

2nd Circ. To Tackle Adequacy Of Geico Refund Program

By **Shane Dilworth**

Law360 (May 16, 2022, 12:15 PM EDT) -- The Second Circuit will hear arguments Tuesday over whether a lower court properly tossed a putative class action alleging a premium refund program offered by Geico during the COVID-19 pandemic was inadequate, in a first-of-its-kind appeal that could set precedent for similar disputes.

A panel of the appeals court will address whether policyholders Todd Grossman and Mujo Perezic sufficiently alleged that the insurer made misrepresentations when advertising its Geico Giveback program, which offered a 15% premium credit to new customers or those who renewed policies during a certain timeframe.

The policyholders complain the credit was not enough and the rates charged by the insurer during the early stages of the pandemic were excessive.

U.S. District Judge Victor Marrero of the Southern District of New York tossed the suit in September, finding the policyholders could not challenge the amount for premiums charged by Geico under the "filed-rate" doctrine. Pursuant to the doctrine, individuals cannot lodge lawsuits over the reasonableness of insurance rates if they are approved by regulatory agency; in this case, the New York Department of Financial Services, or NYDFS.

What's At Stake

The federal appeals panel's ruling, experts say, will impact similar putative class actions, one of which is pending in California federal court. To date, courts have handed down conflicting rulings on the applicability of the filed-rate doctrine to premium refund initiatives.

While Geico defeated Grossman's and Perezic's suit in New York, a California federal judge in January **allowed a proposed class** to amend allegations for breach of contract against the insurer and found they were not barred by the filed-rate doctrine.

Golden State policyholder Jessica Day later filed an amended suit the insurer is again seeking to toss. Briefing on the motion is complete. According to a March 28 order, the case was scheduled for a settlement conference in April, however, the parties agreed it would not be meaningful and productive, since the plaintiffs are going to file a motion for class certification by May 20.

"These cases become very important because the average consumer just doesn't understand that sometimes they aren't getting what they're supposed to get," Keith Altman of the Law Office of Keith L. Altman told Law360.

Altman, who represents policyholders, **successfully argued** before the Second Circuit in February in a putative class action that accused Geico of undervaluing certain vehicles that were deemed total losses.

The attorney went on to say that the approval of insurance rates by a state agency should not be the death knell for suits from policyholders.

"It's kind of like when the FDA [U.S. Food and Drug Administration] approves a drug," Altman said. "That doesn't mean you're protected from anything that goes wrong with your drug. I still think that

there are parameters that have to be looked at and conditions that need to be considered."

However, John Ewell and Joanna M. Roberto of Gerber Ciano Kelly Brady LLP told Law360 that reasonableness of insurance rates should be left to state agencies rather than juries.

"A judicial proceeding contesting a decision related to the 'filed-rate' doctrine would ominously interrupt grounded precedent that exists to ensure market stability within the insurance industry," Ewell and Roberto said in a joint statement.

The viability of consumer protection claims over the program will also come into play, as Grossman and Perezic also allege violations of New York's consumer protection law, also known as New York General Business Law Chapter 93A.

Much like the rulings on the applicability of the filed-rate doctrine, judges have reached different conclusions on whether state consumer protection laws can support class action suits over Geico's program. For example, an Illinois federal judge sided with policyholders last June, ruling they adequately stated claims under the state's deceptive trade practices act.

Ewell and Roberto, who predominantly represent carriers, expressed doubt over the ultimate viability of claims alleging consumer protection law violations.

"Even if GEICO's advertising materials were misunderstood by the public at large, it is difficult to fathom recognizable damages as rebates were provided which presumably amounted to paying less for coverage than prior years," they said.

The duo concluded that suits like those brought by Grossman and Perezic are "unlikely to gain traction," explaining that the policyholders still received coverage for any auto losses if they occurred.

"They purchased auto insurance that would respond to an auto accident regardless if the pandemic existed or not," Ewell and Roberto said. "The coverage was not limited or curtailed in scope because of the pandemic. There is no dispute the insurance contract was in full force."

How We Got Here

The onset of the COVID-19 pandemic in March 2020 sent many in the workforce to their homes to work remotely. As a result, fewer drivers were commuting, greatly reducing the time they spent on the road.

According to some policyholders, carriers obtained a windfall in premiums as a result of the pandemic. Some, such as Geico, offered premium refunds or discounts to new customers and existing policyholders who decided to renew.

According to Grossman's and Perezic's New York federal court class action, the Geico Giveback program offered a 15% credit on premiums to new customers as well as those who renewed personal auto insurance policies within a certain timeframe.

The policyholders sought to represent a class of New York Geico policyholders and asserted claims for breach of contract, unjust enrichment and violation of Chapter 93A.

Geico moved to ax the action, contending the filed-rate doctrine was applicable. Since the NYDFS approved the rate, the insurer said, the policyholders could not challenge the amount of the premiums regardless of whether they thought they were excessive. After Judge Marrero sided with the insurer in September, Grossman and Perezic turned to the Second Circuit.

Policyholders' Stance

Grossman and Perezic are urging the appeals panel to jumpstart their suit, arguing that Judge Marrero's ruling was premature and that they should be allowed to amend their allegations.

In their opening brief filed in January, **the policyholders maintained** that the filed-rated doctrine

does not apply to their suit. According to Grossman and Perezic, their allegations focus on the misrepresentations Geico used to lure policyholders into renewals.

Additionally, Grossman and Perezic look to the Illinois federal judge's ruling last June that found a putative class of policyholders **sufficiently stated** a claim under the state's deceptive trade practices act. That case also involved complaints about Geico's giveback program.

Although the Illinois case has since been dismissed voluntarily, the Empire State policyholders point out that the pleading requirements for the Illinois Consumer Fraud and Deceptive Business Practices Act are nearly identical to those of Chapter 93A.

Geico's Stance

Geico maintains that Judge Marrero's ruling should not be disturbed since the filed-rate doctrine clearly bars the policyholders' allegations.

The insurer explained **in a response brief** submitted to the Second Circuit in February that juries are not equipped to decide whether insurance rates are excessive or if rates should be recalculated.

Moreover, Geico said the policyholders did not make any changes to their information that would have required an adjustment to their rates and any allegations of unjust enrichment lack merit.

The parties and their counsel did not respond to requests for comment.

Grossman and Perezic are represented by Blake G. Abbott, Eric Poulin and Roy T. Willey IV of Anastopoulo Law Firm and Edward Toptani of Toptani Law Offices.

Geico is represented by Damon Vocke and David McTaggart of Duane Morris LLP.

The case is Todd Grossman et al. v. Geico Casualty Co., case number 21-2789, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Lauren Berg, Hope Patti and Ganesh Setty. Editing by Roy LeBlanc.