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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EILEEN-GAYLE COLEMAN and ROBERT CASTRO, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION and USAA GENERAL INDEMNITY COMPANY,

Defendants.

CASE NO. 3:21-cv-00217-RSH-KSC

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO EXCLUDE THE REPORTS AND TESTIMONY OF JONATHAN GRIGLACK AND ALLAN SCHWARTZ

Hearing:
Date: August 25, 2023
Courtroom: 3B
Judge: Hon. Robert S. Huie

PER CHAMBERS RULES, NO ORAL ARGUMENT UNLESS SEPARATELY ORDERED BY THE COURT

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(Continued)

I. INTRODUCTION

Plaintiffs' theory is that GIC policyholders paid too much. But their experts admit they don't know how much those policyholders actually paid (**Variable A)** or how much they should have paid (**Variable B)**. And the experts have no reliable way of replicating either value. The Court should therefore exclude the experts' opinions.

As to Variable A, Plaintiffs never asked for the amount of GIC premiums anyone actually paid. They instead artificially sought to reconstruct those figures at six-month intervals. Those "snapshot" calculations do not account for the fact that policyholders can, and regularly do, make changes to their policies in the middle of policy periods that meaningfully alter their premiums. Plaintiffs ask the Court to overlook this deficiency in their model because, in their view, the only "variable of interest" is the "spread" between Variables A and B (i.e., the damages they claim they're due). But, of course, if neither variable is correct, the damages model necessarily cannot yield a valid, reliable result—no matter how good it is at subtracting one value from another.

As to Variable B, Plaintiffs maintain they can retroactively recalculate GIC policyholders' rates using United Services' rating system—even though it's undisputed that California law precludes insurers from doing exactly that. In asserting that this Court should nevertheless bless Plaintiffs' model because a proper calculation would necessitate excessively complex analyses and regulatory intervention, Plaintiffs confirm that this case should not be in this Court in the first place because it is a collateral attack on rates approved by the California Insurance Commissioner. That's also why a class action is not superior to the Commissioner's robust regulatory tools.

II. ARGUMENT

A. Griglack and Schwartz are unable to reliably calculate Variable A, which is the amount of GIC premiums that class members actually paid.

There are several potentially reliable ways to prove the amount of premiums any particular GIC policyholder actually paid over a multi-year period. Policyholders could use canceled checks or credit-card statements showing payments made during the period. They could introduce USAA's own billing/payment records. Or they could use their declarations pages, which identify the six-month premium quoted at the outset of each policy period and are re-issued and updated within each period whenever changes are made to the policy that affect the premium amount.

The problem here is that Plaintiffs and their experts did none of these things. They instead asked USAA to create spreadsheets with a variety of information for each class member (age, type of car, driving experience, coverages, etc.) on eight arbitrary dates during a four-year period. Mr. Griglack then performed a series of calculations to arrive at the six-month premium amount GIC would have quoted the policyholder on each of those dates. And then he added the eight "snapshot" numbers together.

As Defendants have explained, Plaintiffs' methodology produces a wholly unreliable estimate of the GIC premiums that any given policyholder *actually* paid over any six-month period, let alone the entire class period. For one thing, the twice-a-year "snapshot" dates almost never correspond to anyone's six-month policy period. And more importantly, Plaintiffs' methodology does not account for the frequent changes policyholders make during a six-month period that affect their premiums—things like changing coverages or coverage limits, moving, getting married or divorced, speeding tickets, or cancelling a policy entirely. *See* Dkt. 122 at 10–11.

Plaintiffs' various efforts to defend their shortcut approach are unpersuasive.

1. Plaintiffs emphasize that their calculated GIC premiums closely match USAA's own figures more than 99% of the time. Dkt. 126 at 5. This is misleading. What Plaintiffs are saying is that their calculated premiums (mostly) match the numbers USAA itself arrived at when performing the same "snapshot" exercise as Plaintiffs' experts. This ignores the fundamental defect in the "snapshot" approach—the fact that a six-month premium quote on a "snapshot" date is not the same as what anyone actually paid in premiums over that six-month period.

2. Plaintiffs distort USAA's position to be that only "day-to-day" premium estimates would suffice. To be clear, USAA's position is that Plaintiffs should not be using estimates at all. They should be using the *actual* premiums paid by GIC policyholders—which they never bothered asking for and have no way to calculate.

Consider how the trial would play out: Plaintiffs' expert would testify as to the amount he calculated a given class member paid in GIC premiums over a six-month period, and, in many cases, USAA would be able to show that this number is arbitrary and unreliable because (among other reasons) it fails to account for mid-period changes. For instance, for Plaintiff Castro, in the six-month period starting on March 31, 2021, Plaintiffs' model shows that he paid $641.19 in GIC premiums, when in reality he *actually* paid nearly *three times* that amount. *See* Dkt. 123 at 23. Plaintiffs have no response to this problem, which would play out over and over again, making a class trial "prohibitively cumbersome" and unmanageable. *Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459, 469–70 (9th Cir. 2023).

3. Plaintiffs next claim their "snapshot" calculations were "off by only 2.5%" from policyholders' actual premiums paid, according to a sample taken by USAA's expert. Dkt. 126 at 10. In fact, the sample shows that Plaintiffs' methodology is off by 6.1% on average (Plaintiffs were mistakenly looking at the "net" percentage difference, not the "absolute value"). *See* Dkt. 122-1 at 204.

To put this in context, USAA's expert's sample revealed that, on average, Plaintiffs' estimates of GIC premiums were off by $79.81 per policyholder in one six-month period, off by $65.90 in another period, off by $57.48 in yet another period, etc. Dkt. 122-1 at 204. And because these are just averages, the swings can be much higher for individual class members—all of which will need to be accounted for at trial. Take, for example, the named Plaintiffs: As noted above, Castro actually paid more than three times what one of Plaintiffs' "snapshots" estimated; and for Coleman, in one six-month snapshot period in 2018, Plaintiffs' model was off by roughly $470; in another six-month period it was off by $90. Dkt. 122-1 at 107.

These are far from trivial differences. The problem with Plaintiffs' model is not that it is slightly inaccurate. The problem is that the entire methodology is fraught and unreliable—and at class certification, it can't mask the many individual calculations needed to determine whether and to what extent each policyholder was injured, and if so, in what amount. *See Jimenez v. Allstate Ins. Co.*, 2019 WL 13088814, at *26 (C.D. Cal. May 13, 2019) (expert testimony properly excluded where "reliability issues of the proffered opinion evidence cannot be separated from the substantial shortcomings of the [expert's] results on which they are based").

4. Plaintiffs ultimately say it doesn't matter whether their experts can reliably calculate either Variable A (actual premiums) or Variable B (but-for premiums), because the only relevant question is the "spread" between them. *See* Dkt. 126 at 18. But the difference between two inaccurate numbers is meaningless. A grocery-store cashier who gives customers arbitrary amounts of change would be fired, even if the (wrong) amounts were consistent with each other. An expert's methodology needs to produce results that correspond with the numbers in the real world—that is, with the amounts actually paid and the amounts that should have been paid.

Plaintiffs contend their model produces relatively few examples of class members "switching" from injured to uninjured between one snapshot period and the next. Dkt. 126 at 11.[1] But that doesn't mean that mid-period changes have no effect on the actual or but-for premiums, or the "spread" between them, i.e., the amount of purported damages. Nor does it mean that mid-period changes are necessarily "picked up" and "therefore accounted for" in the next snapshot period. *Id*. at 13.

- A mid-period change can affect Variable A (actual premium) and Variable B (but-for premium) in different ways. Plaintiffs do not dispute that GIC and United Services assign different weights to certain rating factors, such that mid-period changes can affect the two variables differently. Thus, even if those

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[1] Mr. Griglack concludes that one in every sixteen GIC policyholders wasn't injured under his calculations, and that almost a quarter (22.8%) paid within 10% of the amount Plaintiffs believed they should have paid. Dkt. 122-1, Ex. N. So even in Plaintiffs' view of the world, minor systematic errors or adjustments could easily swing a meaningful proportion of the class from injured to uninjured, or vice versa.

premiums moved in the same direction, the increase in but-for premium could nevertheless exceed the increase in actual premium. Dkt. 122 at 16.

- Plaintiffs have no way of dealing with mid-period *cancellations*. Their model assumes that policyholders paid the entire six months of GIC premium associated with a snapshot date, when in reality those policyholders may have paid much less because they canceled (or didn't renew) somewhere between day 1 and day 179 of the six-month snapshot period. Plaintiffs don't dispute that roughly 14.5% of the class canceled mid-period. Dkt. 123 at 16. In fact, their expert identified tens of thousands of policyholders who cancelled somewhere in between snapshot periods (only 35,000 of the 212,000 policyholders held their policy through all of the eight "snapshot" periods). Dkt. 119-1 at ¶ 45.
- Plaintiffs' model ignores not only the *fact* of a mid-period change, but also the *timing*. If a policyholder increased a coverage limit on day 10 of the six-month snapshot period, that would have a different impact on the GIC premium—and the "spread" between GIC premium and but-for premium—than it would if the change happened on day 170. At trial, the factfinder would need to determine (for each class member) when the changes happened, and the corresponding effects on both actual and but-for premiums.
- Plaintiffs' model also cannot account for temporary mid-period changes that are not reflected in the next snapshot. Take Plaintiff Castro, who added rideshare gap protection and adjusted liability limits when he became a Lyft driver, but switched back a month later. *See* Dkt. 122 at 15. That change increased his GIC premium by 15% for one month during the snapshot period, but Plaintiffs' model ignores it because that change isn't reflected in the next snapshot.

5. Plaintiffs' experts emphasize an "almost perfect" "correlation" between the actual and but-for premiums. Dkt. 126 at 11. But all this means is that when their calculated GIC premium increases or decreases between snapshot periods, their calculated but-for premium generally moves in the same direction. *See* Dkt. 119-2,

¶ 17; Dkt. 119-4, ¶ 14. This is entirely unsurprising; any change that increases coverage or reflects increased risk (e.g., adding a car, getting into an accident) will cause premiums to increase, just as changes to reduce coverage or that reflect decreased risk (e.g., reporting lower annual mileage) will do the opposite—regardless of the rating system used. The fact that the figures are *directionally* consistent (or correlated) across multiple periods doesn't mean that the changes in those values are necessarily equal. As a result, the degree of "spread" between the two values (the amount of damages) can increase and decrease throughout a six-month period based on mid-period changes, and Plaintiffs have no way of measuring that change.

6. Plaintiffs also do nothing to defend their miniscule sample. They quote cases that approve of sampling in the abstract, but offer no support for the notion that the sampling of dates is inherently acceptable, let alone why looking at just 8 out of 1,460 dates (or 0.5% of the class period) is appropriate in this case.

7. Finally, Plaintiffs try to distance this case from the many that Defendants cited where courts excluded expert testimony that relied on inaccurate "derivations" rather than on actual data. Dkt. 122 at 16–18. Plaintiffs claim those cases excluded testimony "for reasons having no bearing here," Dkt. 126 at 14, but in those cases, just like here, the plaintiffs relied on their experts' unreliable reconstruction of certain figures instead of seeking evidence of the actual, known amounts. *E.g.*, *Finjan, Inc. v. ESET, LLC*, 2019 WL 5212394 (S.D. Cal. Oct. 16, 2019) (excluding testimony that looked to "hypothetical construction" of costs when actual costs could be determined).

B. Griglack and Schwartz are unable to reliably calculate Variable B, which is the but-for premium for each class member.

Even if the snapshot approach were reliable, there would be an independent reason to exclude the experts' opinions: Their but-for scenario is a legal and actuarial impossibility. In their proposed counterfactual world, USAA would have calculated and charged *GIC* policyholders' premiums using *United Services*' rating system. But California law forbids insurers from charging unapproved rates, meaning Plaintiffs' model assumes USAA would have violated the law (and basic actuarial principles to boot). Under California's prior-approval regime, insurers are "required and entitled to charge the approved rate, until a different rate [is] approved." *State Farm Gen. Ins. Co. v. Lara*, 71 Cal. App. 5th 148, 194 (2021); *see also Walker v. Allstate Indem. Co.*, 77 Cal. App. 4th 750, 753 (2000). Because United Services' rates were carefully set and approved based on the risk profile of *its* policyholders, USAA could not have applied those rates to an entirely different set of *GIC* policyholders whose risk profile was not "part of [the United Services] rate plan which has been approved in advance." *MacKay v. Superior Ct.*, 188 Cal. App. 4th 1427, 1431 (2010).

Plaintiffs don't try to square their counterfactual model with the law or established regulatory practice. Instead, they urge this Court to accept their model in spite of this deficiency because the legal and actuarially sound method of calculating but-for premiums is, in their view, effectively impossible to carry out. Dkt. 126 at 18. But that is not the law. Plaintiffs rely on general maxims about how defendants cannot hide behind uncertainty in damages calculations to escape liability, *see* Dkt. 126 at 18–19, but Plaintiffs overlook that *they* are the ones seeking to establish that this case can be maintained as a class action as "an exception" to traditional litigation, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). At class certification, it is the *plaintiffs* who carry the burden of affirmatively demonstrating by a preponderance of evidence that Rule 23's requirements are satisfied. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022). Plaintiffs cannot shirk their obligation to develop an injury model "consistent with [their] liability case" by waving a white flag. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013).

Nor is Plaintiffs' "impossibility" premise correct. Insurers can seek to change their rates to reflect changes to their risk pool, but they need to work hand in hand with the Department to do so. Dkt. 122-1 at 12–13; Dkt. 122-3 ¶¶ 19, 26–27, 36. So while that exercise may have proven too much for Plaintiffs' experts (who never attempted to create a counterfactual model consistent with California's prior-approval regime), it is a commonplace occurrence for insurers and the Department. And the inability of Plaintiffs' experts to develop a plausible counterfactual model simply confirms that a class action is not the superior means of addressing the injuries alleged by Plaintiffs. *See* Dkt. 123 at 8–13; *H.J. Inc. v. Nw. Bell. Tel. Co.,* 954 F.2d 485, 493 (8th Cir. 1992) (where a plaintiff seeks damages on the theory that a rate previously approved by a regulatory body is too high, that is "necessarily and plainly [a] challenge [to] the rates previously approved").[2]

Plaintiffs also try to bless their calculation of but-for premiums by suggesting that their methodology "follow[s] the statutory language precisely." Dkt. 126 at 20. As Plaintiffs see it, compliance with Section 1861.16(b) of the Insurance Code would have required GIC to calculate premiums for its "good driver" policyholders using United Services' rates. *Id.* at 20 n.7. But Plaintiffs offer no support for the idea that GIC could hide behind Section 1861.16(b) to avoid complying with California's prior-approval scheme of ratemaking. Said another way, California law requires insurers like GIC to charge policyholders pre-approved rates, and nothing in the text of Section 1861.16(b) suggests that insurers could rely on that statute to charge *different* rates and bypass the rigorous rate application and approval process.

Thus, even if Plaintiffs' interpretation of Section 1861.16(b) were correct, compliance with that statute *and* the prior-approval regime (i.e., the but-for world) would have required USAA to combine the risk pools of GIC good drivers and United Services and calculate a brand-new set of rates and relativities. Dkt. 122-1 at 17–18;

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[2] This Court ruled at the pleadings stage that the filed-rate doctrine did not bar this action because "Plaintiffs do not challenge the validity or reasonableness of Defendants' rates." Dkt. 22 at 8. Defendants respectfully disagree and will revisit this issue at summary judgment. As the Western District of Washington reasoned in dismissing a copycat case against USAA based on the same theory asserted here, Plaintiffs "seek[] to have the Court or fact finder to determine that the proper rate for Enlisted Policyholders to pay is the same rate that Officer Policyholders pay"—a determination that "falls squarely in the province of the [regulator]." *Epstein v. USAA Gen. Indem. Co.*, 636 F. Supp. 3d 1260, 1265 (W.D. Wash. 2022).

Dkt. 122-3 ¶ 38. Plaintiffs don't dispute that these rates and relativities are all but certain to be different from GIC's and United Services' current rates and relativities. Dkt. 122-1 at 18, 129–30, 231–32. Instead, their only retort is that this "combined [risk] pool" approach is entirely outside the ambit of Section 1861.16(b) (and thus untenable as a counterfactual) because it assumes the existence of a single insurance company whereas the statute necessarily addresses situations involving two or more companies. Dkt. 126 at 21. That's not right either. Under Plaintiffs' reading of the statute, USAA would have needed to move GIC good drivers into United Services; GIC would be left intact, but with only its non-good driver policyholders. That change to the risk pools of both companies would necessitate new rates across the board, again rendering Plaintiffs' Variable B (based on United Services' *current* rates) irrelevant.

Still, Plaintiffs claim this case is distinguishable from those cited by Defendants in which courts have excluded expert analysis that depends on impossible counterfactuals. Dkt. 126 at 22. But Plaintiffs don't explain *why* this case is different. And it isn't. In *Helft v. Allmerica Financial Life Insurance & Annuity Company*, for example, the excluded opinion was premised on the incorrect, impossible assumption that the plaintiffs' rate of return on their investment would stay the same for up to 46 years. 2009 WL 815451, at *10 (N.D.N.Y. Mar. 26, 2009). Here, Plaintiffs' calculation of Variable B is based on the incorrect, impossible assumption that Defendants could have lawfully charged GIC policyholders premiums based on United Services' rates and relativities. In both cases, the counterfactuals fail to take into account the realities of the but-for world—in *Helft*, the "actual investment environment in which plaintiffs' hypothetical restriction trades would have taken place," 2009 WL 815451, at *13, and here, the actual prior-approval regime in California.

But even after Plaintiffs give a full-throated defense of their calculation of Variable B, they admit that if the Court were to actually "require[] creation of a counterfactual world, Schwartz performed an alternative damages calculation" that tries to keep the total revenue collected by USAA from GIC and United Services policyholders constant. Dkt. 126 at 23. For starters, this concession confirms that not only would the first model result in a windfall given the overall revenue deficit that USAA would face, but also that Variable B as originally proposed doesn't even purport to represent what GIC policyholders should have paid in any but-for world. And on its own merits, this second model is still unreliable because it (1) depends entirely on Mr. Griglack's flawed calculation of both Variables A and B, merely multiplying Variable B by a fudge factor, and (2) relies on another impossible assumption that Defendants could retroactively collect higher premiums from United Services policyholders to make up for the lower revenue from GIC. *See* Dkt. 122-1 at 19.

Tellingly, Plaintiffs offer no substantive response to these critiques. Instead, they urge the Court to accept this alternative model because "it has the virtues of being calculable and not speculative." Dkt. 126 at 23. But again, that's not enough. *See supra* at 7. A damages model that utilizes arbitrary inputs cannot satisfy Rule 23's "stringent requirements for certification" just because it manages to spit out *some* result. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). That result might even be correct in a vacuum, but if there's "simply too great an analytical gap between the data and opinion proffered," the expert testimony should still be excluded. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1996); *see Myers v. United States*, 2014 WL 6611398, at *41 (S.D. Cal. Nov. 20, 2014), *aff'd*, 673 F. App'x 749 (9th Cir. 2016) (a model's validity is determined by its ability to measure what it sets out to measure). Here, neither Mr. Griglack nor Mr. Schwartz attempted to calculate a Variable B that reflects the rates that GIC policyholders should have paid in any plausible counterfactual world, and Plaintiffs' resulting model should be rejected. *See Olean*, 31 F.4th at 666 n.9 (citing *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 29 (1st Cir. 2008) ("If there is no *realistic* means of proof, many resources will be wasted setting up a trial that plaintiffs cannot win." (emphasis added))).

III. CONCLUSION

The Court should exclude the opinions of Messrs. Griglack and Schwartz.

Dated: August 18, 2023

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