Jim's Perspective…

Class Action COVID-19 Litigation

State Senator Tom Briese introduced LB139 which is intended to provide businesses with protection from COVID-related lawsuits. It does not include protection for employer/employee workplace related COVID litigation, but focuses more on small businesses such as convenience stores, restaurants, and retail establishments. Recently, former state senator Andrew La Grone, an attorney who represented District 49 (Gretna) from 2019 to 2021, wrote an op-ed piece in the Lincoln JournalStar in support of this bill. He pointed out that so far, more than 8,000 COVID-related lawsuits have been filed and that lawyers are advertising for more COVID lawsuits to be filed. His article focuses on people who get physically ill from the disease and accuse a business of being responsible for their illness. There is no discussion in the article about insurance policy coverage for financial loss due to the pandemic which is understandable since LB139 does not address this issue. However, as I have previously mentioned, there are thousands of insurance coverage cases related to COVID's impact on business now pending in the United States.

Recently, I saw where there was a new type of class action lawsuit filed against auto insurance companies. According to a JournalStar Associated Press article, a Las Vegas law firm has sued ten auto insurers in the Clark County District Court (Las Vegas) contending that the companies charged excessive insurance premiums during the pandemic by failing to account for a drop in driving and automobile accidents. The class action litigation acknowledges that some insurers provided discounts due to the emptier roads, but it is alleged that the discounts or refunds did not offer "any meaningful relief that actually reflects the reduction in cars on the road and reduced driving during the pandemic." It is alleged that the rates charged during the pandemic violated the state's insurance rate filing law which prohibits insurers from charging rates that are excessive. This law is part of an NAIC model rate filing law that is in effect in all states that provides that rates may not be excessive, inadequate or unfairly discriminatory. The ten insurers include in part; State Farm, USAA, GEICO, Liberty Mutual, Farmers Insurance Group, Progressive and Allstate.

In Nevada, after the governor ordered the closure of nonessential businesses, the Nevada-California border, which usually sees highway traffic backups when tourists pour into Vegas for a weekend trip, had 66% less traffic in April 2020 than in the same month in 2019. An attorney for the Plaintiffs said the 15% to 25% one-time refunds by auto insurers was "totally woefully inadequate." Incidentally, the Consumer Federation of America issued a press release last September expressing a similar opinion.

I wonder if these companies had an underwriting profit in Nevada for auto business written in 2020? As you know, auto insurance rate making is not an exercise in chance or guess work. It involves the law of large numbers and it must be based on an actuarial analysis of loss data. For a rate to be actuarially sound, it must involve loss data over a three to five year period. So you can't just change the rate based upon a few months of a different type of loss exposure or loss experience. Over time, the loss data from 2020 will be factored into the filed rate. Granted, the pandemic presents a unique situation, but it is not easy to suddenly, or immediately, know exactly how to adjust every consumer's auto insurance premium payment because a pandemic causes a reduction in auto travel. Besides, less travel will not exist for everyone. Essential workers may be traveling as much as always, so should they receive an equal share of a class action judgment against the insurance companies? Should this class action lawsuit result in a large award for the plaintiffs in the class, I shudder to think how many of these types of class actions will be filed across America. This type of litigation won't be limited to the pandemic. What if there are no hurricanes in Florida this year? Should property insurers refund a large amount of premium to insurance consumers? What about state regulators? Insurance rates charged must be filed and reviewed or approved by every department of insurance. Do filed rates now mean nothing? Is it now up to a court and a jury to decide how much an insurance company can retain as earned premium for each calendar year? Granted, the pandemic presents an unusual and unique situation, but I worry about what this type of class action litigation, if successful, might portend for insurance companies and rate-making in the future.

Another issue involving this litigation is that class action lawsuits are perceived by some as a bad element of civil litigation. Class action lawsuits are allowed because there are certain types of civil negligence incidents that involve an individual loss that is so small that it doesn't make economic sense for each individual to sue the wrongful party. For example, there might be a false advertising issue in which a food manufacturer might use a misleading food product label. It wouldn't make sense for an individual to sue to recover a $1.25, but if there is a class of millions of purchasers of an "all natural" food product which isn't "all natural" then there is an incentive to pursue a claim on a class action basis. A concern with this type of litigation is that the members of the class may receive a small check from the class action judgment, but the plaintiffs' law firm gets a big check that might be a 25 to 33 percent share of the entire judgment as a contingent fee. The fee is usually subject to court approval, and the court may approve a fee much less than the typical contingent fee, but it is still an issue for critics of class action litigation. Incidentally, the Las Vegas law firm that filed this insurance class action case also oversaw and managed various lawsuits and law firms and thousands of victims in the Route 91 Harvest festival shooting litigation against MGM Resorts International, owner of the festival venue and Mandalay Bay, where the gunman was situated. A judge last year approved an $800 million settlement for all of the victims and their associated lawsuits represented or managed by this firm. It appears the firm operated as a kind of third-party negotiator to help reach a settlement of all of this litigation. MGM paid $49 million, while insurance companies paid $751 million. Wow!

Well, maybe I am over-reacting. The insurance companies have many distinguished professional representatives to fight this type of litigation. Farmers Insurance Group has the nutty Professor Burke! GEICO, of course, has Gecko. There is no one more convincing than him. State Farm will have Jake standing by Chris Paul in the court room. Chris will act very concerned and think something bad is going to happen. Maybe a big jury verdict against State Farm. But no! A little girl riding a bike will enter the court room and ride by Chris, but not hit him, and he will look bewildered and relieved and Jake will comfort Chris by saying that nothing really happened and then tell the court that State Farm always gives you "the real deal" and nobody else does! Liberty Mutual will be represented by LiMu EMU, and of course Progressive will have the genial and upbeat Flo.

I'm sorry. I will stop with the insurance advertising mess. However, I think it is a big mistake for insurance companies to go down the advertising road that many of them are headed. It suggests insurance is funny, or stupid, or just no big deal, and that some companies are cheaters and only one company gives consumers a fair deal. Nonsense. Finally, plaintiffs' lawyers have used these nonsensical commercials in bad faith litigation. These stupid commercials do not come across well to a jury after listening to a policyholder on the witness stand, in tears, describing her financial problems as a result of a wrongful denial of a claim.

James B Dobler

Jim Dobler, CPCU
PIA Legislative Coordinator
Questions or Comments? Please email jbdobler@outlook.com