I. Introduction

One of the most important opinions to be handed down from the Colorado Court of Appeals this year was *Fisher v. State Farm Mutual Automobile Insurance Company*, 2015 COA 57 – an opinion that provided guidance to both personal injury attorneys and insurance defense counsel concerning an automobile liability insurance carrier's duties and obligations when evaluating a claim for uninsured ("UM") and/or underinsured motorist ("UIM") benefits. This article will evaluate the Court's opinion, and will summarize the salient points or "takeaways" from this opinion.

II. Fisher v. State Farm

A. Facts and Findings

Although there were a number of issues addressed in *Fisher*, this article will focus on those facts relating to the insurance company's duty to pay the undisputed amount of damages suffered by an insured presenting a claim for UIM benefits. So here is what you need to know:

- 1. Fisher was injured in a motor vehicle accident.
- 2. Fisher was not at fault for causing the accident.
- 3. The at-fault party had a \$25,000 bodily injury liability limit.
- 4. Fisher was insured under several State Farm insurance policies that afforded a combined \$400,000 in UIM coverage.
- 5. Fisher's accident-related medical expenses totaled \$59,572.10.
- 6. Fisher presented a claim to State Farm for UIM benefits totaling \$1.35 million.
- 7. The at-fault party's insurance company tendered the \$25,000 bodily injury liability limit.

- 8. State Farm gave consent for Fisher to settle his third party claims for the \$25,000 limit.
- 9. State Farm evaluated Fisher's claim and concluded that the reasonable amount of Fisher's accident-related medical expenses totaled \$59,572.10.
- 10. State Farm offered to settle Fisher's UIM claim for \$59,572.10.
- 11. Fisher rejected State Farm's offer and filed suit against State Farm alleging, among other things, State Farm unreasonably delayed or denied payment of benefits in violation of C.R.S. §10-3-1115.

At the close of Fisher's case-in-chief, State Farm moved for a directed verdict on Fisher's statutory bad faith claims, but the Court denied this motion.

Following a jury trial, the jury returned a verdict for Fisher in the amount of \$780,572, and also found that State Farm had unreasonably delayed payment to Fisher for medical expenses totaling \$61,125.16.

The trial court entered judgment for Fisher for \$400,000 (the UIM policy limits), *plus* \$122,250.32 (two times Fisher's medical expenses), *plus* \$51,100 in attorneys' fees, *plus* \$54,175.21 in costs.

B. Statutory Bad Faith Claims Under C.R.S. §§10-3-1115 and 10-3-1116

Section 10-3-1115(1) provides, "[a] person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits owed to or on behalf of any first-party claimant."

Pursuant to Section 10-3-1116(1), if a claim for payment of benefits has been unreasonably delayed or denied, the claimant "may bring an action . . . to recover reasonable attorney fees and court costs and two times the covered benefit."

On appeal, State Farm first argued the trial court erred in denying State Farm's motion for a directed verdict because Fisher's medical expenses were not, as a matter of law, "benefits owed" to Fisher at the time Fisher initiated the lawsuit, *i.e.*, the benefits are not "owed" until a)

the claimant and the insured agree upon the amount, or b) there is a judicial determination of the amount of the benefit owed. Since neither had occurred pre-suit, State Farm argued it could not have unreasonably delayed payment of "owed" UIM benefits.

In rejecting State Farm's argument, the Court of Appeals relied, in part, on the UIM statute, C.R.S. §10-4-609 (as amended in 2007), and the Court's prior ruling in *Jordan v. Safeco Ins. Co. of Am., Inc.*, 2013 COA 47, ¶29, namely, that an insurer's obligation to pay UIM benefits is triggered by the *exhaustion* of at-fault third party's liability limits, and "not necessarily any payment from or judgment against" the at-fault third party. *Fisher*, ¶19. Thus, the *Fisher* Court concluded that "it is no longer the case that UIM benefits are *not* owed until third-party liability has been determined," but rather, a UIM insurer is responsible for damages exceeding the at-fault third party's liability limit, subject to the UIM limits of the insured's policy of insurance. *Id.* (emphasis added, citations omitted).

Thus, the *Fisher* Court found C.R.S. §10-4-609 precludes an insurer from relying on any policy language that purports to prevent an insured from establishing a statutory bad faith claim under C.R.S. §10-3-1115 "until the amount of compensatory damages to which he is legally entitled to collect from the underinsured motorist has been determined." *Fisher*, ¶20. The Court then concluded that "to the extent State Farm argues that its conduct could not have been unreasonable because the amount the underinsured motorist owed to Fisher had not been determined at the time he initiated the lawsuit, this argument is inconsistent with Colorado law." *Id.*

C. Payment of UIM Benefits on a "Piecemeal" Basis

1. State Farm's Argument

State Farm next argued that it had no legal obligation to pay Fisher's UIM claim on a "piecemeal" basis because there was a genuine disagreement as to the *total* amount of benefits owed on Fisher's *entire* UIM claim at the time suit was filed, and therefore, State Farm had no obligation to pay any part of Fisher's UIM claim, including the undisputed amount of Fisher's accident-related medical expenses. *Fisher*, ¶21. In further support of this argument, State Farm asserted it "could not have owed Fisher any benefits while the value of the entire claim remained 'fairly debatable.'" Therefore, State Farm argued, State Farm "could not have unreasonably delayed 'payment of a claim for benefits owed' to Fisher" as a matter of law. *Id*. The Court of Appeals was not persuaded.

2. The Court's Rejection Of State Farm's Argument That Whether A Claim Is "Fairly Debatable" Can Be Determined As A Matter of Law

In rejecting State Farm's argument, the Court first disagreed with State Farm's position that under C.R.S. §10-3-1115, "an insurer's decision to delay or deny payment of a 'fairly debatable' UIM claim cannot be unreasonable as a matter of law." *Fisher*, ¶ 22. Rather, as set forth in C.R.S. §10-3-1115(2), and as interpreted by the Court of Appeals in *Kisselman v. Am. Family Mut. Ins. Co.*, 292 P.3d 964, 972 (Colo. App. 2011), the question becomes whether the insurer had a "*reasonable basis*" for the insurer's delay or denial in authorizing payment of a covered benefit. *Fisher*, ¶ 22.

3. The Court's Rejection Of State Farm's Argument That No Benefits Are Owed Until A) The Parties Reach An Agreement Concerning Damages or B) The Claimant Has Met His Or Her Burden Of Proof

State Farm also argued the UIM insurer does not owe any benefits under C.R.S. §10-3-1115 until either a) the insured and the insurer reach an agreement concerning the amount of the

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insured's damages, or b) the insured has met his or her burden of proof concerning the amount of the insured's damages in the appropriate judicial setting. *Fisher*, ¶ 25. The *Fisher* Court refused to adopt this argument because to do so would insulate an insurer from liability as long as the insurer disputed the amount of the benefits owed. *Id*.

4. The Court's Rejection Of State Farm's Argument That State Farm's Failure to Pay UIM Benefits Could Not Have Been Unreasonable As A Matter Of Law Because State Farm Was Not Legally Required to Pay UIM Benefits On A Piecemeal Basis

State Farm next argued that its failure to pay Fisher's medical expenses could not have been "unreasonable" because State Farm was not legally required to pay UIM benefits on a "piecemeal" basis. *Fisher*, ¶ 26. Again, the Court was not persuaded. After engaging in statutory construction, the Court found that neither C.R.S. §10-3-1115 nor Fisher's insurance policy requires that *all* of a UIM claim be established beyond reasonable dispute before the insurer's duty to pay *some* (*i.e.*, the undisputed portion) of the UIM claim arises. *Id*.

Under C.R.S. §10-3-1115(2), "an insurer's delay or denial was unreasonable if the insurer delayed or denied authorizing payment of a *covered* benefit without a reasonable basis for that action." (Emphasis added.) In *Fisher*, it was undisputed that a) the insured's accident-related medical expenses were a "covered benefit" under the UIM policy; and b) State Farm had set a sum certain on the reasonable amount of the insured's accident-related medical expenses.

Focusing on the plain language of the statutes, the *Fisher* Court found C.R.S. §§10-3-1115 and 10-3-1116 deal with the denial or delay in paying a *covered* benefit, and not the denial or delay in paying an *entire* claim. *Fisher*, ¶ 29. Thus, the *Fisher* Court found that State Farm had a duty to *not* unreasonably delay or deny payment of the undisputed amount of Fisher's UIM

5

claim (*i.e.*, Fisher's accident-related medical expenses), even though other components of Fisher's UIM claim may have been subject to reasonable dispute. *Fisher*, ¶¶ 29 and 36.

IV. Conclusion: Import of Fisher

So here are the takeaways from Fisher:

- 1. An insurance company *shall not* unreasonably delay or deny payment of a claim for benefits owed to or on behalf of its insured. (C.R.S. § 10-3-1115.)
- 2. An insurance company's obligation to pay UIM benefits is triggered by the *exhaustion* of the at-fault third party's liability limits, and not the actual *payment* of the at-fault third party's limits.
- 3. An insurance company *cannot* rely on insurance policy language that purports to prevent an insured from establishing a bad faith claim under C.R.S. § 10-3-1115 until *after* the amount of damages to which the insured is entitled to collect from a UM/UIM has been determined.
- 4. The fundamental question under C.R.S. § 10-3-1115 is whether the insurance company had "a reasonable basis" to delay or deny payment of a covered benefit.
- 5. Even if the insurance company asserts that its delay or denial of payment of a covered benefit was based upon the "fairly debatable" nature of the UIM claim, the determining factor under C.R.S. § 10-3-1115 is whether the insurance company had a *reasonable basis* for determining the UM/UIM claim was "fairly debatable."
- 6. An insurance company's duty to pay a covered benefit under C.R.S. §10-3-1115 may arise even though a) the insured and the insurer have not reached an agreement concerning the total amount of all of the insured's incident-related damages, and/or b) the insured has not yet met his or her burden of proof concerning the amount of the insured's damages in the appropriate judicial setting.

And now the kicker:

7. C.R.S. §10-3-1115 does *not* require that *all* of a UM/UIM claim be established beyond reasonable dispute before the insurer's duty to pay *some* (*i.e.*, the undisputed portion) of the UM/UIM claim arises. This is true even though other components of a UM/UIM claim may be subject to reasonable dispute.

If you were injured in a motor vehicle accident and have questions concerning how you may use the Court's opinion in *Fisher v. State Farm* to your advantage, please contact our firm and ask for Daniel Foster or Kari Jones. On the other hand, if you are an insurance carrier and

6

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