

***Fisher v. State Farm Mutual Automobile Insurance
Company, ___ P. 3d ___ (2015), 2015 WL2198515***

An Overview of the Case and Current Trend

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Statutory Claim 1115 and 1116

In 2008, the Colorado General Assembly enacted §§ 10-3-1115 and 1116, C.R.S. Section 10-3-1115 provides in pertinent part:

(1)(a) 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.

(b) For the purposes of this section and section 10-3-1116:

(I) "First party claimant" means an individual, corporation, association, partnership, or other legal entity asserting an entitlement to benefits owed directly to or on behalf of an insured under an insurance policy. "First party claimant" includes a public entity that has paid a claim for benefits due to an insurer's unreasonable delay or denial of the claim.

(II) "First party claimant" does not include:

(A) A nonparticipating provider performing services; or

(B) A person asserting a claim against an insured under a liability policy.

Section 10-3-1116, C.R.S., provides that where payment of benefits has been unreasonably delayed or denied a first-party claimant can bring an action to recover attorney's fees, court costs, and two times the covered benefit. In *Hansen v. American Family Mutual Insurance Co.*, ___ P.3d ___, 2013 WL 6673066 (Colo. App. 2013), the Court of Appeals held that a plaintiff can recover the covered benefit (either through payment in advance of suit (e.g. an unreasonable delay claim) or through a common law claim (breach of contract or bad faith)) and can recover two times that amount as a penalty under the statute. In the event of an unreasonable denial, the exposure can be three times the covered benefit plus attorney's fees and costs. Certiorari in Hansen was granted by the Colorado Supreme Court on multiple issues, including the measure of the statutory penalty. The case was argued to the Court on June 4, 2015. A decision from the Supreme Court is likely later this year or early 2016.

The scope of a claim under §§ 10-3-1115 and 1116 is still being defined by the courts. The standard for liability is unreasonable delay or unreasonable denial of payment of a first-party claim, i.e. "the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action." Regulation 5-1-14 of the Colorado Division of Insurance should assist in defining the scope of the claim. Although not directly referencing §§ 10-3-1115 and 1116, Regulation 5-1-14 pertains to "Penalties For Failure To Promptly Address Property And Casualty First Party Claims." Regulation 5-1-14 § 4.A.1.a. provides: "All insurers

authorized to write property and casualty insurance policies in Colorado, shall make a decision on claims and/or pay benefits due under the policy within sixty (60) days after receipt of a valid and complete claim unless there is a reasonable dispute between the parties concerning such claim, and provided the insured has complied with the terms and conditions of the policy of insurance.” Regulation 5-1-14 § 4.A.2.a provides, *inter alia*, that “[a] valid and complete claim is deemed received by the insurer” when “[n]egotiations or appraisals to determine the value of the claim have been completed” or “[a]ny litigation on the claim has been finally and fully adjudicated.” Section 4.A.2.a.(7) and (8). Similarly, Regulation 5-1-14 § 4.A.2.b. provides that a reasonable dispute may include, but is not limited to, *inter alia*, “[l]itigation is commenced on the claim” or “[n]egotiations or appraisals are in process to determine the value of a claim.” Section 4.A.2.b.(6) and (7).

Despite the apparent “safe harbor” offered by Regulation 5-1-14 for matters in negotiation, and notwithstanding that many reported cases under §§ 10-3-1115 and 1116 involve denials, there are some reported federal district court cases where a §§ 10-3-1115 and 1116 claim was allowed to go the jury where the claim did not appear to fit the statute. *See, e.g., Etherton v. Owners Insurance Co.*, 2014 WL 1302483 (D. Colo. 2014) (this case involved the insurer offering \$150,000 to settle a UIM claim and the insurer then refusing to itemize what the components of the settlement offer were and the insurer refusing to pay the undisputed amount; the jury found liability against the insurer on the § 10-3-1115 – 1116 claim).

Sections 10-3-1115 and 1116 explicitly provide that the statutory remedy does not preempt other remedies. The common law bad faith claim introduces the specter of noneconomic (emotional distress) damages into the equation. This allows the insured to complain about how badly he was treated and the emotional distress he suffered as a result of the insurer’s conduct. This is a component of damages that allows juries to assess significant amounts if the jury is upset by the insurer’s conduct.

The standard of proof differs between the statutory bad faith claim and the common law bad faith tort claim. A common law bad faith claim requires, *inter alia*: (1) proof that the insurer acted unreasonably, and (2) proof that the insurer knew or should have known that it was acting unreasonably. In contrast, §§ 10-3-1115 and 1116 only require an unreasonable delay or denial of payment. The lower statutory standard of proof and the penalty and attorney’s fee provisions make the statutory claim attractive to plaintiffs.

Along Came Fisher v. State Farm Mutual Automobile Insurance Company

In May 2015, the Colorado Court of Appeals announced its decision regarding claims brought pursuant to C.R.S. §§ 10-3-1115 and 1116 in *Fisher v. State Farm Mutual Automobile Insurance Company*, ___ P.3d ___, 2015WL2198515 (Colo. App. 2015). This was an underinsured motorist (“UIM”) case in which Fisher was involved in an automobile accident with a driver who only had policy limits of \$25,000. Pursuant to his State Farm insurance policy, Fisher’s UIM limits were \$400,000. Fisher made a demand to State Farm for \$1.35 million. State Farm consented to the settlement of the driver’s policy limits. Then, State Farm made an offer of \$59,572.10 to settle the UIM claim. Fisher rejected the offer and filed a complaint alleging, among other claims, that State Farm had unreasonably delayed or denied payment of benefits in violation of C.R.S. § 10-3-1115.

The case proceeded to trial and the jury returned a verdict in the amount of \$780,572. In addition, the jury found that State Farm had unreasonably delayed payment to Fisher for medical expenses in the amount of \$61,125.16. The trial court entered judgment against State Farm in the amount of \$400,000 on the UIM claim and \$122,250.32 (two times the benefits) as the statutory penalty under C.R.S. § 10-3-1116 for unreasonable delay of payment. The court also awarded attorney fees in the amount of \$51,000 and costs of \$54,175.21 pursuant to C.R.S. § 10-3-1116. State Farm appealed only the portion of the judgment related to the unreasonable delay of payment of medical benefits.

State Farm argued that since the amount of compensatory damages as well as medical expenses had not been determined, it could not have acted unreasonably and that the value of the entire claim was “fairly debatable.” The court rejected the arguments. Unlike the common law insurance bad faith claim, in which the insured has to prove both that the insurer acted unreasonably under the circumstances and that the insurer knowingly or recklessly disregarded the validity of its insured’s claim, “the only element at issue in [a] statutory claim [under section 10-3-1115] is whether an insurer denied benefits without a reasonable basis.” *Vaccaro v. American Family Ins. Group*, 275 P. 3d 750 (Colo. App. 2012). The court invoked the reasonable person standard for the statutory claim and stated “if a reasonable person would find that the insurer’s justification for denying or delaying payment of a claim was ‘fairly debatable’ (i.e., ...reasonable minds could disagree as to the coverage-determining facts or law), ...this weighs against a finding that the insurer acted unreasonably.” The “fairly debatable” defense is not a threshold inquiry that is outcome determinative as a matter of law, but a mitigating factor for the fact finder to consider in judging the insurer’s conduct.

With regard to the argument that no determination of benefits had been made, the court also rejected this position. The court cited to *Peden v. State Farm Mut. Auto. Ins. Co.*, No. 14-CV-00982-LTB-KLM, 2014 WL 4696401, at *2 (D.Colo. Sep. 22, 2014)(unpublished opinion) which stated

Under [this] logic, any insurer would be insulated from liability under § 10-3-1115(1)(a) as long as they dispute the amount of “benefits owed,” no matter how unreasonable the insurer’s position. Put another way, a defendant insurer ... could unreasonably delay and/or deny a valid claim for benefits.... Despite this bad faith, however, the insurer could not be found liable under the statute unless and until its insured prosecuted a successful breach-of-contract suit against the insurer and won a judgment for damages. This would cause the insured to first need to successfully prosecute the breach-of-contract suit against the insurer, and then subsequently bring an entirely separate lawsuit seeking to prove a violation of [section] 10-3-1115.... [This] surely cannot be what the ... General Assembly intended. Thus, the fact that the benefits owed to Plaintiff is currently in dispute does not mean that Plaintiff’s statutory ... claim fails as a matter of law.

The court also cited to *Vaccaro* stating that “an insurer [cannot] avoid liability for unjustified denials of benefits simply by framing each denial as a valuation dispute” because “every lawsuit over insurance coverage is a valuation dispute to the extent that the parties disagree about how

much should be paid under a policy” and thus “[i]f every claim [were] ‘fairly debatable’ as a matter of law, ... insurers could refuse to pay any claim where money is at issue.” Thus, the defenses of “fairly debatable” and the benefits have not been determined do not prevent the statutory claims from going forward. It is for a jury to decide whether or not the insurer’s conduct was reasonable in delaying or denying the payment of benefits under C.R.S. § 10-3-1115.

Finally, the court authorized payment of benefits on a piecemeal basis. Review of the language in C.R.S. 10-3-1115(2), the court noted that an insurer’s unreasonable delay or denial is related to the authorization of a payment for *a covered benefit* without a reasonable basis. *Fisher*, supra. The court opined that the unreasonable delay or denial relates to *a covered benefit* and not the delay or denial of an *entire* claim. *Id.* In *Fisher*, it was undisputed as to the amount of medical expenses for the injuries incurred were a covered benefit. The rest of the UIM claim was for other damages unrelated to the medical expenses. Thus, State Farm had a duty to not unreasonably delay or deny the payment of the medical expenses while the remainder of the claim was still not determined. *Id.*

Lessons From Fisher

While cert is being sought, the current status of the law regarding bad faith tells us:

1. Statutory bad faith claims are separate and distinct from other bad faith claims;
2. A statutory bad faith claim is proved using a reasonable person standard – under the circumstances of the claim would a reasonable person believe the delay or denial of payment of benefits was unreasonable;
3. Fairly debatable argument is not a defense to the statutory claim;
4. The fact that there has been no determination of the amount of benefits owed is not a defense to the statutory claim;
5. If an insured has presented a demand for covered benefits during the claims handling process or during litigation, the carrier must review and provide a reasonable basis for delaying or denying the payment authorization of covered benefits sought from the insured. The Court of Appeals has held that an insurer has an obligation to consider and pay covered benefits on a piecemeal basis where a portion of the claim is undisputed; otherwise, failure to do so exposes the carrier to penalties and fees under the statute; and
6. The statutory bad faith claim is a factual question to be decided by a jury – is there a reasonable basis for the delayed or denial of payment of benefits. In rare cases where there is no factual dispute, it may be appropriate for a determination of law by the court.

The petition for writ of certiorari was filed July 16, 2015.