"Modal" Insurance Premium Class Action Litigation: Coming to a Courthouse Near You?

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Over two dozen insurance companies are currently defending purported nationwide class actions in New Mexico claiming that familiar insurance billing practices are unfair to consumers. Most life and automobile insurers offer options that allow premiums to be paid more frequently than annually, and most insurers charge additional amounts to cover the additional administrative costs incurred in processing multiple payments, as well as for the lower profits (greater lapse rate) generated from policies where such payments are made. The plaintiffs in the New Mexico cases make the claim that insurers should disclose so-called "annual percentage rates" ("APRs") and "finance charges" where a single annual payment would be less than a year of monthly, quarterly or semi-annual premium payments. Because the claims arise from the different payment modes available to policyholders, the litigation has been dubbed the "modal" premium litigation. In the cases, plaintiffs seek to recover all of the additional fees paid, plus damages and attorneys' fees under New Mexico's consumer protection statute.

On the topic of attorneys' fees, it is noteworthy that, among the named plaintiffs in these cases, there are several Albuquerque lawyers, one of whom is also a domestic partner of one of the plaintiffs' lawyers.

At first blush, the factual allegations sound like claims under the federal Truth-in-Lending Act ("TILA"), but, except in the three auto insurance cases, the plaintiffs do not contend that the premium plans are loans, and they do not make claims under TILA because of an express exemption in TILA for insurance premium plans where the consumer has no ongoing obligation to make payments. While plaintiffs allege that no single class member seeks $75,000 or more in damages, many of the defendants have made efforts to secure federal court jurisdiction based upon aggregation arguments and/or by asserting the presence of questions of federal law (including TILA issues). With one removal pending, all of the removal efforts have been unsuccessful to date.

Where the plaintiffs complain about the absence of disclosures of "finance charges" and "APRs", the fact that the transactions at issue in these cases are not loans should arguably be dispositive. Under every policy in these cases, when a consumer stops paying his or her periodic premiums, the insurance coverage terminates and the consumer has no obligation to pay for coverage in the future. Because an insurer does not commit to coverage for an entire year unless all of the annual premium is paid, the payment of a premium for one month at a time is not the repayment of money borrowed from the insurer. Consequently, the concepts of finance charges and APRs do not even apply.

Also, the plaintiffs do not claim that the insurers failed to disclose the fact of the additional charges. In some cases, the insurers even list each option right on the face of the policies (e.g. $10 monthly; $28 quarterly; $52 semi-annually; $100 annually). Nonetheless, the plaintiffs claim that they have been deceived by the fact that the insurers did not disclose the dollar differences and the "APR", which, in some cases, plaintiffs claim exceeds 100%.

The plaintiffs' damages claims are remarkable because no named plaintiff has changed over to annual premium payments despite the fact that all of the named plaintiffs are lawyers and/or are now advised by counsel who have provided them with all of the "finance charge" and "APR" figures. In short, no named plaintiff can show that further disclosures would have caused them to act differently.

These claims track a long-rejected theory of Professor Joseph Belth (Indiana University) that insurers should disclose "APRs" even where consumers are not required to continue making payments. For over 20 years, Belth has failed in his efforts to sell his theory to regulators, legislators and the National Association of Insurance Commissioners ("NAIC").

Belth's theory has, however, gained some traction in courtrooms in New Mexico. Defense motions based upon state regulatory approvals, federal preemption, the absence of duty to disclose and the failure of the plaintiffs to plead detrimental reliance have been unsuccessful. One judge has awarded summary judgment in favor of the plaintiffs. Also, despite significant differences in applicable substantive law of the states, and the presence of individual proof issues in each case (e.g. reliance and the sales practices of individual agents), two trial judges have certified nationwide classes on most of the plaintiffs' claims.

The litigation has attracted the attention of regulators who, represented by NAIC, have argued in intervention efforts and as amicus, that New Mexico courts have no business regulating insurance practices in other states.

The cases have garnered some attention from New Mexico's busy appellate courts. Discretionary interlocutory review is rarely granted in New Mexico, yet both of the applications for such review in the modal premium litigation have been accepted. Similarly, while New Mexico's current Rule 23 has never generated a reported decision, both applications for discretionary review of the trial court decisions on class certification have been accepted. Most of the other cases are stayed pending the outcome of one or more of the appeals.

Meanwhile, several insurers have entered into "coupon" settlements, some of which include disclosure changes incorporating the fictitious "APR" concept, and all of which include substantial attorneys fees. Tens of millions of dollars in attorneys' fees have already been approved in the settlements of only a handful of cases.

Much of the ultimate course of this litigation in New Mexico lies in the local appellate courts. The same decisions, particularly decisions on the nationwide aspect of the class certification orders, may well define whether this litigation leaks from New Mexico's borders into other jurisdictions.

Azar v. Prudential, New Mexico Court of Appeals No. 22,133.

Enfield v. Old Line, New Mexico Court of Appeals No. 23,239; *Berry v. Federal Kemper*, New Mexico Court of Appeals No. 23,186.

Azar v. Prudential, supra.; *Smoot v. Physicians Life*, New Mexico Court of Appeals No. 22,708

See note 2.