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Eleventh Circuit Reverses Certification of Damages Class Masquerading as Injunction Class

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Takeaway: Injunctive relief is a forward-looking remedy. A damages award compensates for past harm. This dichotomy lies at the heart of the difference between a Rule 23(b)(2) injunctive relief class and a Rule 23(b)(3) damages class. In an opinion that discussed the fundamental differences between injunctive and compensatory relief, the Eleventh Circuit recently overturned the certification of an "injunction" class under Rule 23(b)(2), determining that it was really a "damages" class attempting to avoid the more onerous predominance and superiority requirements of Rule 23(b)(3). This decision – *AA Suncoast Chiropractic Clinic, P.A., et al. v. Progressive American Insurance Company*, --- F.3d ---, No. 17-13003, 2019 WL 4316088 (11th Cir. Sept. 12, 2019) – should encourage class action defendants to scrutinize proposed injunction classes to determine whether the relief sought is a damages claim in disguise.

AA Suncoast Chiropractic challenged a 2013 revision to Florida's personal injury protection ("PIP") statute that allows insurers to reduce policy limits from $10,000 to $2,500 if any medical provider – including a non-treating medical provider – finds that the motorist did not suffer an emergency medical condition ("EMC"). 2019 WL 4316088, at *1. In addition to seeking damages for past reductions in coverage, the putative class of health care providers and injured drivers sought a declaration that allowing non-treating medical providers to make an EMC determination that would cap policy limits at $2,500 was unlawful and also sought an injunction that would have restored coverage limits to $10,000 for affected policies. *Id*.

After the case was removed to federal court under the Class Action Fairness Act, Suncoast moved to certify two classes: an injunction class under Rule 23(b)(2) and a damages subclass under Rule 23(b)(3). *Id*. at *2. The district court refused to certify the damages subclass – which would have required "each and every member of the damages subclass" to "jump through a series of hoops to establish an individualized entitlement to damages" – but certified the class seeking injunctive relief under Rule 23(b)(2). *Id*. at *2-3.

On interlocutory appeal before the Eleventh Circuit, the putative class argued that it sought only (1) a declaration that Progressive's practice of relying on non-treating physicians was unlawful and (2) a corresponding injunction to prevent such a practice. *Id*. at *3. It framed the class injury not as a loss of money in and of itself, but rather the loss of an opportunity to have received money. *Id*.

In an opinion authored by Judge Britt Grant, the Eleventh Circuit found that the class did not present a true injunction relief claim seeking to prevent future injury but, instead, sought to press a disguised damages claim

seeking to redress past harms.

First, the court took issue with class plaintiffs' theory of standing, which was predicated on a "lost opportunity" to receive up to $10,000 in coverage. Id. at *4. The court found that this purported injury constituted a retrospective harm because the putative class had an interest in getting paid for *past* claims that had been rejected. Citing *Houston v. Marod Supermarkerts, Inc*., 733 F.3d 1323 (11th Cir. 2013), the Eleventh Circuit reaffirmed that injunctive relief must be geared towards preventing *future* harm, while the relief sought by Suncoast looked backwards. *Id*.

Second, the court characterized the claimed relief as seeking the *reprocessing* of past claims. *Id*. at *4-5. Among other requests, the class sought to reinstate "the full amount of PIP coverage, in the amount of $10,000, which should have been available under the affected policies." *Id*. at *4. The only outcome of this requested relief would be the full payment of benefits, for previously-processed claims, to compensate already-suffered harms. *Id.*

Third, the court found the injunction class was both over- and under-inclusive and, yet again, calculated to redress past rather than future injuries. *Id*. at *5-6. The injunctive class was defined as follows:

A. All Qualified Providers who (i) *received* an assignment of benefits from a Claimant under a Progressive PIP policy, (ii) provided initial or follow up medical services to a Claimant after January 1, 2013, and (iii) were given notice by Progressive that available PIP benefits *were reduced* to $2,500 because of a Negative EMC Determination that Progressive obtained from a Non-treating Provider; and

B. All Claimants who *were notified* that Progressive reduced available PIP benefits to $2,500 because of a Negative EMC Determination Progressive obtained from a Non-treating Provider.

Id. at *5 (emphasis added). In the Eleventh Circuit's view, "nothing in that definition envisions future harm." *Id*. Moreover, by failing to limit class membership to providers who were likely to see a greater number of future Progressive insureds, the class definition was over-inclusive. *Id*. It was also under-inclusive in that it failed to include claimants and qualified providers who had not yet had a claim denied but who might be injured in the future. *Id*. at *6.

Because the class sought to rectify past injuries rather than to enjoin future harm, the court concluded that Rule 23(b)(2) was an improper path to class certification. *Id*. In so ruling, the court followed an earlier ruling of the Eleventh Circuit as well as a similar ruling of the Seventh Circuit. *See Holmes v. Continental Can Co*., 706 F.2d 1144, 1158 n. 10 (11th Cir. 1983) ("[T]he policies underlying the requirements of (b)(3) should not be subverted by recasting and bifurcating every class suit for damage as one for final declaratory relief of liability under (b)(2), followed by a class suit for damages under (b)(3)."); *Kartman v. State Farm Mut. Auto. Ins. Co*., 634 F.3d 883, 895 (7th Cir. 2011) ("In short, the plaintiffs are not really interested in final *prospective* equitable relief at all; they are singularly focused on recovering a retrospective damages remedy, and Rule 23(b)(3), not (b)(2), governs certification of a damages class.").

Though the Eleventh Circuit's opinion focused on the claim for injunctive relief, it also noted that the claim for declaratory relief did not save the Rule 23(b)(2) class. 2019 WL 4316088, at *6. Under both theories, class

plaintiffs must allege a likelihood of future harm in order to show Article III standing, which the court found lacking in this case, citing to *Malowney v. Fed. Collection Deposit Grp*., 193 F.3d 1342, 1346-47 (11th Cir. 1999). Likewise, the declaratory relief sought did not "correspond" with injunctive relief and instead sought monetary damages. *Id*. at *7.

The court made clear that its holding should not be read to mean that injunctive relief could never serve as a mechanism to obtain monetary relief – only that a class must still meet all the traditional requirements for injunctive relief, including a demonstrated risk of future harm. *Id*. at *7, n.7. In other words, without allegations of future harm, Rule 23(b)(2) is not an avenue for relief for putative class plaintiffs.

Judge Jordan concurred in the judgment only, critiquing the certified class for a narrower technical reason. *Id*. at *7-8. In his view, the certified injunctive class was "fatally overinclusive" by including providers who rendered services in the absence of a positive finding of an emergency medical condition ("EMC"). Relying on *Robbins v. Garrison Property & Casualty Co*., 809 F.3d 583, 587-88 (11th Cir. 2015), Judge Jordan concluded that those providers have not suffered any harm from the $2,500 benefits cap because there was no positive EMC determination. *Id*. at *8. Thus, as uninjured absent class members, those providers could not be part of the same class under Rule 23 as those class members who did have a positive EMC determination. This concurrence may indicate at least some judges on the Eleventh Circuit would be willing to join other federal circuits in holding a class cannot include a significant number of uninjured class members. *See* *D.C. Circuit denies class certification where putative antitrust class includes uninjured class members* (August 30, 2019).