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Insurance Class Actions in the United States

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The research described in this report was conducted by the RAND Institute for Civil Justice.

Library of Congress Cataloging-in-Publication Data

Insurance class actions in the United States / Nicholas M. Pace ... [et al.].
p. cm.
Includes bibliographical references.
ISBN 978-0-8330-4131-9 (pbk. : alk. paper)
1. Class actions (Civil procedure)—United States. 2. Tort liability of insurance companies—United States. I. Pace, Nicholas M. (Nicholas Michael), 1955–

KF8896.I57 2007
346.73'08600269—dc22

2006103045

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Published 2007 by the RAND Corporation
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Summary

Class actions, which are civil cases in which parties initiate a lawsuit that also includes as plaintiffs others not specifically named in the suit, often make the headlines, especially when they result in settlements affecting millions of class members and requiring millions of dollars in restitution. They have also aroused vocal policy debates, as exemplified during the deliberations of the U.S. Congress over CAFA (Public Law 109-2). But despite this long-standing interest, policymakers and the public know very little about the majority of class actions filed in this country—their numbers, their dynamics, or their outcomes. The lack of data is caused by shortcomings in court recordkeeping practices and by litigants' reluctance to reveal what took place in cases seeking class certification.

Study Purpose and Approach

What is known about class actions is based almost entirely on the small percentage of cases that are officially certified by judges to proceed on a class basis, not the much larger proportion of attempted (or "putative") cases that are never certified. Previous studies have also tended to focus on class actions filed in federal courts, which generally keep better records than state courts do on class status, although what little evidence is available suggests that the bulk of class action litigation is initiated in state courts.

We used a defendant-based survey to collect original data on a well-defined subset of class actions that were filed in both state and federal courts and that included all class actions, whether they were certified or not. We focused on the insurance industry. We selected insurers as the targets of our survey because class actions involving that industry were known to occur frequently enough to make the data collection effort worthwhile and we wanted to understand the interplay of class actions and regulation in an industry subject to extensive governmental oversight.

The data presented in this monograph come from responses to surveys sent to a group of the largest insurers that, taken together, account for 65 percent of all direct premiums written in the property and casualty market and in the life and health market. We received 988 case-level questionnaires from 57 large insurance companies operating

in the United States, describing 748 distinct cases that were open at some point during the 10-year period. We also conducted a separate survey to identify overlap among the issues in these cases and the traditional authority and activities of state regulators. This survey went to staff members of a number of state departments of insurance and asked them to rank the key allegations found in the insurer survey data in terms of regulator interests. We used responses from 17 states in our analysis. Together, these survey results provide a unique database on class actions against insurers and help to answer important questions about the dimensions of this type of litigation.

Some limitations, however, should be noted. We surveyed large insurance companies in two phases. In the first phase, we asked insurers whether they had been named as defendants in class actions. Those who had were sent a follow-up survey to seek more detailed information about those cases. The response rate to the initial large-insurer survey was approximately 48 percent and the response rate to the follow-up survey was 56 percent. Because many insurers did not respond, particularly those in the life and health markets and the smaller companies, our results are most generalizable to the experiences of the very largest property and casualty (P&C) insurers in the country, especially those whose primary business is writing automobile private passenger coverage. We analyzed observable characteristics of responding and nonresponding firms, but unobservable, systematic differences may also further limit our ability to characterize insurance class actions in their entirety.

Also, some respondents did not complete certain questions asking about settlements, which are often subject to confidentiality agreements. Accordingly, we advise our readers not to generalize from the results presented in the discussion on settlement outcomes. Additionally, the data do not distinguish between those cases certified for trial and those cases certified only provisionally or for settlement purposes only. Finally, as is typically the case with such surveys, the data are only as good as the respondents' records and recall. Some insurers, for example, may have been better able to provide information about more recent cases or cases that were certified.

Class Action Filings

Forum for Filing

Survey data show that 89 percent of the class actions were filed in state courts. This should not be a surprising result as insurance in the United States is regulated at the state level and presumably claims involving federal statutes would be relatively few in number.

Despite the overwhelming proportion of state court filings in our data, the issue of federal jurisdiction plays a role in many cases, even prior to the passage of CAFA (Public Law 109-2), which liberalized the rules for diversity jurisdiction for class actions in federal courts. A sizable number moved between systems as parties sought to have

the matter adjudicated in different forums: One in five cases reported removal to federal court from a state court at some point during the litigation (some of these case would have been remanded back to state court). In the end, federal courts were the final forums for 17 percent of the closed cases.

Geographic Scope of the Class

In the vast majority of reported insurance class actions (82 percent), the class consisted of residents of a single state. National classes were sought in 15 percent of the cases, and the remainder involved residents of two or more specifically identified states.

Some observers have voiced concerns about instances in which a state court judge is asked to decide on insurance-related matters affecting citizens not only in that specific jurisdiction but also those residing in as many as 49 other states and the District of Columbia. We found that this type of proposed class occurs in about 17 percent of state court filings.

Choice of Jurisdiction

In our data, 42 percent of all state court insurance class actions were filed in Illinois, Florida, and Texas. Two jurisdictions in particular—Miami-Dade County, Florida, and Cook County, Illinois—accounted for about 17 percent of our state cases. On the federal side, districts in Florida and Texas again were at the top of the list in frequency, accounting for 23 percent of all federal insurance class actions in our data.

The distribution of cases may be, at least in part, a reflection of the characteristics of the insurers that responded: where the companies are licensed to write insurance, where their corporate headquarters are located, where their articles of incorporation are filed, and their share of the overall market in each state. Local laws that provide the legal foundation for bringing these claims are another possible jurisdictional influence.

A more telling measure of jurisdictional "hot spots" than raw numbers of filings may be the types of cases filed in particular jurisdictions. For example, as already mentioned, 17 percent of the state court filings sought a class involving citizens or residents of more than one state. But some counties had a much higher percentage of cases seeking multistate classes and, perhaps more telling, exceeded the average reported for that state. In Broward County, Florida, for example, 46 percent of the state court cases were seeking multistate classes versus 11 percent for the state as a whole. Madison County, Illinois, had an even higher percentage (68 percent) of such cases, more than any other county with eight or more cases reported. These findings suggest that attorneys may be choosing these jurisdictions for multistate class litigation over other counties and states that would have been equally acceptable from a strictly procedural point of view.

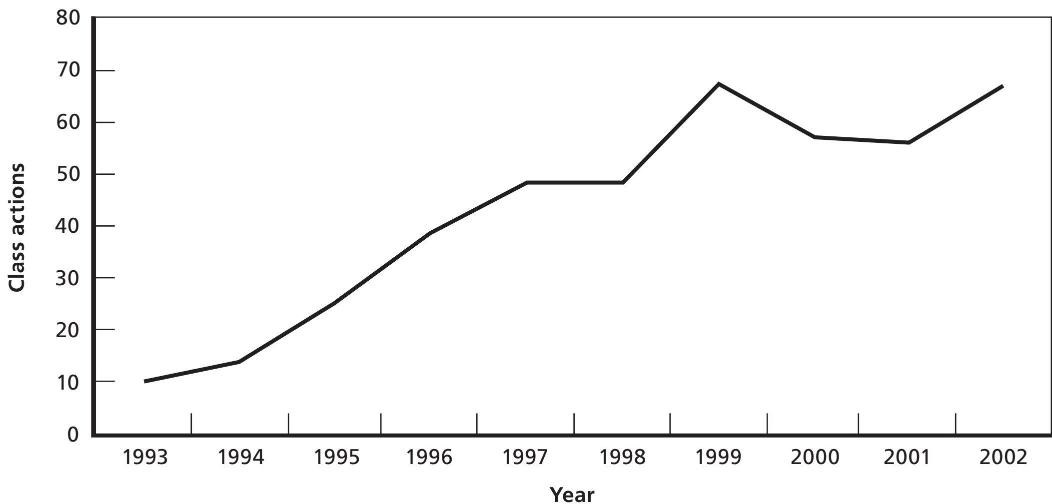
Trends in Numbers of Class Actions

We also have some data that suggest that the number of class actions filed against insurers rose during the 10-year period of 1992–2002. Of the 57 large insurance companies responding to our survey, 12 reported that they could identify every class action active in every year over the entire study period (1993 to 2002). Using data from these companies (431 cases), we found a strong growth in filings (a 23.5-percent compound annual growth rate) as shown in Figure S.1. Data from the 24 companies with complete information over the last five years of the study span (382 cases) show reduced growth compared with the 10-year rate (a 5.3-percent compound annual growth rate).

Numbers and Types of Defendants

In most instances, class action litigation was directed at a small number of insurers. The companies responding to the survey were the sole corporate defendant in 65 percent of reported cases (though one or more individuals might have been named as well) and, in 20 percent of the cases, two to three corporate defendants were named. In a few instances, the scope was much greater: In 3 percent of the cases, 40 or more insurers were named and one notable case identified more than 1,000 corporate defendants. Insurers whose business primarily involves personal automobile policies were the defendants in more than a third of all of our cases. Two out of three cases involved automobile insurance policies.

Figure S.1
Class Actions Filed During the Year Reported by Companies with Complete Records for 1993–2002



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Most Frequent Allegations

Including attempted cases in our data provides important evidence about what sorts of claims are repeatedly advanced, even if they are ultimately unsuccessful. The most common claim was that that the insurer failed to compensate policyholders for the diminished value of automobiles following repairs under the insured's first-party coverage. About half of all cases involved allegations related to the payment of medical benefits to health care providers under automobile policies, various real and personal property coverage claims, claims by policyholders or beneficiaries under automobile uninsured or underinsured motorist policies, diminished value claims related to first-party automobile coverage, or various workers' compensation issues.

The data suggest that insurance-related statutes play a significant role in these cases, often involving omnibus consumer protection acts. Of the cases in which the respondents identified what the key statutes and regulations were in the litigation, 72 percent involved state laws concerning unfair or deceptive trade practices; unfair claims, settlement, or other insurance practices; consumer protection rights or prohibitions against fraud; or unfair competition or business practices. These responses show that state legislatures have significant power to shape both the frequency and the scope of these cases.

Certification and Resolution

Because we collected information on all attempted class actions, we were able to calculate the rate of certification. Only 14 percent of the cases in our data set wound up with certified classes. The judges denied certification in 11 percent of the cases, and the remainder—about 75 percent of the total—never had a decision either way.

Case Outcomes

Table S.1 shows striking differences in final outcomes depending on the status of the motion for certification. For all attempted class actions, a negotiated settlement that bound a certified class took place in only 12 percent of all closed cases. Settlements involving only the small number of plaintiffs specifically named in the original filings, and not a class, occurred in 20 percent of the cases. The judge ruled in favor of the defendant on some sort of dispositive pretrial motion in 37 percent of the cases. In 27 percent of the cases, plaintiffs dismissed their complaints voluntarily, presumably without prejudice, which would have allowed them to refile the same case later.

For class actions in which the plaintiffs have made a motion for certification, however, the distribution of outcomes changes considerably. Class settlement in those cases is much more likely, with a third of all cases resulting in a settlement for a certified class. The frequency with which plaintiffs voluntarily drop their cases is reduced, as are pretrial dispositive rulings for the defense. When a class is, in fact, certified, the end result in nine of 10 cases is a class settlement.

Table S.1
Resolution of Class Actions

Types of Class Actions[a]	Class Settlement (%)	Individual Settlement (%)	Pretrial Ruling for the Defense (%)	Voluntary Dismissal (%)	Other Outcome (%)
All attempted class actions (564 cases)	12	20	37	27	4
All class actions with motion for certification (207 cases)	34	20	27	15	4
All certified class actions (78 cases)	90	1	4	1	4

[a] Includes closed cases only.

Terms of Settlement and Distributions

Although about 12 percent of our closed cases resulted in a class settlement, some respondents declined to provide detailed information about the terms of those settlements, the awards of attorneys' fees and costs, and the distribution of benefits to class members. We cannot determine whether the surveys with complete information on negotiated outcomes comprise a representative sample of all insurance class actions settlements in our data. Therefore, the findings we report must be understood as illustrative only. It should be added that information we collected on compensation does not include the value of any injunctive relief that might have been obtained for current and future class members. Nevertheless, although we cannot generalize from such findings, they do offer an unusual glimpse into the range of outcomes that characterize how insurance cases are resolved on a class basis.

Common Fund, Class Size, and Available Benefits. Total funds offered by the defendants to pay benefits to class members and the fees and expenses of class counsel were reported in 32 cases and ranged from $360,000 to $150,000,000 with a median fund size of $2,600,000. The common fund was less than $5 million in 63 percent of the reported cases, a finding of interest in estimating CAFA's impact.

In the 36 cases in which the respondent provided information on class size estimated at the time of settlement, the classes ranged from as small as 127 members to as large as 4,300,000 members with a median of 28,000 members.

The median benefit available to each class member in the 22 cases for which we had the data was $97. While some settlements contained the potential for a class member to collect as little as $3.50, other cases offered about $61,000. The larger-value cases involve uninsured or underinsured motorist coverage issues or disputes over the payment of contingency fees in subrogation cases.

Notification and Claiming Procedures. We also asked how class members were notified of their rights under the settlement, and we received answers in 43 cases. Of these, about half had the claimants notified by both direct mail and by publication. Another quarter was notified exclusively by direct mail and most of the remaining cases relied on publication alone. In 80 percent of the 36 cases for which we have information on the mechanism used for claiming against the fund, claimants were required to submit a written form to the insurer or settlement administrator.

Final Distributions. A mean average total payout of $9.5 million was made in the 39 cases for which we have information on the total direct monetary benefits distributed to the class, but this figure reflects a single case in which $149 million was paid out. Distributions were typically much smaller, with a median total payout of $500,000 and, in one case, the total was just $200.

In some instances, the total payout represented a fraction of the net compensation fund (which is the total common fund less class attorneys' fees and expenses) theoretically available to the class at the time of settlement. In seven of the 23 cases with complete information, fund distribution rates were at or near 100 percent (the median was 79 percent). But another quarter of the cases reflected a fund distribution rate of 13 percent or less and, in three instances, only 4 percent of the original net compensation fund was paid.

The number of class members who ultimately received at least some direct monetary benefit was reported in 33 cases. In four of these cases, payments were made to fewer than 100 individuals or businesses. Although the mean number of recipients was 27,000 class members and the median size was 1,500 members, in one instance, only a single class member received any direct benefits at all. In contrast, there were 600,000 compensated class members in the largest reported case.

The number of actual beneficiaries was often much smaller than the class size estimated at the time of settlement. In 10 of the 29 cases in which both the potential class size and the number of claims paid were reported, 100 percent of the projected number of class members received some amount of direct compensation. In one case, however, less than 1 percent of the estimated total was paid. The average case paid benefits to 45 percent of the estimated number of class members at the time of settlement, while the typical case had a much smaller claiming rate, with a median percentage of just 15 percent.

Class Counsel Fees and Expenses. We received information on the award to class counsel for fees and expenses in 48 cases. Fees and expenses in reported cases ranged from $50,000 to $50,000,000 with a median award of $554,000. We did not directly collect information on the specific percentage that the judge might have applied against the gross common fund to calculate the attorneys' fees and expenses, but we can approximate a fee and expense percentage for 27 cases: It ranged from 12 to 41 percent of the fund, with a mean of 29 percent and a median of 30 percent.

Another way to look at attorneys' fee and expense awards, however, would be to use the size of the actual monetary distribution to the class as the benchmark. This would help gauge the effectiveness of class counsel at putting compensation into the pockets of class members. "Effective" fee and expense percentages—in other words, ones based on the fee and cost awards divided by the sum of the distributed benefits, attorneys' fees, and other costs—increase to a median average of 47 percent (based on 36 cases in which this information was available). In a quarter of these cases, the effective fee and cost percentages were 75 percent or higher and, in 14 percent (five cases), the effective percentages were over 90 percent.

Legislative and Regulatory Issues

What the Data Suggest About the Class Action Fairness Act of 2005

CAFA modifies the rules for federal court jurisdiction over class actions based on the diversity-of-citizenship test. Before CAFA, *all* named plaintiffs in a class action had to be citizens of states differing from those of *all* defendants, a situation that would not be met in class actions seeking national classes. In addition, there was a minimum monetary threshold of $75,000 to be met by every plaintiff in the case.

With CAFA, the rules for diversity jurisdiction have eased, though for class actions only, so that diversity of the parties could be achieved if *any* class member or *any* defendant was a citizen of a different state from any other defendant and if the aggregated, not individual, amount in controversy for all class members exceeded $5 million.

We analyzed our data to determine the potential under the new law for removal to the federal system of insurance class actions now litigated in state courts. In all, 89 percent of state court cases in our data had either a multistate class or an out-of-state defendant. The world of insurance class actions is therefore one dominated by cases with interstate implications. But location of the defendant is only half of the puzzle, because CAFA requires both diversity of citizenship and aggregate claims exceeding $5 million. Based on the limited number of class actions for which we had information on settlement funds, 63 percent of cases had gross common funds at the time of settlement worth less than $5 million. If the value of insurance class actions generally reflected these settlement figures, just 33 percent of state filings would be removable under CAFA's liberalized rules for diversity jurisdiction, compared to 89 percent if the monetary threshold issue were ignored.

Overlap of Class Action Litigation and Regulation

Because some have asserted that the outcomes of class actions can conflict with the intentions of state insurance regulators, we identified cases in our database that were most likely to have regulation-related aspects.

To do so, we conducted a separate survey of staff members of state departments of insurance to rate the issues in our cases by the degree to which the administrators believed the issues related to their regulatory authority. Cases identified as having the strongest relationship to administrative regulation involved allegations that defendants promised life insurance premiums would "vanish" over time, automobile uninsured or underinsured motorist coverage issues revolving around what took place at the time of initial policy purchase, patterns and practices involved in property claim adjustments, first-party collision or comprehensive automotive claims involving disclosure of the use of aftermarket parts, and automobile uninsured or underinsured motorist issues over multicar coverage and pricing. We found that cases with strong regulatory implications have similar outcomes (in terms of the rates of class settlements and pretrial rulings in favor of the defense) to those with more modest ties to regulatory issues.

One might expect defendants to routinely assert that issues in a class action involving a regulated entity would be better handled by administrative agencies. But in fact, in only 15 percent of insurance class actions in our data did defendants claim that state or federal regulators had either exclusive or primary jurisdiction over the issues in the case. Even in cases with issues rated as having a strong relationship to the regulatory regime, the defense was raised just 23 percent of the time. Regulatory authority is not an issue that defendants are routinely bringing to judges' attention.

We expected to see state insurance departments getting involved in many insurance class actions, especially those with strong regulatory implications. For example, the agencies might intervene directly as parties, file amicus briefs, or submit affidavits. But perhaps because defendants are not raising these issues during the litigation, only 8 percent of all class actions were reported to involve governmental agencies and entities in any way. Even in cases with issues rated as having a strong relationship to the regulatory regime, intervention of some sort occurred in just 9 percent of such cases.

It will be interesting to see whether insurance regulators become more involved in class actions in the future as a result of CAFA. One explanation for the low rate of direct regulator involvement was that the agencies were unaware of the pendency of most insurance class action litigation. But the new law now requires that regulators be notified of all class action settlements submitted for judicial review in federal courts. Since a larger percentage of insurance class actions may now find themselves in a federal forum, the notification requirement may be one of the new act's more enduring legacies.