

Auto Premium Discounting – What Insurers Need to Know

The California Insurance Commissioner issued a Bulletin last week accusing some of the largest auto insurers of improperly “collect[ing] inflated premiums” from California policyholders during the ongoing COVID-19 pandemic.¹ That pronouncement comes closely on the heels of several class action lawsuits filed against auto insurers in Nevada state court attacking the size of auto insurers’ premium refunds and discounts during the pandemic. The allegations in the Nevada class actions largely mimic the claims in class actions filed in Illinois last July. The media attention given to the California Commissioner’s latest Bulletin and to the recently filed Nevada cases will likely prompt other state commissioners to take similar steps and/or trigger additional class actions against insurers. Carriers should be prepared to defend their premium rate setting strategies during the pandemic. We are following these regulatory pronouncements and lawsuits closely and will continue to update our clients as the issues evolve. Here is what you need to know now:

How it started:

Within weeks of governors instituting “stay at home” and “shelter in place” orders in the spring of 2020, state insurance regulators began ordering insurance companies to refund premiums and to extend grace periods to drivers and businesses impacted by shut downs due to COVID-19.² Whether by order or competitive market pressures, carriers began issuing refunds and discounts almost immediately. For example, on April 6, 2020, Allstate announced it was returning more than \$600 million in premiums to its auto customers.³ State Farm, GEICO, Travelers, Progressive, Farmer’s and many other auto carriers quickly followed. On average, these measures shaved 15-25 percent off of customers’ premium payments for a few months. Some carriers extended discounts through the end of 2020.

Despite the discounts and refunds, in July 2020, Illinois policyholders filed seven lawsuits against Allstate, American Family Insurance, Progressive, GEICO, Erie Insurance, and The Travelers Company alleging the insurers breached their contracts, were unjustly enriched, and violated the Illinois’ consumer fraud statute by not giving larger discounts in auto premiums

as a result of reduced claims during the pandemic.⁴ The Illinois lawsuits accuse the carriers of receiving a “windfall” as a result of the significant drop in driving and claims, rather than returning premiums to their policyholders.

How it’s going:

So far, we have identified 17 lawsuits that have been filed arising out of auto insurers’ discounting and refund practices during the pandemic. Of those, motions to dismiss have been filed in at least 6 cases, and ruled upon in 3. The carriers’ motions to dismiss have been relatively successful. In two cases pending in the Northern District of Illinois, the court granted the motions to dismiss in full. In a third case in that district, the court dismissed the majority of the plaintiff’s claims, but allowed a count for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act to proceed. The court reasoned that based on the allegations of the complaint, the insurer’s statement regarding the discount program misled policyholders into thinking the insurer was passing on all its savings from reduced driving. In the remaining cases, motions to dismiss have either been filed, or the insurers have yet to respond to the complaints.⁵

On the regulatory front, and as noted above, just last week Ricardo Lara, the Insurance Commissioner for the California Department of Insurance, issued [Bulletin 2021-03](#), accusing carriers of collecting “inflated premiums” during the pandemic. His Department also summarized its findings following the Department’s first-of-its-kind “systemic review of data” regarding claims experiences during the pandemic. The Department’s analysis concluded that, on average, carriers provided less than half of the premium refunds and discounts due policyholders based on the significant reduction in driving and claims during the pandemic.⁶ The Bulletin requires insurance companies to return additional premiums to policyholders and to inform policyholders how they can obtain further relief in the future. Finally, the Bulletin directed carriers to report their actions through a newly created Excel workbook.⁷

What’s Next:

We anticipate departments of insurance from other states will issue similar directives in the coming weeks, and

¹ Press Release, Ricardo Lara as the Commissioner of the California Department of Insurance, *Commissioner Lara finds auto insurance companies overcharged drivers as accidents plummeted during the pandemic* (Mar. 11, 2021), <http://www.insurance.ca.gov/0400-news/0100-press-releases/2021/release030-2021.cfm> (last visited Mar. 15, 2021).

² CALIFORNIA DEPARTMENT OF INSURANCE, *Bulletin 2020-03, Premium Refunds, Credits, and Reductions in Response to COVID-19 Pandemic* (Apr. 13, 2020), http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/Bulletin_2020-03_re-covid-19_premium_reductions-2.pdf (last visited Mar. 15, 2021).

³ Suzanne Barlyn, *Allstate to return \$600 million in auto premiums as coronavirus cuts driving*, *REUTERS* (Apr. 6, 2020, 7:41 AM), <https://www.reuters.com/article/us-health-coronavirus-in-insurance-auto/allstate-to-return-600-million-in-auto-premiums-as-coronavirus-cuts-driving-idUSKBN210IH> (last visited Mar. 15, 2021).

⁴ At least one putative class action alleging a carrier [State Farm] had failed to provide discounts due to decreased risks during the pandemic was filed prior to these Illinois suits. See *Alissa’s Flowers, Inc. v. State Farm Fire and Casualty Co.*, No. 2:20-cv-04093-BCW (W.D. Mo., May 28, 2020). That case involves commercial general liability coverage. While our Firm is tracking that litigation, this update is limited to cases involving auto policies.

⁵ See *infra*, Section titled “The Lawsuits”.

⁶ CALIFORNIA DEPARTMENT OF INSURANCE, *Bulletin 2021-03, Premium Refunds, Credits, and Reductions in Response to COVID-19 Pandemic* (Mar. 11, 2021), <http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/Bulletin-2021-03-Premium-Refunds-Credits-and-Reductions-in-Response-to-COVID-19-Pandemic.pdf> (last visited Mar. 15, 2021).

⁷ *Id.*

that additional class actions will be filed. Carriers should be prepared if and when those lawsuits are filed. As discussed further below, two of the carriers defending the Illinois class actions raised, among other defenses, the filed-rate doctrine.⁸ At the heart of that doctrine, along with its cousins, the exhaustion of administrative remedies and the primary jurisdiction doctrines, is the idea that auto premium rate setting is highly regulated by state departments of insurance. Policyholders should not be entitled to challenge premium rates in court before seeking redress from the appropriate department of insurance. Relatedly, carriers should not be subject to liability for charging rates that have been pre-approved by the regulatory body charged with setting those rates (i.e., the department of insurance). While the application of these doctrines varies by state – and there is some question whether they can carry the day in Illinois, they have been widely applied by courts in analogous scenarios when dismissing complaints challenging actions by insurance companies.⁹ These theories should be on the carriers' roadmaps as more cases are filed.

Despite that rate-setting is typically an area in the regulatory domain, the pending litigation demonstrates that policyholder's counsel are working in overdrive to evade this roadblock. Carriers should continue to closely monitor this area and buckle up for a winding regulatory and litigious road ahead.

The Lawsuits

The Illinois Cases

In *Ridings v. American Family Insurance Company*, American Family filed a motion to dismiss plaintiff's claim that American Family's Premium Relief Credit and Premium Relief Payment violated the Illinois Consumer Fraud statute on grounds that American Family had made no false or deceptive offer or any action to induce reliance. No. 20-cv-5715 (N.D. Ill. Oct. 30, 2020). American Family argued that plaintiff had not been deceived, nor would any reasonable policyholder read American Family's premium relief to provide anything other than a one-time credit. Second, defendant moved to dismiss plaintiff's Bad Faith – Breach of Contract claim on grounds that the duty of good faith and fair dealing does not create an independent cause of action and cannot form the basis of a claim absent a violation of an insurance contract. Lastly, defendant moved to dismiss plaintiff's Unjust Enrichment claim on the basis that the claim was premised on alleged fraudulent representations, which American Family argued were not fraudulent. American Family also argued that a claim for unjust enrichment has no application in the context of an insurance policy between an insurer and its policyholder where a specific contract governs the relationship of the parties. Ultimately, Judge Manish S. Shah of the Northern District of Illinois granted American Family's motion to dismiss holding that American Family had neither a statutory nor a contractual obligation to offer the discount. The District Court found that the proposed class action

⁸ *Id.*

⁹ See e.g., *Alissa's Flowers, Inc. v. State Farm Fire & Cas. Co.*, No. 2:20-CV-04093-BCW, 2020 WL 6555048 (W.D. Mo. Oct. 22, 2020); *Farmers Ins. Exch. v. Superior Ct.*, 826 P.2d 730 (1992); *Kirksey v. American Bankers Ins. Co. of Florida*, 114 F. Supp. 2d 526 (S.D. Miss. 2000); and *Lupton v. Blue Cross & Blue Shield of N. Carolina*, 533 S.E.2d 270 (2000).

failed to identify any deceptive or unfair conduct, and the complaint failed to identify any damages resulting from American Family's offer.

One week after granting American Family's motion to dismiss in *Ridings*, Judge Shah was presented with a similar motion to dismiss in *Kopsaftis v. Progressive Universal Insurance Company*. No. 1:20-cv-06261 (N.D. Ill. March 1, 2021). Progressive made the additional argument that the filed-rate doctrine precluded the court from modifying the premiums that it filed with the Illinois Department of Insurance. Without addressing Progressive's filed-rate doctrine argument, Judge Shah granted the carrier's motion to dismiss. The Court noted that its rationale for dismissal mirrored that in *Ridings*, and therefore warranted dismissal.¹⁰

In *Siegal v. GEICO Casualty Company*, GEICO moved to dismiss plaintiff's five-count amended class action complaint challenging GEICO's auto insurance premium rates as unconsciously excessive in light of an alleged reduction in the insurance risk pool amid the COVID-19 pandemic. No. 1:20-CV-04306 (N.D. Ill. Oct. 15, 2020). GEICO successfully moved to dismiss plaintiff's breach of contract claim, arguing that the plain language of the policy's "Changes" section did not vest GEICO with the discretion to reduce premiums in response to any pandemic-related change in circumstance. The Northern District of Illinois also sided with GEICO and dismissed with prejudice plaintiff's stand-alone "frustration of purpose" claim seeking declaratory relief, holding that the pandemic's impact on the auto insurance risk pool was known at the time plaintiff renewed her policy and the pandemic did not negate the plaintiff's ability to cancel her policy at any time and receive a pro-rated refund. Additionally, GEICO successfully moved to dismiss plaintiff's alternative stand-alone claim for unjust enrichment, arguing that the indisputable existence of an express contract between GEICO and its policyholders negates plaintiff's ability to pursue a claim for unjust enrichment. Notably, while Judge Sharon Johnson Coleman dismissed plaintiff's breach of contract, frustration of purpose, and unjust enrichment claims with prejudice, she rejected GEICO's argument that it did not violate the Illinois Consumer Fraud and Deceptive Business Practices Act because it promised a 15% premium credit and delivered just that. Without ruling on the merits, Judge Coleman concluded that plaintiff adequately alleged that the "GEICO Giveback" discount program misled policyholders into thinking GEICO was passing on all its savings from reduced driving and did not disclose that its premiums were not based on an accurate assessment of risk during the pandemic.

GEICO faces similar causes of action in *Thomas v. GEICO Casualty Company*, No. 1:20-cv-06453 (N.D. Ill. Nov. 6, 2020). Again, GEICO filed a motion to dismiss the complaint. In December 2020, pursuant to the parties' stipulation and proposed order, Judge Coleman stayed any briefing related to GEICO's motion to dismiss pending the resolution of GEICO's almost identical motion to dismiss

¹⁰ *Kopsaftis v. Progressive Universal Insurance Company*, No. 1:20-cv-06261 at *2 (N.D. Ill. March 1, 2021) ("Progressive's alleged statements and the terms of the contracts are not meaningfully different than the company's statements and policies in *Ridings*, and I continue to hold the same views I expressed in *Ridings*.").

in *Siegal*. In light of the court's recent decision in *Siegal*, plaintiffs' opposition in *Thomas* is forthcoming in the next few days.

Erie Insurance Exchange ("Erie") also faces identical causes of action in *EBCF Enterprises, Inc. v. Erie Insurance Exchange*, and has filed a motion to dismiss plaintiff's complaint. No. 20-cv-5476 (N.D. Ill. Dec. 18, 2020). Erie's arguments in support of dismissal mirror those made by other carriers facing these suits. Erie's motion to dismiss is fully briefed and pending before Judge Jorge Louis Alonso of the Northern District of Illinois. Additionally, pending before the court is EBCF's motion for leave to amend its complaint.

The Travelers Indemnity Company ("Travelers") filed a motion to dismiss plaintiff's five-count complaint alleging claims for (1) declaratory relief, (2) violation of the Illinois Consumer Fraud Act, (3) common law fraud, (4) bad faith breach of contract, and (5) unjust enrichment. *Donnellan v. The Travelers Company, Inc.*, No. 1:20-cv-06064 (N.D. Ill. Nov. 13, 2020). Similar to the argument Progressive raised in its motion to dismiss, Travelers argued that the Northern District of Illinois has no specialized expertise in evaluating the reasonableness of insurance rates, and accordingly, plaintiff's claims fall within the primary jurisdiction of the Illinois Department of Insurance and should therefore be barred by the filed-rate doctrine. The court has not reached that issue. Instead, on March 8, 2021, plaintiff sought leave to amend her complaint in light of the recent dismissals in *Ridings*, *Kopsaftis*, and *Siegal*. Traveler's response in opposition of plaintiff's motion for leave to amend must be filed by March 23, 2021, and plaintiff's reply in support must be filed by April 6, 2021.

Lastly, a five-count class action complaint alleging claims for (1) declaratory relief, (2) violation of the Illinois Consumer Fraud Act, (3) common law fraud, (4) bad faith breach of contract, and (5) unjust enrichment was also filed against Allstate Fire and Casualty Insurance Company ("Allstate") in the Circuit Court of Cook County, Illinois on July 29, 2020. *Anagnos v. Allstate Fire and Casualty*, No. 2020-CH-05164 (Ill. Cir. Ct. Jul 29, 2020). Unlike the above-mentioned suits, this action was not removed to the Northern District of Illinois. While access to filings in Cook County Circuit Court are limited, it appears Allstate filed a motion to dismiss, which led plaintiff to seek leave to amend the complaint. The court seems to have granted plaintiff leave to amend the complaint, but plaintiff has not yet done so.

The Nevada Cases

On February 23, 2021, [policyholders sued ten auto carriers in separate class actions](#) in Clark County District Court in Nevada alleging the carriers failed to give sufficient discounts or refunds to policyholders as a result of reduced risks during the pandemic.¹¹ The complaints, which mirror one another, allege the defendant auto insurers provided "arbitrary and capricious" premium refunds or credits during the

COVID-19 pandemic.¹² Plaintiffs contend the refunds and credits do not accurately reflect the reduction in driving during the pandemic, and that the refunds and credits are "insufficient to provide fair, actual, and meaningful relief to the insureds." The complaints seek declaratory relief (First Cause of Action), and alleges claims for breach of contract (Second Cause of Action), breach of covenant of good faith and fair dealing (Third Cause of Action), bad faith (Fourth Cause of Action), and violation of Nevada's Deceptive Trade Practices Act (Fifth Cause of Action). USAA has removed one of those cases to federal court, but the carriers have not yet responded to the complaints.

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¹¹ *Bamforth v. State Farm Mutual Automobile Insurance Company*, No. A-21-829883-B (Nev. Dist. Ct. Feb 23, 2021); *Cain v. USAA Casualty Insurance Company*, No. A-21-829884-B (Nev. Dist. Ct. Feb 23, 2021), amended notice of removal filed Mar. 10, 2021; *Cannuscio v. GEICO Advantage Insurance Company*, No. A-21-829886-B (Nev. Dist. Ct. Feb 23, 2021); *Egypt v. Acuity A Mutual Insurance Company*, No. A-21-829892-B (Nev. Dist. Ct. Feb 23, 2021); *Fagan v. Liberty Mutual Group, Inc.*, No. A-21-829903-B (Nev. Dist. Ct. Feb 23, 2021); *Garrido v. Farmers Automobile Insurance Association*, No. A-21-829905-B (Nev. Dist. Ct. Feb 23, 2021); *Greenfield, v. Progressive Advanced Insurance Company*, No. A-21-829908-B (Nev. Dist. Ct. Feb 23, 2021); *Head-Egypt v. The Travelers Casualty Company*, No. A-21-829897-B (Nev. Dist. Ct. Feb 23, 2021); *Malone v. Depositors Insurance Company*, No. A-21-829914-B (Nev. Dist. Ct. Feb 23, 2021); *Smith v. Allstate Fire And Casualty Insurance Company*, No. A-21-829912-B (Nev. Dist. Ct. Feb 23, 2021).

¹¹ Michelle L. Price, Associated Press, *Lawsuits Filed Against Auto Insurers Over Rates in Pandemic*, THE ASSOCIATED PRESS (Feb. 23, 2021, 8:57 PM), <https://www.usnews.com/news/business/articles/2021-02-23/lawsuits-filed-against-auto-insurers-over-rates-in-pandemic> (last visited Mar. 15, 2021).