WAS THE INTERNET'S ANGER AT THE PROGRESSIVE INSURANCE / FISHER CLAIM DIRECTED AT THE CORRECT PARTY?

By: Alan R. Levy

Matt Fisher, a NYC-based stand-up comedian, generated one of the most publicized and controversial insurance claims on August 13, 2012, when he wrote a blog post titled, "My Sister Paid Progressive Insurance to Defend Her Killer in Court."[1] Within a few hours, links to the story were posted on the Twitter accounts of actor, Wil Wheaton (over 2,000,000 followers) and comedian Patton Oswalt (over 800,000 followers). By the next day, a whirlwind of Internet commentary (almost all of it critical of Progressive) followed as the story was reported on by Internet news sites, Gawker[2] and The Huffington Post[3], and eventually reported on by media sources like the New York Times[4] and The Wall Street Journal[5].

Although the facts surrounding the claim are somewhat disputed, it appears that on June 19th, 2010, Fisher's sister, Kaitlyn, was killed in a car accident in Maryland. The driver of the other car had auto liability insurance policy with Nationwide with $25,000, policy limits. Meanwhile, Fisher had $100,000 in liability policy limits, and $100,000 in uninsured (UM) and underinsured motorist coverage (UIM) limits. There was some dispute as to who was at fault for the accident. Two witnesses claimed that Fisher ran a red light, while one eye-witness claimed that the other driver ran the red light. Nevertheless, the carrier for the other driver, Nationwide, offered its $25,000 policy limits to Fisher. Fisher's estate then looked to Progressive Insurance for $75,000 difference based on her UIM policy.

This is where things began to get complicated. Both the Fisher family and Progressive claim that they attempted to negotiate a settlement on the UIM claim, but the parties failed to reach an agreement. Pursuant to Maryland law, Fisher's estate filed a lawsuit against the other driver, and Progressive intervened in the lawsuit as a "related party." In his blog post, Matt Fisher claims that the Progressive hired an attorney to defend his sister's "killer," which was the main focus of his anger towards his sister's insurance carrier. However, Progressive has denied this, asserting that the driver was represented by an attorney provided by Nationwide, although Progressive did intervene as a defendant in the action. Following a trial, the jury found the other driver 100% liable and entered a judgment of $760,000, although it appears that the jury's verdict still did not settle the UIM claim. In any event, on August 16th, a mere three days after Matt Fisher's original blog post, Progressive and Fisher's attorney announced that the claim had been settled. Fisher's attorney, Allen Cohen, reported that Progressive paid $75,000 on the

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[1] http://mattfisher.tumblr.com/post/29338478278/my-sister-paid-progressive-insurance-to-defend-her

[2] http://gawker.com/5934436/comedian-calls-out-progressive-for-defending-his-sisters-killer-progressive-responds-in-heartless-robot-fashion

[3] http://www.huffingtonpost.com/2012/08/14/comedian-matt-fishers-tum_n_1775191.html

[4] http://www.nytimes.com/2012/08/18/your-money/progressives-side-of-the-insurance-case-that-blew-up-on-the-internet.html?pagewanted=all

[5] http://blogs.wsj.com/law/2012/08/17/insurance-spat-that-went-viral-ends-in-settlement/

UIM claim and also agreed to pay "tens of thousands" more to settle any bad faith claim, but did not elaborate any further.

As one would expect, the media coverage of this controversy, and public sentiment, has been quite hostile against Progressive. However, almost none of the media coverage has touched upon the statutory and regulatory framework which both the Fishers and Progressive were bound by. While, it is easy for the populist anger to be directed at an insurance company, one could argue that not only did Progressive act in accordance with Maryland law, but was, in fact, compelled to take the very actions they took. Hence, the anger expressed by many on the Internet might be more appropriately directed toward lawmakers and regulators.

First of all, Maryland is one of only four states (plus the District of Columbia) that is a "Contributory Negligence" jurisdiction, which means that if a personal injury claimant is found to be even 1% negligent by a jury, he or she is barred from receiving any award, even if the defendant was 99% liable. The remaining states utilize a form of Comparative Negligence whereby, the percentage of a plaintiff's negligence proportionately reduces the plaintiff's award. Secondly, Maryland is one of a minority of states which holds that an insurance carrier does not have a fiduciary duty to settle first party claims with its own insureds. Hence, an unsatisfied insured cannot assert a claim of bad faith for a carrier's failure to settle their insurance claim. See Johnson v. Federal Kemper Ins. Co., 74 Md.App. 243, 248, 536 A.2d 1211 (1988); McCauley v. Suls, 123 Md.App. 179, 716 A.2d 1129 (1998). Therefore, under Maryland law, parties like the Fishers seeking UIM benefits have the option of either suing their own insurance carrier directly under a contract claim, or by bringing a tort action against the other driver. See West American Ins. Co. v. Popa, 352 Md. 455, 462-63, 723 A.2d 1, 4-5 (1998). When selecting the second option, as the Fishers did, all questions of liability are resolved in that tort action; hence the UIM insurance carrier has the right to intervene into the action as a defendant invoking "substantive defenses that would have been available to the uninsured [or underinsured] motorist **such as contributory negligence**." Erie Ins. Exchange v. Heffernan, 399 Md. 598, 617, 925 A.2d 636, 647 (2007) quoting Reese v. State Farm Mut. Auto. Ins. Co., 285 Md. 548, 403 A.2d 1229 (1979) (emphasis added). Hence, Progressive acted properly by intervening in the Fisher suit.

The combination of these two factors provided a powerful incentive to Progressive to demand a trail to resolve the Fisher's UIM claim. First of all, if a jury found Kaitlyn Fisher to be even 1% liable, her estate would be barred from collecting any award. Secondly, since there was no possibility of a bad faith claim, Progressive was immune to any extra-contractual or punitive damages. Simply put, by taking the case to trial, they had a fair chance of legally being absolved of any payment; and the most they could lose was $75,000. Interestingly, other than Maryland, only two other jurisdictions in the United States have the same combination of Contributory Negligence and while not recognizing an insured's right to assert a bad faith claim against their own insurance carrier -- that is, Virginia and The District of Columbia. Courts in both of those jurisdictions have ruled that insurance carriers have acted properly in nearly identical factual scenarios as the Fisher case, although it does not appear that there was any media

coverage in those cases. See Macci v. Allstate Ins. Co., 917 A.2d 634 (D.C. 2007); Mills v. Virginia Mut. Ins. Co., 70 Va.Cir. 412 (Cir. Ct. 2006). In fact, in both Virginia and the District of Columbia, insureds cannot bring a contract claim against their UM/UIM carrier: rather, in order to compel payment of those benefits, they must first take the step of obtaining a civil judgment against the tortfeasor. See Id. supra.

One can argue that since the Fisher's had no opportunity to assert a claim against Progressive in a court of law, their only option was to assert a claim in the court of public opinion on the Internet.

Could this type of scenario occur in my state/jurisdiction?

Of course, each state has its own individual statutory/regulatory framework in relation to UM/UIM claims, although it appears that only Maryland, Virginia and the District of Columbia have this type of scenario. For example, New York is a "pure" Comparative Negligence jurisdiction, and the courts have expanded the doctrine of first party bad faith to allow insureds to seek extra-contractual damages for failure to pay certain first party claims. See Bi-Economy Market, Inc. v. Harleysville, 10 N.Y.3d. 187, 856 N.Y.S.2d 505 (2008); Panasia Estates, Inc. v. Hudson Insurance Co., 10 N.Y.3d 200, 856 N.Y.S.2d 513 (2008). In fact, in a recent case with very similar facts as the Fisher case (although far less tragic), a New York court held that, at the pleading stage, an individual had the right to assert a bad faith claim against their own insurance carrier for failing to settle an Underinsured Motorist claim. See Grinshpun v. Travelers' Cas. Co. of Connecticut, 23 Misc.3d 1111, 885 N.Y.S.2d 711 (Sup. Ct., Kings Co., 2009).

While, an insurance carrier is certainly justified in fearing a bad faith claim, the Fisher claim presents a scenario which can be far far worse to an insurance carrier: a public relations nightmare. For example, Progressive has issued two statements explaining its position regarding the Fisher claim, asserting that it acted properly under the law.[6] However, these statements have over 500 individual comments, mostly angry Progressive customers threatening to switch their insurance providers. Even if it is true that the Progressive claims handler and counsel acted in good faith on this claim, the general public appears clearly to have adopted a far different opinion. The fact that Progressive paid some amount of extra-contractual damages to Fisher's attorney shows the value of resolving this claim.

As an attorney who concentrates his practice in insurance-related matters, I have defended carriers against claims of bad faith and pursued such claims as well. Handling cases on both sides of the aisle, my experience of the vast majority of insurance claims handlers are as competent, diligent and devoted to the good faith resolution of meritorious claims. Nevertheless, claims handlers are also human beings, who make mistakes. However, even in a pro-plaintiff state like New York, a mere mistake by a claims handler does not rise to the level of bad faith; rather, the carrier must show "gross

[6] http://www.progressive.com/understanding-insurance/entries/2012/8/14/statement_on_fisher.aspx
http://www.progressive.com/understanding-insurance/entries/2012/8/16/update_on_the_kaitl.aspx

disregard" for their insured's interests and a pattern of behavior exhibiting a conscious or knowing indifference to their insured's interests. Pinto v. Allstate Ins. Co., 221 F.3d 394, 398-99 (2nd Cir. 2000); Pavia v. State Farm Mut. Auto. Ins. Co., 82 N.Y.2d 445, 453, 605 N.Y.S.2d 208, 626 N.E.2d 24 (1993).

Certainly, no carrier wants to invite a bad faith claim. However, would Progressive have rather argued the Fisher claim in a court of law or in the court of public opinion on the Internet?

Alan's practice focuses on a wide variety of civil litigation raging from products liability, motor vehicle defense, premises liability and complex corporate disputes. Mr. Levy is also the Vice-Chair of DRI's Product Liability Committee Building Products SLG.