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Class Actions Resulting from COVID Claims and Bad Faith: Part 1

With policies containing different terms and each claim involving different factual scenarios, can policyholders establish a class action claim for bad faith?

By **Stacy Manobianca and Andres Avila** | February 09, 2021

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In the year following the global outbreak of COVID-19, thousands of businesses have experienced unprecedented financial hardship. It is no surprise that surviving businesses are looking to their insurance policies to recover lost business income incurred as a result of the pandemic. Because every insurance policy contains an implied duty of good faith and fair dealing, which requires that insurers act reasonably in processing, investigating, and paying for insurance claims, policyholders expect that their claim will be handled accordingly. However, insurers have consistently denied many COVID-19 related insurance coverage claims. In some cases, insurers have denied COVID-19 related claims before completing any investigation of the claim.

As a result, many policyholders have filed bad faith insurance claims against their insurers in addition to the standard insurance breach of contract claim. Some of those policyholders have sought strength in numbers and have united to create and certify class actions against their insurers. With policies containing different terms and each claim involving different factual scenarios, can policyholders establish a class action claim for bad faith?

Groups of policyholder plaintiffs in Massachusetts and Illinois are currently engaging in this very exercise. In two pending cases, policyholders are seeking class action certification against insurers that have, allegedly, systemically denied claims for COVID-19-losses without conducting a reasonable investigation. Although a lawsuit seeking class certification must meet a number of additional requirements before it can proceed to trial, if met, a class action can be a much more efficient mechanism than an individual claim for demonstrating the full scope of large-scale improper conduct by insurers in the context of COVID-19 business interruption insurance claims.

Class Action Certification

The Federal Rules of Civil Procedure delineate specific requirements to establish a class, which must be demonstrated by a preponderance of the evidence.[1] First, an action must meet the four conditions under Fed. R. Civ. P. 23(a): (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23 also creates an implicit requirement that requires class members to be identifiable, or ascertainable.[2]

The primary hurdle[3] for policyholders seeking class certification in bad faith action is commonality. To satisfy this requirement, policyholders must demonstrate the existence of issues of law or fact common to all class members. The test for whether common questions predominate is whether the successful adjudication of the plaintiffs' claim will establish a right to recovery for all class members.[4]

Specifically, the United States Supreme Court has held that putative class action plaintiffs must establish that:

- (i) The proceedings will "generate common answers" that drive the resolution of the litigation;
- (ii) The determination of a common class-wide question must simultaneously serve to resolve all claims for the class as whole;
- (iii) The resolution of a class-wide contention must address an issue that is central to the validity of each individual claim.

In the COVID-19 insurance coverage class action context, policyholders are advocating common questions of contract interpretation, which is normally a question of law. Policyholders will need to show that there is a common question that "predominates" over individual questions to satisfy the commonality requirement.[5] Typically, this argument includes assertions that the presence of COVID-19 on commercial property or the existence of a shutdown civil authority order satisfies the widely used insurance coverage trigger of "direct physical loss of or damage to property." Policyholders also argue that certain virus, pollution, communicable disease, and similar exclusions are common enough to meet the commonality requirement.

In response, insurers argue that the differences in policy language (i.e., the terms, conditions, and exclusions), factual causation, losses, and damages, prevent policyholders from establishing commonality. For instance, some policies may contain specific virus-related exclusions, and others may contain pollution exclusions or communicable disease exclusions addressing viruses. These differences in policy language may, in fact, make it difficult for policyholders to establish commonality, and thus obtain class certification.

Bad faith allegations pose an even greater challenge. Bad faith may arise with respect to an individual policyholder when the insurer breaches the implied duty of good faith contained in its insurance contracts, such as when the insurer preemptively denies a claim without conducting a reasonable investigation. Unless there can be a showing of a market wide insurance bad faith practice by any given carrier, the specific facts of any individual policyholder may not always lend themselves to a *prima facie* case of bad faith for a class as a whole. However, putative class members that can establish institutional bad faith – where, for example, the insurer has a pattern and practice of denying claims without a reasonable investigation, class certification is more likely.

Insurance Bad Faith Principles

The legal standards and remedies for bad faith conduct by insurers vary significantly from state to state. Although not every wrongful denial of coverage gives rise to a bad faith claim, an insured who succeeds on a bad faith claim may be able to recover damages beyond the policy limits, such as attorney fees, penalties, and punitive damages.

Two states that have recently expanded on bad faith jurisprudence are Illinois and Massachusetts. The very same states that are currently dealing with pending insurance bad faith COVID-19 class action litigation.

In Illinois, bad faith claims are governed by Section 155 of the Illinois Insurance Code.[6] A policyholder or assignee bringing a claim must prove (1) the insurer denied coverage or delayed settlement (2) the complained of action was vexatious and unreasonable. To determine whether an insurer acted vexatiously and unreasonably, the court applies a totality of circumstances test, which can include factors such as: (1) the advice of the insurance company's own adjuster; (2) the refusal to negotiate; (3) the advice of the defense counsel of the insured; (4) the nature of the communication with the insured; (5) the adequacy of investigation and defense; (6) whether there existed a substantial prospect of an adverse verdict; and (7) the potential for damages in excess of the policy limits.[7]

In Massachusetts, insurance bad faith claims are governed by two statutes: (1) chapter 93A, "Regulation of Business Practices for Consumers' Protection" and (2) chapter 176D, "Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance." A policyholder arguing insurance bad faith in Massachusetts must prove four elements: (1) the insurer committed an unfair or deceptive act or practice, (2) the unfair practice occurred while conducting any trade or commerce, (3) the policyholder suffered an injury, and (4) the insurer's unfair practice caused the injury.[8] A business stating a claim under 93(A) must generally plead a fifth element: there was a "commercial relationship" between the business and the defendant. [9]

Footnotes

1. Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012).
2. Then, an action must satisfy one of the requirements of 23(b): (1) prosecuting separate actions would create a risk of either inconsistent adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class, or adjudications with respect to individual class members that would be dispositive of the interests of other members not parties to the individual adjudications or would substantially impair their ability

to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate for the class as a whole; or (3) the court finds that questions of law or fact common to the class predominate over questions affecting individual members, and a class action would be superior to other available methods.

3. Another hurdle for policyholders seeking to be certified as a class is the ascertainably requirement. Ascertainability mandates that the class members must be easily identified and determined using an objective criteria. Courts require a rigorous analysis showing that the class can be readily ascertained before granting certification. Ascertainability for class actions is a heightened standard requiring policyholders to "demonstrate [their] purported method for ascertaining class members is reliable and administratively feasible." Carrera v. Bayer Corp., 727 F.3d 300 (3rd Cir. 2013).
4. Weiss v. Waterhouse Securities, Inc., 804 N.E.2d 536, 543 (2004).
5. Miner v. Gillette Co., 87 Ill.2d 7, 17 (1981).
6. 215 Ill. Comp. Stat. Ann. 5/155.
7. O'Neil v. Gallant Ins. Co., 769 N.E.2d 100, 100 (5th Cir. 2002).
8. Mass. Gen. Laws Ann. 93A, §9.
9. Mass. Gen. Laws Ann. 93A, §11.

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