009) ("It is well established that a proposed class representative is not "typical" under Rule 23(a)(3) if 'the representative is subject to a unique defense that is likely to become a major focus of the litigation.'").
[54] *Beck v. Maximus, Inc.*, 457 F.3d 291, 297 (3d Cir. 2006).
[55] Rule 23(a)(4).
[56] *See Hubert v. Med. Info. Tech., Inc.*, CV 05-10269-RWZ, 2007 WL 9797660, at ** 5-8 (D. Mass. Mar. 20, 2007) (citing in part *Dierks v. Thompson*, 414 F.2d 453, 456 (1st Cir. 1969) ("Unless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize plaintiffs as representative, and a violation of due process to permit them to obtain a judgment binding absent plaintiffs.")).

bound by the judgment.[57] Indeed, recent amendments to Rule 23 have made "adequacy" a prerequisite for class action settlement approval.[58]

Plaintiff has the burden to demonstrate that the "adequacy" requirement is satisfied.[59] To meet the "adequacy" requirement, a class representative must zealously represent the class.[60] Furthermore, the representative cannot have material conflicts of interest with the other class representatives.[61] To defeat the "adequacy" requirement of Rule 23(a)(4), however, a conflict "'must be more than merely speculative or hypothetical'"; the conflict "'must be fundamental.'"[62]

Under Rule 23(g)(4), moreover, the duty of class counsel is to "fairly and adequately represent the interests of the class."

D. Predominance and Superiority

Rule 23(b)(3) authorizes a class action only when justified by the presence of predominating common questions of law or fact *and* a determination the class action is superior to other available methods for resolving the dispute fairly and efficiently.[63] These "twin requirements of Rule 23(b)(3) are known as predominance and superiority."[64] Certification of a 23(b)(3) damages class action "is proper 'whenever the actual interests of the parties can be served best by settling their differences in a single action.'"[65] The court takes the whole of the case into account when examining whether common issues predominate over individual issues and whether class treatment would be superior.[66]

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[57] *Ward v. Hellerstedt*, 753 Fed. Appx. 236, 247 (5th Cir. 2018) ("Since 'absent class members are conclusively bound by the judgment in any class action brought on their behalf, the court must be especially vigilant to ensure that the due process rights of all class members are safeguarded through adequate representation at all times.'").
[58] *See* Rule 23(e) 2)(A) (providing that "If the proposal [for a proposed settlement, voluntary dismissal, or compromise] would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether: (A) the class representatives and class counsel have adequately represented the class;. . . ").
[59] James M. Terrell and Courtney C. Gipson, Adequacy Requirements, Chapter 3.C, p. 75, in *ABA Class Actions Guide*.
[60] *Id.*
[61] *Gen. Tel. Co. of the Nw., Inc. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318, 331, 100 S. Ct. 1698, 1707, 64 L. Ed. 2d 319 (1980) (the court explained that "the adequate-representation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class").
[62] *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) (a disqualifying conflict "'must be more than merely speculative or hypothetical.'" (citing 5 *Moore's Federal Practice* § 23.25[4][b][ii] (2002)).
[63] *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).
[64] *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008), *as amended* (Jan. 16, 2009).
[65] *Clark v. Bonded Adjustment Co., Inc.*, 204 F.R.D. 662, 665-66 (E.D. Wash. 2002).
[66] *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 313-14 (3d Cir. 1998).

1. Predominance

The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[67] As noted, issues common to the class must predominate over individual issues. "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'"[68] To assess whether predominance is met at the class certification stage, "a district court must determine whether the essential elements of the claims brought by a putative class are 'capable of proof at trial through evidence that is common to the class rather than individual to its members.'"[69] When "'proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.'"[70]

2. Superiority

The superiority requirement "obligates the court to determine whether 'a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'"[71] In assessing the superiority of a Rule 23(b)(3) class action, the court evaluates whether a class suit would be the best or the fairest way of channeling and adjudicating the claims involved.[72] The court must initially consider what other procedures exist for disposing of the litigation and then assess the relevant alternatives to ascertain whether class certification would be the most effective means of handling the total controversy.[73] In determining whether a class action is superior to other available methods for fair and efficient adjudication of claims, the district court's focus is not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs.[74] Rule 23(b)(3) provides a non-exhaustive list of four factors pertinent to determining superiority.

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[67] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 2249, 138 L. Ed. 2d 689 (1997).
[68] *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016).
[69] *Gonzalez v. Corning*, 885 F.3d 186, 195 (3d Cir. 2018), *as amended* (Apr. 4, 2018).
[70] *Id.*
[71] *Ceccone v. Equifax Info. Servs. LLC*, 13-CV-1314 KBJ, 2016 WL 5107202, at *7 (D. D.C. Aug. 29, 2016).
[72] *Partain v. First Nat. Bank of Montgomery*, 59 F.R.D. 56, 17 Fed. R. Serv. 2d 1003 (M.D. Ala. 1973).
[73] *Breeden v. Benchmark Lending Group, Inc.*, 229 F.R.D. 623, 62 Fed. R. Serv. 3d 431 (N.D. Cal. 2005); *In re Tetracycline Cases*, 107 F.R.D. 719, 732 (W.D. Mo. 1985).
[74] *Holzman v. Malcolm S. Gerald & Associates, Inc.*, 334 F.R.D. 326, 333 (S.D. Fla. 2020).

III. Putative Class Action Lawsuits Against Insurance Carriers

A. Property and Casualty Insurance

Property and casualty insurance[75] claims serve well to illustrate some of the issues that commonly arise in insurance class action litigation.[76] The homeowners insurance context has been an especially fertile ground for class action disputes in recent years, especially with multiple class actions filed in the wake of various natural disasters. Moreover, the COVID-19 pandemic resulted in a proliferation of class action litigation against insurers based on a variety of theories, including against automobile and commercial property policies.[77]

The United States Supreme Court had issued a landmark decision in 2011, *Wal-Mart Stores, Inc. v. Dukes* ("*Dukes*"),[78] significantly affecting class action litigation. *Dukes* pronounced in part an unambiguous prohibition against the use of Rule 23(b)(2) to certify class action claims seeking to recover "individualized" monetary relief.[79] The *Dukes* decision has had an impact on class actions in the insurance context, especially in the area of property and casualty insurance claims handling practices. Insurers have argued, following *Dukes*, that Rule 23(b)(2) can no longer be a vehicle to avoid the more rigorous requirements of Rule 23(b)(3), *i.e.*, especially "predominance," such as when the putative class of plaintiffs seeks individualized damages along with an injunction or declaratory relief.[80]

With respect to class certification in the property and casualty insurance context, in light of the *Dukes* decision, some courts have denied class certification where alleged injuries of the plaintiffs were too dissimilar or required individualized analysis.[81] For example, in *Jenkins v. State Farm*,[82] plaintiffs requested class certification of a statewide class concerning the insurance company's alleged failure to reimburse automobile insureds who had made claims under their uninsured motorist coverage but had not received compensation for diminished value related to the "stigma" associated with owning a previously damaged vehicle. The Washington federal trial court found that although plaintiffs satisfied "commonality," they failed to meet the "predominance" requirement under Rule 23(b)(3). In

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[75] Property and casualty insurance, broadly defined, includes homeowners, automobile, and commercial property insurance, including third-party liability insurance.

[76] Richard L. Fenton and Jeffrey A. Zachman, Property and Casualty Insurance, Chapter 19 F., p. 616, in *ABA Class Actions Guide*.

[77] *Id.*

[78] 564 U.S. 338, 360-61, 131 S. Ct. 2541, 2557, 180 L. Ed. 2d 374 (2011).

[79] *Id.*

[80] *See e.g., In re State Farm Fire & Cas. Co.*, 872 F.3d 567, 577 (8th Cir. 2017) (the federal appellate court reasoned that "although we do not rule out the possibility that State Farm's use of the Xactimate estimating methodology would produce an unreasonable estimate of the actual cash value of some partial losses, this issue may only be determined based on all the facts surrounding a particular insured's partial loss. . . [and, therefore,] there are no predominant common facts at issue, and the decision certifying a class . . . must be reversed.").

[81] *See e.g., Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 415 (5th Cir. 2017) (reversing class certification regarding fraud against automobile insurer as the allegations required an individualized determination of reasonable reliance on the purported misrepresentation).

[82] *Jenkins v. State Farm Mut. Auto. Ins. Co.*, C15-5508 BHS, 2018 WL 526993, at *10 (W.D. Wash. Jan. 24, 2018), *aff'd sub nom. Van Tassel v. State Farm Mut. Auto. Ins. Co.*, 843 Fed. Appx. 948 (9th Cir. 2021).

so ruling, the court reasoned that "common questions do not predominate in this case because there are too many individualized factors in determining whether any particular vehicle actually suffer[ed] from diminished value."[83] The court further elaborated that other individualized factors included "the presence and severity of prior [automobile] accidents" and "the manner in which [the insurance company] resolved or failed to resolve . . . claims where a vehicle had suffered diminished value."[84]

In the health insurance context, on the other hand, in *Ballas v. Anthem Blue Cross Life & Health Ins. Co.*,[85] the plaintiff requested certification of a class composed of all Californians who had participated in an ERISA plan administered by the insurer and who had been denied benefits for total disc replacement pursuant to a specific medical policy. The court ultimately denied certification, permitting leave for the plaintiff to prove the class was sufficiently "numerous." In the process, however, the court rejected the insurer's reliance on *Dukes* and determined the *Dukes* case itself did not preclude certification.[86]

The insurance company, in *Ballas*, argued *Dukes* directed that determining the question of whether coverage was correctly denied was highly individualized and depended on the specific facts of each patient that had sought coverage for a highly experimental procedure. Nonetheless, the trial court rejected the insurer's argument. Instead, the court found the plaintiff was not arguing that each individual member was entitled to coverage. Rather, the court found the predominant issue to be that the insurance company's adoption of a blanket policy denying coverage for experimental devices prevented the insurer from conducting an individualized determination at the outset and, therefore, resulted in denying the insureds the opportunity to demonstrate eligibility. Although the court denied the claimant's petition for class certification, on the issue of individualized analysis the *Ballas* court concluded that the uniform application of the insurer's policy satisfied the "commonality" requirement.

The *Dukes* case will continue to affect the outcome of requested class action certifications in the insurance context.[87]

B. First-Party Homeowner and Business Claims

Plaintiffs seeking certification of a class of first-party homeowner or business claimants carry a heavy burden. At first blush, the class action option might appear attractive. That is, homeowner insurance claims frequently are relatively small on their own, and the class action option may be an appealing means for adjudicating claims on a mass basis that

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[83] *Jenkins*, 2018 WL 526993, at *8.
[84] *Id.*
[85] 2013 WL 12119569, at *13 (C.D. Cal. Apr. 29, 2013).
[86] *Ballas*, 2013 WL 12119569, at *8.
[87] *See e.g., King v. Homeward Residential, Inc.*, 2017 WL 3205477, at *4 (E.D. Ark. July 27, 2017) (denying class certification because individual inquiries into the reasonableness of each class member's insurance premium amounts paid undermined commonality).

otherwise would not justify the cost of litigation.[88] Furthermore, insurers' increasing utilization of computerized estimation and adjusting software has empowered plaintiffs' counsel to argue the use or accuracy of such software programs presents common issues that predominate over individualized questions, so that individual damage issues may be reduced to a formulaic proposition.

Nevertheless, homeowner insurance claims often are highly individualized. Property claims are tremendously varied, and notwithstanding the use of software tools, insurance claims adjustment continues to be a highly individualized process. Application of electronic tools and claims analysis software, in the end, often requires the exercise of adjuster judgment and discretion. Furthermore, the amount of the loss often lies within a range and cannot be calculated with precision.[89]

Indeed, proof that an insurer breached its contract with one policyholder does not necessarily establish a breach with respect to other policyholders.[90] Even where the damage to home or business property arguably arises out of a common event, such as natural disasters like hurricanes or pandemics, moreover, individual adjusting issues may be prevalent.[91] Indeed, such claims or actions may often raise "common questions" but they rarely will be susceptible to "common answers."

To illustrate, even when a covered loss can be established, no two businesses and no two losses are identical. Businesses are different in the products and services they provide, the markets they serve, and the nature of the alleged damages suffered. Moreover, local market factors and local government policies may significantly affect business damages. The question, therefore, often becomes whether the plaintiffs' losses are sufficiently similar to establish class cohesion or predominance of the common issues.

As with business damages during COVID-19, homeowner claims arising out of natural disasters frequently present individualized commonality and predominance issues. To illustrate, class action treatment for Hurricane Katrina homeowner claims was almost uniformly rejected in the federal courts, frequently by way of motion to strike the class allegations on the face of the pleading.[92] Indeed, in *Aguilar v. Allstate Fire & Cas. Ins. Co.*,[93]

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[88] Richard L. Fenton and Jeffrey A. Zachman, Property and Casualty Insurance, Chapter 19 F., p. 619, in *ABA Class Actions Guide*.
[89] *Id.*
[90] *See e.g., Mills v. Foremost Ins. Co.*, 269 F.R.D. 663, 676-78 (M.D. Fla. 2010) (denying class certification of claims of underpayment of property repair or replacement where standard for whether policyholder was entitled to payment for general contractor overhead and profit required individualized evidence for each class member's claim).
[91] *See Comer v. Nationwide Mut. Ins.*, 1:05 CV 436 LTD RHW, 2006 WL 1066645, at **3-4 (S.D. Miss. Feb. 23, 2006) (denying motion for leave to file amended complaint seeking class action against insurers by homeowners claiming coverage for damages from Hurricane Katrina, because no two property owners would have suffered the same loss and each individual claim would require evidence to establish the cause and extent of covered losses).
[92] *See e.g., John v. Nat'l Sec. Fire & Cas. Co.*, 06-1407, 2006 WL 3228409, at *5 (W.D. La. Nov. 3, 2006), *aff'd*, 501 F.3d 443 (5th Cir. 2007) (noting in part that a factual inquiry would have to be made concerning each putative class member's damages, the federal trial court granted a motion to dismiss as to class action claims but denied the motion as to the remaining claims).
[93] CIVA 06-4660, 2007 WL 734809, at *3 (E.D. La. Mar. 6, 2007).

the court held that allegations the defendant had underpaid claims by repeatedly utilizing below-market unit pricing could not be proven on a class-wide basis, and reasoned as follows:

> While [the insurance company defendant's] general internal policies for adjusting claims may arguably be one common issue of fact, demonstrating a wrongful pattern and practice of failing to adjust claims will require an intensive review of the individual facts of each class member's damage claim, including the nature and extent of damage, the timing and adjustment of each class member's claim, how much each class member was paid for his claim and for what damage, and whether that amount was sufficient and timely. On the face of the pleading, it is clear that those individualized and highly personal issues pertaining to each class member patently overwhelm any arguably common issues, rendering the claims inappropriate for class treatment.[94]

A similar result was reached by the court in *Thompson v. State Farm Fire & Cas. Co.*,[95] in which the court- primarily on predominance grounds- in part denied class certification of claims seeking payment for diminished value arising from homeowners' claims, finding that even after the coverage determination had been made:

> [T]he most significant and difficult issues remain. As discussed, the issue of breach is not a question common to the class. To prove breach, class members must present proof that their property in fact suffered diminished value. While the Plaintiffs may be confident, perhaps overly so, that they can do this with mass appraisals, even they effectively admit State Farm is entitled to present evidence that it did not breach the contract because an insured property did not decrease in value after proper repairs. And State Farm can do this for each insured in the class. Accordingly, even assuming that the issue of coverage is sufficient to establish commonality, it does not predominate over the individualized issues of fact that must be resolved.[96]

Plaintiffs' efforts to overcome predominance and manageability issues based on insurers' use of estimating software to adjust claims have not fared significantly better in the homeowner's context. While the use of estimating software may provide one arguably common issue, it also opens up a host of individualized questions. Insurers who utilize estimating software in the claims handling process often rely on a third-party vendor which

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[94] *Id.*
[95] 5:14-CV-32 (MTT), 2016 WL 951537, at *9 (M.D. Ga. Mar. 9, 2016).
[96] *Id.*

provides geographically specific data that is periodically updated to reflect market changes in the price of construction materials. In addition, adjusters may have the ability to override the pricing system based on, for instance, more current or claim-specific information. Thus, notwithstanding the use of computerized estimating software, analysis of any given claim often essentially depends upon a claim-by-claim inquiry.[97]

The area of first-party homeowners claims is continuing to evolve as the basis for putative class action litigation.[98] For example, the state of Georgia has applied "diminished value" analysis in the context of real property insurance claims,[99] which has led to several class actions in that state seeking recovery of "diminished value" claims in the area of homeowners insurance.[100] It can be noted, however, that most jurisdictions at present do not require insurers to pay diminished value, and that many carriers have now enacted policy amendments to specifically exclude coverage for diminished value, including in Georgia.

On the other hand, third-party bodily injury insurance recovery actions are rarely prosecuted as class actions for the reason that individual issues and questions tend to predominate such claims. In what has proven to be an "outlier" decision, however, in a state court class action, *Jacobsen v. Allstate*, the Montana Supreme Court affirmed certification of a bodily injury case.[101] The *Jacobsen* decision has been roundly criticized as ignoring the due process interests of the insurer-defendant and for allowing a class action to proceed that in reality sought determination of individual, specific bodily injury claims for damages. Indeed, Montana federal courts have undermined the viability of the holding by restricting it to the facts and procedural posture of the case.[102]

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[97] *See e.g., Henry v. Allstate Ins. Co.*, CIV.A. 07-1738, 2007 WL 2287817, at *5 (E.D. La. Aug. 8, 2007) (striking class allegations and fraud claim concerning the use of computerized software because "proving a questionable pattern and practice of undervaluing claims w[ould] require an intensive review of the individual facts of each class member's damage claim. . .").

[98] Richard L. Fenton and Jeffrey A. Zachman, Property and Casualty Insurance, Chapter 19 F., pp. 626-28, in *ABA Class Actions Guide*.

[99] *See Royal Capital Dev. LLC v. Maryland Cas. Co.*, 291 Ga. 262, 265, 728 S.E. 2d 234, 237 (2012) (Insured was not precluded from seeking from real property insurer both costs of repair to building damaged during construction activity on adjacent property and any post-repair diminution in building's value resulting from the damage).

[100] *See e.g., Thompson v. State Farm Fire & Cas. Co.*, 5:14-CV-32 (MTT), 2016 WL 951537, at *1 (M.D. Ga. Mar. 9, 2016) (in part certifying a class of homeowners and designating class representatives to pursue a class action for breach of contract against the insurance company based upon its "failure to assess [damage] for diminished value").

[101] *See Jacobsen v. Allstate Ins. Co.*, 371 Mont. 393, 410, 310 P.3d 452, 464 (2013) (Contention of motorist that insurer's business procedure for obtaining settlements from unrepresented third-party claimants was pattern and was in violation of the state's Unfair Trade Practices Act (UTPA) was common contention central to validity of motorist's action against insurer for violation of UTPA, supporting finding that commonality requirement for class certification of action was met; contention alleged that proposed class members suffered violation of same provision of law in same way, through application of insurer's general business practice).

[102] *See e.g., Moe v. GEICO Indem. Co*., 2020 WL 3396872, at *2 (D. Mont. June 19, 2020) (granting motion to dismiss class allegations in part because "*Jacobsen* supports the use of bifurcated proceeding in some class actions that involve a common question of law to be decided in one proceeding followed by individual hearings on damages to class members," and only involved "narrow review of the district court's classification").

C. First-Party Automobile Physical Damage Claims

Many of the issues present in automobile physical damage cases are similar to those arising in the homeowner's context, in terms of the prevalence of common issues presented by the use of computerized estimating platforms for claim adjustment. For example, a number of class actions in the late 1990s and early 2000s focused on insurers' specification of aftermarket sheet metal parts in automobile repair estimates. Plaintiffs typically alleged the original equipment manufacturer (OEM) parts were of higher quality than non-OEM parts and that by specifying less expensive non-OEM parts, the insurance company was breaching its obligation to pay for repair or replacement of the damaged property with property of "like, kind and quality."[103] Defendant-insurers, on the other hand, typically argued that such determinations could not be made without reference to specific vehicle, parts, and repair, which rendered such claims unsuitable for class action status.

Likewise, a series of first-party automobile claims were also brought to recover for purported "diminished value" losses. In this context, plaintiffs' theory of diminished value usually presupposes an automobile that has suffered significant collision damage, even if properly repaired, loses value which is not typically compensated by insurance and first-party collision claims. Such class action claims are attractive for certification because they involve the assertion of relatively small dollar amounts and typically utilize proposed formulas for determining the amount of diminished value per vehicle. In such matters, defendant-insurers usually challenge the contention there is any inherent diminished value (including one that can be determined by applying an across-the-board formula) and they typically argue that the determination of whether an automobile has suffered diminished value as a result of a collision can only be made on a case-by case basis.[104]

Both the aftermarket-parts class actions and the diminished value class actions demonstrate that plaintiffs typically utilize expert testimony in an effort to establish that common factual propositions, and thereby a predominance of common issues, exist in circumstances where defendants argue those same facts must be adjudicated on a case-by-case basis.[105] In the diminished value cases, plaintiffs usually contend that all automobiles with more than a minimum threshold of surface damage necessarily suffer inherent

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[103] *See e.g., Smith v. Am. Family Mut. Ins. Co.*, 289 S.W. 3d 675, 689 (Mo. Ct. App. 2009) (Insureds brought state court class action for breach of contract against automobile insurer and the court certified the class despite allegation by insurer that in order to establish breach, insureds would have to compare the post-loss condition of each individual class member's vehicle to determine if aftermarket parts were used to repair the vehicle).

[104] *See Sims v. Allstate Ins. Co.*, 365 Ill. App. 3d 997, 1003, 851 N.E. 2d 701, 706 (Ill. App. Ct. 2006) (Automobile owners brought class action lawsuit against automobile insurer, contending that insurer's failure to compensate them for the diminished value of their damaged but repaired vehicle constituted a breach of contract; however, the court held that the applicable policy did not require the insurer to reimburse owners for the diminished value of their damaged but repaired vehicle).

[105] *See e.g., Perez v. State Farm Mut. Auto. Ins. Co.*, 628 Fed. Appx. 534, 535 (9th Cir. 2016) (affirming the denial of class certification in an antitrust case brought under the California Cartwright Act alleging a conspiracy between insurance carriers regarding the specification of aftermarket parts for auto repairs; the court reasoned that plaintiffs could not prove damages on a class-wide basis).

diminished value, while defendants typically proffer examples of automobiles that maintained resale value after repair, notwithstanding the collision damage.[106]

Other automobile physical damage claims practices have been the subject of class actions, such as "betterment," *i.e.*, an insurer's taking of a deduction from the claimant's recovery when the repair or replacement enhanced the quality of the vehicle, such as where worn tires are damaged in an automobile accident and are replaced with new tires.[107] There have also been "omitted repair" cases challenging whether insurers' repair estimates had systematically omitted needed repair processes.[108] Furthermore, class actions against insurers have been permitted by non-insured parties, *i.e.*, who alleged an automobile insurer had engaged in unfair trade practices when it sought to negotiate with auto repair shops over the rates the insurer was willing to pay for repairs.[109]

D. Med-Pay and Personal Injury Protection (PIP) Class Actions

Two general types of putative class actions pertain to Med-Pay and PIP insurance coverage. The **first category** involves class actions alleging that an insurer's use of computer software in deciding whether a medical bill for treatment is reasonable or necessary constitutes either breach of contract or an unfair insurance practice. The pivotal inquiry in such actions, which seek certification of putative medical payments classes of plaintiffs, is dependent upon how the issue is construed. Plaintiffs seeking class certification attempt to construe the issue as whether the third-party medical bill review software (used by the insurers to assist in determining the proper medical payment amounts owed to injured claimants) are generically flawed and, therefore, result in biased payment decisions.[110]

Nevertheless, most of the class action cases decided in this first category have **denied** certification. Such cases have held the determination of liability does not turn on the efficacy of the software that insurers may utilize to assist in medical bill review; but instead have

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[106] *See McGilloway v. Safety Ins. Co.*, SUCV201702089BLS2, 2018 WL 6378404, at *2 (Mass. Super. Oct. 1, 2018) (declining to address "predominance" in motion to dismiss class action complaint and, instead, instructing the parties to engage in discovery before the court would decide the issue in a putative diminution in value class action lawsuit).

[107] *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 80 (E.D. N.Y. 2004) (Class action was superior method of adjudication, for insured's claim that automobile insurer's "betterment" deductions were in breach of its insurance policies that were issued throughout United States, although individual damages issues remained).

[108] *Watts v. Allstate Indem. Co.*, CIV. S-08-1877 LKK, 2011 WL 1833005, at *11 (E.D. Cal. May 12, 2011) (Plaintiff brought a class action lawsuit against his insurance company and the court held Allstate did not act in bad faith by failing to replace a car's undamaged seat belts following a serious accident in accordance with instructions in an owner's manual for the vehicle).

[109] *Artie's Auto Body, Inc. v. Hartford Fire Ins. Co.*, 317 Conn. 602, 623, 119 A.3d 1139, 1150 (2015) (although the class action brought by an auto body repair shop, which led the insurer required appraisers to use low labor rates when estimating cost of auto repairs, was certified, the Supreme Court Connecticut reversed a substantial class action judgment in the repair shops favor; Connecticut's highest appellate court determined that state regulations governing ethics of appraisers did not prohibit automobile insurer from requiring its staff motor vehicle physical damage appraisers to use hourly labor rates agreed on by insurer and approved auto body shops).

[110] Richard L. Fenton and Jeffrey A. Zachman, Property and Casualty Insurance, Chapter 19 F., pp. 630-32, in *ABA Class Actions Guide*.

ruled that any assessment of liability must be based on whether the contractual promise to pay a reasonable amount for the medical bills at issue has been breached. The later determination would mean that individualized issues (as to the reasonableness and/or unreasonableness of the insurer's response to each request for payment) would predominate over any common issues (such as the efficacy of the particular bill review system used by the insurer). Accordingly, a class action would be wholly unmanageable.[111]

A **second category** of case that arises in the Med-Pay and PIP insurance context involves preferred provider organizations ("PPOs"). When insurance companies contract with third-party entities to obtain access to a PPO, plaintiffs sometimes allege that such a practice violates the applicable insurance contract and also constitutes an unfair insurance practice, *i.e.,* to improperly directly access the provider's PPO account. Nevertheless, in deciding such cases courts generally focus on the individual issues raised by each potential plaintiff and usually find that certification is improper.[112]

E. COVID-19 Insurance Claims

The COVID-19 pandemic triggered a number of class actions. [113] With respect to property and casualty insurance, two major types of significant COVID-19 litigation emerged.[114]

The **first type** of COVID-19 class actions pertained to "rate reduction" or "premium rebate" litigation. [115] In such cases, insured-claimants have generally alleged that as a result

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[111] *See e.g., Teodoro v. Allstate Fire & Cas. Ins. Co.*, 217-CV-02135-APG-VCF, 2018 WL 1786818, at *5 (D. Nev. Apr. 13, 2018) (dismissing class allegations with prejudice where plaintiff-class alleged that the insurance company was obligated to pay her and other class members' full medical expenses under certain automobile insurance contracts, because "the trier of fact would need to decide whether [the insurer-defendant] breached its contract with each class member by determining whether their entire billed medical expenses were reasonable and their treatment necessary").

[112] *See e.g., Littleton v. State Farm Mut. Auto. Ins. Co.,* 5:14-CV-05007, 2015 WL 128577, at *9 (W.D. Ark. Jan. 8, 2015) (denying the plaintiff's motion for class certification, the court in part explained as follows: "the Court finds that individual issues predominate over class issues. . . [and that an] . [i]ndividualized inquiry will be needed to determine whether each class member either received a benefit by virtue of [the defendant-insurer's] practice of paying reduced, in-network rates, or incurred a detriment and now owes money to one or more medical providers").

[113] *See e.g., Rivard v. Trip Mate, Inc.*, 22-1554, 2023 WL 2624721, at *4 (3d Cir. Mar. 24, 2023) (Following cancellation of his European trip due to the COVID-19 pandemic, after being reimbursed for the cost of the trip, plaintiff filed a putative class action contending the insurer and plan administrator were unjustly enriched when they retained a portion of plaintiff's travel insurance premium associated with "post-departure" coverage; however, the Third Circuit Court of Appeals affirmed the trial court's pre-certification dismissal because the unjust-enrichment claim was foreclosed by the existence of an enforceable express contract, *i.e.,* the Travel Protection Policy, which governed the same "subject matter" as the unjust enrichment claim); and *North Pac. Mgmt., Inc. v. Liberty Mut. Fire Ins. Co.*, 558 F. Supp. 3d 1097, 1105 (D. Or. 2021) (Certain insured companies brought a class action against the defendant insurer; however, the federal trial court dismissed the action with prejudice for the reason that the business income losses allegedly suffered when companies were required to suspend operations, due to government orders issued in response to the COVID-19 pandemic, did not constitute "direct physical loss or damage to covered property" within meaning of the insureds' business insurance policies; insureds did not lose property or demonstrate physical alteration in condition of their property).

[114] Richard L. Fenton and Jeffrey A. Zachman, Property and Casualty Insurance, Chapter 19 F., pp. 638-40, in *ABA Class Actions Guide*.

of the COVID-19 pandemic, their insurance premiums were disproportionately high in contrast to their lowered risk of loss. To illustrate, in the automobile insurance context, premiums are typically based upon historical data and future projections about the risk of loss, *i.e.*, given the particular insured, the locale, the average miles driven per year, and other relevant historical data. In such actions, plaintiffs have asserted that COVID-19 has materially altered the efficacy of such calculations (for instance, by reducing the number of miles driven per year) and, accordingly, that insurance companies have improperly collected insurance premiums based upon outdated data but have had fewer claims to pay as a result of accidents or other covered losses. Although many insurance companies adjusted the premiums they charged by offering credits or rebates to some insureds, plaintiffs in "premium reimbursement" class actions[116] have sought to recover further premium reimbursements. Claimants have asserted class actions under automobile insurance policies[117] and commercial insurance policies.[118] In addition to defending on the merits, insurers have defended such actions in part by arguing that any such damages present an "individualized" issue for each claimant.

A **second type** of COVID-19 litigation involves business income coverage under commercial insurance policies.[119] Insureds have filed class action lawsuits asserting that commercial property insurers improperly failed to pay business income and extra expense

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[115] *See e.g.*, *Haas v. Travelex Ins. Servs. Inc.*, CV2006171PSGPLAX, 2023 WL 4281248, at *5 (C.D. Cal. June 27, 2023), *appeal dismissed*, 23-55670, 2023 WL 9381382 (9th Cir Dec 5, 2023) (After receiving a full refund of the trip cost, an insured brought a putative class action against travel insurer and administrator seeking a full refund of the insurance premium; however, under California law, insured was not entitled to recover insurance premiums for non-cancellation coverages for trips that did not occur due to cancellations resulting from COVID-19 travel restrictions, where pre-departure and post-departure benefits under the travel insurance policy were intertwined, and the policy, therefore, was indivisible, such that entire risk attached at time of purchase).

[116] *See e.g.*, *Kahl v. United States Fire Ins. Co.*, CV2110359SDWJRA, 2023 WL 5346578, at *1 (D. N.J. Aug 21, 2023) (Plaintiffs filed putative class action to recover travel insurance premiums related to post-departure travel insurance coverage that they allege were unlawfully retained by the defendant insurer from plaintiffs, as well as a nationwide class of individuals who purchased travel insurance for trips that were canceled or postponed due to COVID-19 travel restrictions).

[117] *See Siegal v. GEICO Cas. Co.*, 1:20-CV-04306, 2021 WL 2413155, at *1 (N.D. Ill. June 14, 2021) (Plaintiff filed lawsuit challenging the defendant insurance companies' auto insurance premium rates as unconscionably excessive in light of an alleged reduction in the insurance risk pool due to the COVID-19 pandemic).

[118] *4505 Madison LLC and Fisher Law Llc v. The Travelers Indemnity Company of America*, 2020 WL 7867088 (W.D .Mo.) (Plaintiffs filed a nationwide class action to obtain a partial refund on their business insurance premium because of the COVID-19 pandemic; and the defendant-insurer contended the undisputed policy provisions and the insurers' publicly filed "rules and rates" that govern premium calculations establish that Plaintiffs are entitled to no refund).

[119] *See e.g.*, *Town Kitchen LLC v. Certain Underwriters at Lloyd's, London*, 21-10992, 2022 WL 1714179, at *1 (11th Cir. May 27, 2022) (The Eleventh Circuit Court of Appeals affirmed the district court's dismissal of plaintiff's amended putative class action complaint for failure to state a plausible claim for insurance coverage; where insured claimant's allegations that it was statistically certain that coronavirus particles were present at its property and that their physical presence on tables, countertops, etc., directly and physically damaged property did not constitute direct physical loss of or damage to property, and insured's "loss of use" allegation that restaurant became unsuitable for its intended purpose due to high risk of transmission of physical coronavirus inside premises did not constitute direct physical loss of or damage to property, as required for coverage under business income provision of commercial property policy).

losses[120] incurred as a result of government shutdown orders related to COVID-19 precautions. To date, the overwhelming majority of decision have found that neither government shutdown orders, nor the general presence of COVID-19, constitute "direct physical loss or damage" to property as required for business interruption under most commercial property policies.[121] Such judicial decisions reflect that purely economic loss caused by government-issued shutdown orders do not trigger coverage under policies that require "direct physical loss," *i.e.*, an actual, tangible alteration to business property.[122]

F. Life Insurance and Annuities Class Action Litigation

Life insurance policies and annuities contracts have provisions that often generate misunderstandings about how they are intended to operate, as well as disagreements concerning the respective rights and obligations of the insurance company and the purchaser.[123] When these claims arise, the question of whether they can be prosecuted as a class action requires an analysis of whether the putative class claims predominate over the individual claims of class members.

Class actions have been initiated by owners of life insurance policies and annuities to allege the purchasers were misled when they acquired their contracts.[124] Whether a claim that a purchaser was misled about the instrument they purchased can be maintained as a class action usually turns on the nature of the allegedly misleading information. To illustrate, if a plaintiff contends a sales agent orally misstated the terms of the product or misled the

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[120] *See Gonzalez v. Sentinel Ins. Co. Ltd.*, 20-22151-CIV, 2023 WL 3016864, at *1 (S.D. Fla. Apr. 17, 2023) (Dental practice filed a putative class-action against its first-party insurer seeking to recover for business income losses and extra expenses allegedly sustained from the COVID-19 pandemic; however, the Florida federal trial court concluded the Policy's requirement of "direct physical loss or physical damage" precluded coverage for the dentist's allegations and dismissed the action).

[121] *See e.g., Lindenwood Female Coll. v. Zurich Am. Ins. Co.*, 61 F.4th 572, 574 (8th Cir. 2023) (Contamination exclusion barred coverage for insured private liberal arts college's economic losses attributable to COVID-19 pandemic, and Louisiana endorsement providing exemption from contamination exclusion did not apply; policy provided that time element loss must have been caused by Covered Cause of Loss, which was defined as all risks of direct "physical loss" of or "physical damage" from any cause unless excluded, and "contamination" was excluded); and *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 360 (W.D. Tex. 2020) (Insured barbershop's lost business income as result of government closure orders to deal with COVID-19 pandemic was not covered by policies requiring accidental direct physical loss to property; policies required tangible injury to property).

[122] *See Malaube, LLC v. Greenwich Ins. Co.*, 20-22615-CIV, 2020 WL 5051581, at *8 (S.D. Fla. Aug. 26, 2020) (granting insurer's motion to dismiss and finding that, where the insured had alleged no physical damage to the property other than "that two Florida Emergency Orders closed his indoor dining," such allegations "cannot state a claim because the loss must arise to actual damage" and "it is not plausible how two government orders meet that threshold when the restaurant merely suffered economic losses - not anything tangible, actual, or physical").

[123] *See* Alan S. Gilbert (Ret.) and Laura L. Geist, Life Insurance and Annuities Class Actions, Chapter 19.G, p. 641, *ABA Class Actions Guide*.

[124] *See Rowe v. Bankers Life & Cas. Co.*, 09-CV-491, 2012 WL 1068754, at *9 (N.D. Ill. Mar. 29, 2012) (Plaintiffs alleged the insurance/annuity company engaged in a "common scheme," through standardized misrepresentations and omissions to elderly purchasers, regarding the essential characteristics and true costs of the company's equity-indexed deferred annuities; however, the federal trial court concluded that individualized questions of law and fact relating to whether the defendant engaged in mail and wire fraud and whether that alleged mail and wire fraud was the cause of each class member's injuries predominated over any common questions).

plaintiff about an illustration, such a claim very probably will not be allowed to proceed as a class action because such alleged misrepresentations would be unique to that particular sales transaction and could not be used to support the claims of other putative class members.[125] On the other hand, if the claim is premised upon a misleading illustration generated by the company or a misleading company sales brochure, such a claim might be sufficiently common to all class members who received the illustration or brochure and conceivably could support a class-wide action.[126] In some instances, moreover, oral misrepresentation claims have been allowed to proceed on a class basis when there is evidence of agents being trained to make certain specific oral statements or even in some instances being provided with scripts of what to tell potential customers.[127]

There have also been class actions filed against annuity issuers, asserting that the companies and their agents were part of an unlawful "scheme" that targeted the elderly to use their retirement savings to purchase allegedly inappropriate annuities. Complaints in this area typically assert claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") as well as state consumer protection statutes, and for breach of contract. To satisfy the predominance requirement for class certification, such claims are usually focused on overarching "schemes" and product design to avoid individual questions or require individualized inquiry.[128] Where insurers have established that the claims are inherently idiosyncratic, however, class certification has been denied.[129] Where the allegations and

[125] *See e.g., Adams v. Kansas City Life Ins. Co.*, 192 F.R.D. 274, 282 (W.D. Mo. 2000) (Insured sought class certification for her action against life insurance company, which alleged various common law tort and contract claims in connection with insurer's sale of "vanishing premium" life insurance policy, and the court held that "when considered in its entirety, this case is simply not manageable as a class action because plaintiff's claims are likely to be dominated by individualized, fact-specific issues").

[126] *In re Am. Inv'rs Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 263 F.R.D. 226, 236 (E.D. Pa. 2009) (Predominance requirement for maintenance of class action was satisfied with respect to Racketeer Influenced and Corrupt Organizations Act (RICO) and state law claims based on allegation that defendants engaged in a common scheme to defraud the class members into purchasing long-term deferred annuities through uniform misrepresentations and omissions regarding the annuities products, where insurer required agents in every sale to use insurer's package of materials containing the alleged misrepresentations).

[127] *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 310-11 (3d Cir. 1998) (affirming class certification for fraud allegation where insurer's agents uniformly misled class members with virtually identical oral misrepresentations).

[128] *See e.g., Chambers v. Northamerican Co. for Life & Health Ins.*, 411CV00579JAJCFB, 2016 WL 3625613, at *8 (S.D. Iowa June 13, 2016) (Denying the plaintiffs' motion to certify two classes of index annuity holders, the court found that "any inquiry into either Plaintiffs' RICO claims or Plaintiffs' breach of contract claim requires individualized inquiry, such that common questions of fact and law do not predominate over individual questions and that treatment of all of Plaintiffs' putative class members' claims in a class action lawsuit, would be unmanageable.").

[129] *In re LifeUSA Holding Inc.*, 242 F.3d 136, 145 (3d Cir. 2001) (Neither commonality prerequisite nor class certification requirement that common issues predominate over individual questions was satisfied in putative class action brought by buyers against seller of deferred annuity contracts with respect to claims arising from alleged pre-sale misrepresentations; claims did not arise out of single event or misrepresentation, but rather were based on misrepresentations allegedly made to more than 280,000 buyers by more than 30,000 independent agents whose sales presentations were not uniform or scripted, and claims implicated differing aspects of causation, different state laws, and varying defenses).

claims have shown there is an overarching uniform misrepresentation or product defect, classes have been certified.[130]

Class certification in actions asserting violations of the terms of in-force life insurance contracts often depend upon the uniformity of the terms of the different putative class members' contracts, as well as on whether all putative class members are similarly affected by the challenged conduct.[131] The allegedly improper charging of insurance costs on universal life insurance policies has been a frequent subject of class action litigation. For example, some plaintiffs have claimed that companies are violating insurance contracts by initially setting the cost of insurance rates too high by considering factors, such as company expenses or target profits, that are not expressly listed in the policies as factors to be considered when setting cost of insurance rates.[132] Other claimants have challenged insurance companies for raising the cost of insurance rates on in-force policies in violation of the policy language allowing such increases.[133] Differing contract terms in life insurance contracts can defeat class certification.[134]

IV. A Case Study in Insurance Company Class Action Litigation

In the early 2000s, my office represented multiple insurance companies in defending a series of class action lawsuits, brought by classes of insured-claimants, to recover under the United States federal Fair Credit Reporting Act ("FCRA"). We started our defense of the insurers in the federal trial court in Oregon and at least one of the cases proceeded all the

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[130] *See Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1093 (9th Cir. 2010) (Issues of law or fact common to senior citizens in suit against life insurance company predominated over issues affecting individual members, supporting class certification in action against company for alleged violations of Hawai'i's Deceptive Practices Act, arising out of company's sale of indexed annuity products (IAPs); senior citizens' reliance would be judged by an objective reasonable person standard, and thus no individual reliance issues would make case inappropriate for class certification).

[131] Alan S. Gilbert (Ret.) and Laura L. Geist, Life Insurance and Annuities Class Actions, Chapter 19.G, p. 648, *ABA Class Actions Guide*.

[132] *Mai Nhia Thao v. Midland Nat. Life Ins. Co.*, 09-C-1158, 2012 WL 1900114, at *10 (E.D. Wis. May 24, 2012) (Representative plaintiff alleged breach of contract claim challenging a life insurer's ability to set its discretionary cost of insurance rates for universal life insurance products—and plaintiff assiduously avoided claims that might implicate factual inquiries; nonetheless, the district court, citing *Dukes*, subjected the merits of the plaintiff's theory to a "rigorous analysis" and denied certification because different pricing preferences among policyholders meant that there was no "common grievance" appropriate for certification).

[133] *See e.g., Yue v. Conseco Life Ins. Co.*, 282 F.R.D. 469, 476 (C.D. Cal. 2012) (Policyholder satisfied commonality requirement for class certification in action alleging that insurer improperly raised its monthly cost of insurance (COI) rates for its life and universal life policies, despite insurer's contentions that consideration of each class member's subjective understanding at time each policy was issued would be necessary, and that some policyholders would not suffer injury from increase, where policyholder asserted claims for breach of contract, breach of covenant of good faith and fair dealing, and violation of California's Unfair Competition Law (UCL), and UCL claim was based on unfairness of insurer's rate increases, not on any deception or fraud, COI charges significantly increased for all proposed class members, and all class members' claims depended on interpretation of policies' "cost of insurance" provision).

[134] *Huffman v. Prudential Ins. Co. of Am.*, 2:10-CV-05135, 2016 WL 5724293, at *6 (E.D. Pa. Sept. 30, 2016) (In putative class action alleging ERISA violations brought by plaintiffs who were beneficiaries of employer-sponsored life insurance policies, the Court determined that language in the approximately 2,200 plans through which the life insurance was provided to employees presented individual issues that prevented class certification).

way up to the United States Supreme Court. Along the way, federal trial and appellate courts, including the Ninth Circuit Court of Appeals, issued a series of opinions. Ultimately, federal law regarding FCRA was clarified and refined standards were established.

A. Overview of the Fair Credit Reporting Act ("FCRA)

The United States Congress enacted FCRA in 1970 to ensure fair and accurate credit reporting, to promote efficiency in the banking system, and to protect consumer privacy.[135] The Act requires, among other things, that "any person [who] takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must notify the affected consumer.[136] The Act defines "consumer report" in part as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . credit or insurance to be used primarily for personal, family, or household purposes."[137]

The FCRA notice must point out the "adverse action," explain how to reach the agency that reported on the consumer's credit and tell the consumer that he can get a free copy of the report and can dispute its accuracy with the agency. As it applies to an insurance company, "adverse action" is "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for…"[138]

FCRA provides a private right of action against businesses that use consumer reports but fail to comply. If a violation is negligent, the affected consumer is entitled to actual damages.[139] If willful, however, the consumer may have actual damages, or statutory damages ranging from $100 to $1,000, and even punitive damages.[140]

As the United States Supreme Court summarized the key issues before it, in its 2007 Opinion:

> The Fair Credit Reporting Act (FCRA or Act) requires notice to any consumer subjected to "adverse action . . . based in whole or in part on any information contained in a consumer [credit] report." 15 U.S.C. §1681m(a). Anyone who "willfully fails" to provide notice is civilly liable to the consumer. §1681n(a). The questions in these consolidated cases are whether "willful

[135] *See* 84 Stat. 1128, 15 U.S.C. § 1681; *TRW Inc. v. Andrews*, 534 U.S. 19, 23, 122 S. Ct. 441, 444, 151 L. Ed. 2d 339 (2001).
[136] 15 U.S.C. § 1681m(a).
[137] 15 U.S.C. § 1681a(d)(1).
[138] § 1681a(k)(1)(B)(i).
[139] § 1681o(a).
[140] § 1681n(a).

> failure" covers a violation committed in reckless disregard of the notice obligation, and, if so, whether petitioners [the defendant insurance companies] committed reckless violations.[141]

B. The Federal Trial Court Decisions

Plaintiffs initiated a series of class actions, in Oregon federal court, on behalf of individuals who purchased personal lines of insurance from various insurance companies. The plaintiffs generally alleged that the insurers violated the FCRA when they took adverse actions with respect to the underwriting of the insurance policies of plaintiffs and others similarly situated on the basis of information contained in their consumer credit reports and then failed to notify them of those adverse actions.[142]

The federal trial court judge serially granted the defendant-insurers' motions for summary judgment in the respective actions, dismissing them, and on the key FCRA issues generally ruled the insurers had not taken an actionable "adverse action" against the respective plaintiffs. The trial court judge's general reasoning is summarized in the following passage from one of the trial court opinions:

> In *Razilov v. Nationwide Mut. Ins. Co.*, this Court recently examined and construed the meaning of "takes" as used in § 1681m(a) [concerning taking an "adverse action]. *See* No. CV 01–1466–BR, 2003 WL 245706 (D. Or. Jan. 21, 2003). This Court found the dictionary definition, "to undertake and make, do, or perform . . . ([take] legal action)," consistent with the text of § 1681m(a) and the statutory scheme as a whole. *Id.* at *11. This Court also reasoned the plain language of the statute requires an active definition of "takes": "a person 'takes' an adverse action in connection with insurance when the person

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[141] *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52, 127 S. Ct. 2201, 2205, 167 L. Ed. 2d 1045 (2007).

[142] *See Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1309 (D. Or. 2003), *overruled by Ashby v. Farmers Ins. Co. of Oregon*, 143 Fed. Appx. 55 (9th Cir. 2005), *abrogated by Reynolds v. Hartford Fin. Servs. Grp., Inc.*, 416 F.3d 1097 (9th Cir. 2005); *Razilov v. Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977, 978 (D. Or. 2003), *abrogated by Reynolds v. Hartford Fin. Servs. Grp., Inc.*, 416 F.3d 1097 (9th Cir. 2005), *abrogated by Reynolds v. Hartford Fin. Servs. Grp., Inc.*, 426 F.3d 1020 (9th Cir. 2005), *abrogated by Reynolds v. Hartford Fin. Servs. Grp., Inc.*, 435 F.3d 1081 (9th Cir. 2006); *Ashby v. Farmers Grp., Inc.*, 261 F. Supp. 2d 1213, 1215 (D. Or. 2003), *rev'd*, 144 Fed. Appx. 625 (9th Cir. 2005), *abrogated by Reynolds v. Hartford Fin. Servs. Grp., Inc.*, 416 F.3d 1097 (9th Cir. 2005), *abrogated by Reynolds v. Hartford Fin. Servs. Grp., Inc., 426 F.3d 1020* (9th Cir. 2005), *abrogated by Reynolds v. Hartford Fin. Servs. Grp., Inc.*, 435 F.3d 1081 (9th Cir. 2006); *Rausch v. Hartford Fin. Servs. Grp., Inc.*, CV 01-1529-BR, 2003 WL 22722061, at *1 (D. Or. July 31, 2003), *rev'd. and remanded sub nom. Reynolds v. Hartford Fin. Servs. Grp., Inc.*, 416 F.3d 1097 (9th Cir. 2005), *opinion withdrawn and superseded*, 03-35695, 2005 WL 2416126 (9th Cir. Oct. 3, 2005), *opinion amended and superseded*, 426 F.3d 1020 (9th Cir. 2005), *opinion withdrawn and superseded*, 435 F.3d 1081 (9th Cir. 2006), *rev'd. sub nom. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007), *and rev'd. and remanded sub nom. Reynolds v. Hartford Fin. Servs. Grp., Inc.*, 426 F.3d 1020 (9th Cir. 2005), *and opinion withdrawn and superseded*, 435 F.3d 1081 (9th Cir. 2006), *and rev'd. sub nom. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007).

> denies, cancels, increases in price, or reduces or changes adversely the terms or amounts of insurance based on information in a consumer credit report." *Id.*, at *10. Thus, this Court found an internal decision-making process [to set insurance premium rates] is insufficient to trigger the notice requirement under § 1681m(a). *Id.* (citing analogous reasoning in *Obabueki v. Int'l Bus. Machs. Corp.*, 145 F. Supp. 2d 371 (S.D. N.Y. 2001), *aff'd*, No. 02–7499, 2003 WL 220411 (2d Cir. Feb. 3, 2003)). Accordingly, this Court concluded the duty to give the notice required under § 1681m(a) is not triggered by establishing a decision-making process; providing information; and setting policies, guidelines, and standards that lead to the taking of an adverse action. *Razilov*, 2003 WL 245706, at *14.[143]

1. The *Mark/Gustafson v. Valley Insurance Company* Trial Court Case.

In *Mark v. Valley Insurance Company*,[144] on a question of first impression, the insured-claimants brought a class action against Valley Insurance Company ("Valley"), in which plaintiffs alleged Valley had violated the FCRA when it charged more than its optimal rate for automobile insurance based upon information in the insured's consumer credit report and then failed to notify the insured of the "adverse action." Because Valley was a "new" company, not previously in operation, all of Valley's insurance customers were "new business customers" whom Valley did not insure previously. In setting the insurance premiums for the "new business customers," Valley took into account certain statistically based information showing a correlation between poor credit history and an increased likelihood of insurance claims.[145] Accordingly, when formulating premium quotes on automobile insurance, Valley in part considered a numerical score that was calculated by applying an analytical model that predicted the likelihood of future insurance claims based upon information in a consumer's credit history. Underlying this action, Valley did not provide plaintiffs with a FCRA "adverse action" notice when it issued his policy.[146]

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[143] *Ashby v. Farmers*, 261 F. Supp. 2d at 1218.

[144] *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307 (D. Or. 2003), *overruled* by *Ashby v. Farmers Ins. Co. of Oregon*, 143 Fed. Appx. 55 (9th Cir. 2005), *abrogated* by *Reynolds v. Hartford Fin. Servs. Grp., Inc.*, 416 F.3d 1097 (9th Cir. 2005) (The federal trial court held that the insurer did not take an "adverse action" against the insureds, within meaning of the Fair Credit Reporting Act (FCRA), when the insurer issued single initial premium charge to insured for automobile insurance that was more than insurer's optimal rate based on insureds' consumer credit report; insurer's use of credit multiplier in setting charge, was not itself a "charge," and initial charge did not increase any other charge).

[145] 275 F. Supp. 2d at 1309.

[146] 275 F. Supp. 2d at 1311.

In *Mark v. Valley*, my office, representing Valley, filed a Motion for Summary Judgment on the following points:

(1) Arguing that no "reasonable juror" could conclude Valley failed to institute reasonable procedures to ensure FCRA compliance or, alternatively, that Valley "willfully" violated FCRA;

(2) Contending that Valley complied with FCRA's notification requirements when the insurance company mailed notices to the plaintiffs several months after the insurer allegedly took the adverse action;

(3) Asserting Valley had no duty to provide notice to the Named Insured, plaintiff Gustafson, or others similarly situated, because the insurance company in fact did not take an "adverse action" against the insureds when the insurer charged more than its "optimal rate" based upon consumer credit report information; and

(4) Maintaining that no reasonable juror could conclude Valley "willfully" failed to comply with its FCRA notification obligations.[147]

The federal trial court outright denied Valley's Motions for Summary Judgment as to above points (1) and (2), and "took under advisement" Valley's Motions for Summary Judgment as to above points (3) and (4).[148]

Concerning Valley's position it had not taken an "adverse action," referred to in above subparagraph (3), the Oregon federal trial court observed neither the Court nor the parties had been able "to find any controlling authority regarding the proper interpretation of FCRA's adverse action definition."[149] The Court, therefore, applied FCRA's "plain and unambiguous meaning" and concluded an insurance-specific definition of "adverse action" controlled over a more general "'catchall'" statutory definition.[150]

The Court noted, moreover, that FCRA does not define the word "increase." Nonetheless, utilizing an insurance-specific statutory definition of "adverse action," the Court reasoned "the statute plainly means an insurer takes adverse action if the insurer makes greater (*i.e.*, larger) the price demanded for insurance."[151] The Court was further persuaded that "if the plain meaning of a statute is unambiguous, the Court need look no further for guidance as to the interpretation of the statue."[152] The Court concluded and reasoned as follows:

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[147] 275 F. Supp. 2d at 1309.
[148] *Id.*
[149] 275 F. Supp. 2d at 1314 (citing 15 USC § 1681A(k)(1)).
[150] 275 F. Supp. 2d at 1315 (citing 15 U.S.C. § 1681a(k)(1)(B)(iv)).
[151] 275 F. Supp. 2d at 1317.
[152] 275 F. Supp. 2d at 1317-18.

> Based on the foregoing, the Court concludes § 1681a(k)(1) is unambiguous and plainly means an insurer does not "increase any charge for insurance" and, therefore, does not take any adverse action against an insured when the insurer merely issues a single, initial charge to an insured. The Court further concludes an insurer cannot increase a charge for insurance unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand. Although Valley Insurance charged Gustafson a higher premium than it would have charged him if his credit history had been better, the undisputed evidence establishes Valley Insurance issued only a single charge to Gustafson. Gustafson, therefore, has failed to raise a genuine issue of fact regarding whether Valley Insurance took an adverse action with respect to the underwriting of Gustafson's insurance. Accordingly, the Court grants Valley Insurance's Motion for Summary Judgment as to the claim of Gustafson and all others similarly situated and dismisses with prejudice those claims against Valley Insurance.[153]

Concerning Valley's Motion and arguments on "willfulness," referred to in above subparagraph (4), the Oregon federal trial court ruled and explained as follows:

> Because the Court has granted summary judgment to Valley Insurance as to the claims of Gustafson and all others similarly situated on the ground that Valley Insurance did not violate FCRA, the Court denies as moot Valley Insurance's Motion to the extent it is based on Gustafson's failure to show willfulness.[154]

Ultimately, in *Marks v. Valley*, the parties settled the class action allegations and claims by plaintiffs Marks[155] and Gustafson[156] when Valley voluntarily established certain Class Action Settlement Funds without the necessity of a trial, and with the Court awarding attorney fees and expenses to plaintiffs' class counsel.

[153] 275 F. Supp. 2d at 1318-19.
[154] 275 F. Supp. 2d at 1319.
[155] *Gustafson v. Valley Ins. Co.*, CV 01-1575-BR, 2004 WL 2260605, at *1 (D. Or. Oct. 6, 2004).
[156] *Mark v. Valley Ins. Co.*, CV 01-1575-BR, 2005 WL 1334374, at *3 (D. Or. May 31, 2005).

2. The *Rausch/Reynolds v. Harford Financial Services Group* Federal Trial Court Case

Originally styled as *Rausch v. Hartford*,[157] at the Oregon federal trial court level (and on appeal), my office represented defendant The Hartford Financial Services Group, Inc. ("Hartford") in FCRA class action litigation. Filed as a putative class action, in their First Amended Complaint, the plaintiffs asserted that Hartford took "adverse actions" concerning the plaintiffs and all those similarly situated, based on information contained in consumer reports; and also that Hartford failed to provide the plaintiffs with adequate notification of such "adverse actions" as required by FCRA.[158] Specifically, the plaintiffs alleged Hartford increased the "charge" for or "adversely" changed the terms of insurance because the plaintiffs did not receive the best available premium for their insurance policies based on information contained in their credit reports.

In *Rausch/Reynolds v. Hartford*, as a threshold matter, the plaintiffs did not sue the proper insurance companies who had issued the insurance policies underlying the class action. Accordingly, the court granted that part of Hartford's Motion for Summary Judgment arguing that the specifically named Hartford defendants could not be liable because they did not issue the policies in question. The Court explained:

> Consistent with the Court's previous decisions and analyses in these cases, the Court concludes Defendants could not have increased Plaintiffs' premiums or adversely changed the terms of their insurance because Defendants were not the parties that entered into the insurance contracts with Plaintiffs. The Court, therefore, concludes Defendants are entitled to summary judgment as to Plaintiffs' FCRA claims because the undisputed facts establish Defendants could not have taken the alleged adverse actions against Plaintiffs.[159]

Hartford also moved for summary judgment on the basis that no "adverse action" had been taken against the plaintiffs by any Hartford-affiliated entity at the time the plaintiffs' insurance premiums were set, for the reason that an initial setting of a premium does not constitute an increase in the "charge" for insurance. The Court agreed with Hartford and issued summary judgment against the plaintiffs' FCRA claims because "the initial setting of

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[157] *Rausch v. Hartford Fin. Servs. Grp., Inc.*, CV 01-1529-BR, 2003 WL 22722061 (D. Or. July 31, 2003), *rev'd. and rem'd. sub nom. Reynolds v. Hartford Fin. Servs. Grp., Inc.*, 416 F.3d 1097 (9th Cir. 2005), *opinion withdrawn and superseded*, 03-35695, 2005 WL 2416126 (9th Cir. Oct. 3, 2005), *opinion amended and superseded*, 426 F.3d 1020 (9th Cir. 2005), *opinion withdrawn and superseded*, 435 F.3d 1081 (9th Cir. 2006), *rev'd. sub nom. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007), and *rev'd. and rem'd. sub nom. Reynolds v. Hartford Fin. Servs. Grp., Inc.*, 426 F.3d 1020 (9th Cir. 2005), and *opinion withdrawn and superseded*, 435 F.3d 1081 (9th Cir. 2006), and *rev'd. sub nom. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007).

[158] 2003 WL 22722061, at *1 (citing 15 USC § 1681.

[159] 2003 WL 22722061, at *1.

their insurance premiums did not constitute 'adverse actions' under FCRA."[160] The trial court reiterated as follows:

> This Court previously concluded an insurer cannot "increase" a charge for insurance unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report. *See Mark v. Valley Ins. Co*. . . . (issued July 10, 2003). The Court similarly concludes an insurer cannot "reduce" or "unfavorably or adversely change" the terms of insurance unless such terms previously existed and the insurer subsequently alters those terms in an unfavorable manner. Based on this Court's decision and analysis in *Mark*, the Court concludes Defendants also are entitled to summary judgment as to Plaintiffs' FCRA claims because the initial setting of their insurance premiums did not constitute "adverse actions" under FCRA.[161]

Although an appeal to the Ninth Circuit Court of Appeals was filed on behalf of both Rausch and Reynolds, Rausch did not pursue the appeal,[162] leaving Reynolds as the first named class action plaintiff.

C. Ninth Circuit Court of Appeals Decision

The Ninth Circuit Court of Appeals reversed the federal trial court judge's primary rulings in favor of the defendant-insurers[163] and remanded for further proceedings consistent with its appellate opinion. The Ninth Circuit's holdings can be summarized in part as follows:

> After withdrawing its prior opinions, the Court of Appeals, held:
>
> (1) as a matter of first impression, FCRA's "adverse action" notice requirement for insurers applies to the insurance premium rate first charged in initial issues of policies of insurance;
>
> (2) the adverse action notice requirement applies whenever a consumer would have received a lower rate for insurance had his credit information been more favorable;

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[160] 2003 WL 22722061, at *2.
[161] 2003 WL 22722061, at *2 (footnote omitted)).
[162] *Reynolds v. Hartford Fin. Servs. Grp., Inc.*, 435 F.3d 1081, 1086 n.3 (9th Cir. 2006), *rev'd. sub nom. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007).
[163] *Reynolds v. Hartford Fin. Servs. Grp., Inc.*, 435 F.3d 1081 (9th Cir. 2006), *rev'd. sub nom. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007) (withdrawing and superseding the Ninth Circuit's prior opinions at 416 F.3d 1097 and 426 F.3d 1020 (9th Cir. 2005)).

(3) adverse action notice requirement applies whenever credit report in question is missing or insufficient for calculation of credit rating;

(4) notice that did not disclose that rates had been increased because of information in credit report was inadequate;

(5) potential liability as to family of insurance companies was not limited to policy issuer;[164]

(6) Under FCRA's punitive damages provision, "willful" noncompliance requires that the act in question was performed knowingly and intentionally, not negligently; however, the offending act need not be the product of malice or evil motive;[165] and

(7) "willful" noncompliance, under FCRA's punitive damages provision, includes reckless disregard.[166]

D. United States Supreme Court Opinion

Two cases of the series of FCRA class action cases were appealed to the U.S. Supreme Court, which granted certiorari and issued a decision.[167] The Supreme Court's rulings can be summarized in part as follows:

(1) Willful failure covers a violation committed in reckless disregard of the FCRA notice obligation. Where willfulness is a statutory condition of civil liability, it is generally taken to cover not only "knowing" violations of a standard, but "reckless" ones as well;[168]

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[164] 435 F.3d at 1081.
[165] 435 F.3d at 1097.
[166] In *Reynolds*, the Ninth Circuit summarized as follows regarding the element of "reckless" conduct:

> In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless disregard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.

435 F3d at 1099
[167] *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007).
[168] 551 U.S. at 48.

(2) Initial rates charged for newly issued insurance policies to first-time insureds may constitute an "adverse action" under FCRA. The Supreme Court explained "there is nothing about insurance contracts to suggest that Congress might have meant to differentiate [initial] applicants from existing customers when it set the [FCRA] notice requirement; the newly insured who gets charged more owing to an erroneous report is in the same boat with the renewal applicant. We therefore hold that the "increase" required for "adverse action," 15 U.S.C. § 1681a(k)(1)(B)(i), speaks to a disadvantageous rate even with no prior dealing; the term reaches initial rates for new applicants";[169]

(3) One insurer in the appeal before the U.S. Supreme Court was found not to have violated FCRA in the first instance. The Court reasoned: "[b]ecause the initial rate [the defendant insurer] offered [the plaintiff] was what he would have received had his credit score not been taken into account, [the insurer] owed him no adverse action notice under § 1681m(a)";[170] and

(4) Although the other insurance company in the appeal before the U.S. Supreme Court "might have" violated FCRA, the Court determined the insurer had not acted "recklessly." The Court elaborated that "[e]ven if [the insurance company] violated FCRA when it failed to give [the plaintiffs] notice on the mistaken belief that § 1681m(a) did not apply to initial applications, the company was not reckless."[171] Accordingly, "reckless" was found to mean that the insurer not only violated a reasonable reading of the FCRA but also "ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless."[172]

CONCLUSION

Class actions remain a fertile ground of litigation in the United States. Major companies, including insurers, are frequent targets. Federal Rule of Civil Procedure 23 guides federal court class actions and state procedural rules apply in state courts. Relying on in-house and outside counsel, apart from the underlying merits of the case, corporate defendants utilize a variety of defenses grounded in statutory criteria that must be satisfied to qualify a certified class of claimants and to maintain class status. Some companies also employ mandatory contractual arbitration provisions and class action waivers as a risk management tool.

[169] 551 U.S. at 62-63 (footnote omitted).
[170] 551 U.S. at 49.
[171] 551 U.S. at 49.
[172] 551 U.S. at 69 (misreading statute did not constitute reckless violation).