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NJ Justices To Mull Class Action Standard In Insurance Row

By **Shayna Posses**

Law360, New York (December 15, 2015, 7:58 PM ET) -- New Jersey's highest court agreed Tuesday to consider whether lower courts erred by stripping class allegations prior to discovery in suits accusing automotive insurers of improperly refusing to cover the diminished value of policyholders' vehicles.

Tuesday's decision will allow policyholders to reassert their challenge to lower court decisions **striking class action claims** despite the absence of any motions requesting such relief in suits seeking diminished value damages as part of policyholders' underinsured and uninsured motorist coverage. The policyholders argued that the rulings set a dangerous precedent, undermining the rights of all New Jersey consumers.

Two of the policyholders, Patricia Myska and Katherine Wagner, were insured with New Jersey Manufacturers Insurance Co., while a third, John Todisco, was insured with Palisades Insurance Co. The suits brought by the trio will be argued together before the state Supreme Court, said Eric Katz of Mazie Slater Katz & Freeman LLC, representing the policyholders.

The attorney told Law360 on Tuesday that the potential consequences of the appeals courts' decisions created a "chilling effect" for the entire class action bar.

"I had been hopeful the Supreme Court would take this case because I thought it had important ramifications for class actions in the consumer protection space," Katz said. "You can't just have judges throwing out class claims before the plaintiffs have the chance to make their case."

In May, a New Jersey appeals court had refused to revive the policyholders' class claims, finding nothing wrong with a judge's decision to strike the class allegations before discovery.

There's no clear-cut procedure for ruling on class certification early in litigation, and although courts should liberally view class allegations and take steps to avoid premature dismissals, that doesn't mean courts can't dismiss such allegations if the claims "do not properly lend themselves to class certification" based on the required standards, the appellate court said.

"We flatly reject plaintiffs' urging to impose a bright-line rule prohibiting examination of the propriety of class certification until discovery is undertaken," the court said in its opinion.

However, the New Jersey justices agreed Tuesday to hear the policyholders' argument that the decisions prematurely strip consumers of the right to litigate as a class, saying the state high court's 1972 ruling established the general rule that class allegations cannot be

dismissed prior to discovery.

In a May motion for leave to appeal filed in the Myska action, the policyholders said, "the class action is essential for the 'smaller guy' to have 'access to the courthouse' because the claims must be aggregated to create economies of scale."

The motion continued, "The decisions below have closed the courthouse door for many New Jersey consumers."

In addition to agreeing to hear the class action issue, the state Supreme Court decided to consider whether an appeals court correctly tossed fraud claims in the Todisco action related to post-sale actions brought under the New Jersey Consumer Fraud Act. While a fraud claim typically refers to an action that induces a consumer to buy something, recent New Jersey case law suggests you can have a post-sale fraud allegation, Katz said.

The policyholders allege that they purchased the policies in question thinking they were getting diminished value coverage, Katz explained.

"Essentially, our argument is by not providing it, [the insurers] are committing consumer fraud," he said.

Representatives for the insurers did not immediately respond to requests for comment Tuesday evening.

Myska, Wagner and Todisco are represented by Eric D. Katz and David M. Estes of Mazie Slater Katz & Freeman LLC and Stephen T. Sullivan Jr. of Keefe Bartels LLC.

New Jersey Manufacturers is represented by Bruce D. Greenberg of Lite DePalma Greenberg LLC and Daniel J. Pomeroy and Karen E. Heller of Pomeroy Heller & Ley LLC. Palisades is represented by Robert J. Del Tufo of Skadden Arps Slate Meagher & Flom LLP.

The case is Myska et al. v. New Jersey Manufacturers Insurance Co. et al., case numbers M-255 and C-187, in the Supreme Court of the State of New Jersey.

--Additional reporting by Martin Bricketto. Editing by Edrienne Su.

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