## UIM Insurance And the Duty of Good Faith – With Friends Like These, Who Needs Enemies?** – *By David Roosa, Friedman | Rubin*

Insurance companies are supposed to be on your side, so how can a UIM carrier "stand in the shoes" of the defendant and still act in good faith? Just how far are they allowed to go in asserting defenses against their own insureds? The answer seems to depend on who you ask. Insurance companies and plaintiff lawyers differ on where the lines should be drawn. But some recent opinions provide guidance that may help identify when the UIM carrier crosses the line and commits bad faith.

***"It's Complicated…"***

UIM carriers and their insureds have a rocky relationship. On one hand, UIM insurers owe their insureds a "quasi-fiduciary" duty, and must give equal consideration to their own interests and those of their insureds. But UIM insurers also "stand in the shoes" of the defendant, and are permitted to assert any defenses that would otherwise be available to a third party. For example, UIM carriers are permitted to hire experts to dispute causation, or disagree about the value of a claim, within reason. A UIM carrier commits bad faith only if the denial of benefits or coverage was "unreasonable, frivolous, or unfounded."[1]

Put simply, the carrier owes a different duty to its insured depending on what it is doing at that moment. The UIM carrier must give "equal consideration" (and may not be adversarial) when carrying out "obligations under the insurance policy." But it may take a *reasonable* adversarial posture when asserting defenses to the claim.[2]

***UIM Carriers Must Comply With Insurance Regulations:***

Fortunately, a UIM carrier's "obligations under the insurance policy" include compliance with Washington insurance law. This means UIM carriers must follow applicable provisions of

the Washington Administrative Code (WAC) Section 284-30, et. seq. This includes a duty to:

- Promptly and reasonably investigate claims (*see* WAC 284-30-330(4) and WAC 284-30-370);
- Disclose pertinent coverages and provisions (*see* WAC 284-30-330(1) and WAC 284-30-350); and
- Not force their insured into litigation by denying coverage or making low-ball offers (WAC 284-30-330(7)).

Violations of the WACs are at least some evidence of bad faith or a violation of the Insurance Fair Conduct Act ("IFCA").[3] The above list of applicable regulations to UIM insurers is not exhaustive, but represents of some common bad faith scenarios that arise.

***UIM Carriers Must Reasonably Investigate Claims***

A UIM carrier has a duty to promptly and reasonably investigate claims. WAC 284-30-370 and WAC 284-30-330(3) and (4). This means the investigation should be done within 30 days, unless it cannot reasonably be completed in that time.

The duty to investigate is one of the main differences between first party UIM insurance and third party coverage. Third party insurers may simply sit back and wait for the limitations period to run. Not so with UIM carriers. As first party insurers, once they have notice of a claim, they must seek information that will allow them to assist their insured in obtaining available benefits.[4]

What constitutes a "reasonable investigation" is factually dependent and usually a jury question. A recent Western District case held that failure to review any medical records within 30 days prior to denying PIP benefits "when it reasonably could have done so" constituted a bad faith investigation as a matter of law.[5] Another decision held a UIM investigation to be

reasonable as a matter of law where appropriate records were reviewed and witnesses were contacted prior to making a settlement offer.[6] The court added that insurers "need not necessarily investigate every discrete element" of a claim.

Attorneys representing UIM insureds may wish to pay close attention to what investigation is being done. If a claim is denied or a low offer is made quickly and without consideration of important evidence, the UIM insurer may have committed bad faith.

***UIM Carriers Must Disclose Available Coverages***

UIM carriers must disclose that UIM coverage exists, and assist their insureds in making a UIM claim if warranted. WAC 284-30-330(1) and WAC 284-30-350. The Division One Court of Appeals held in *Nelson v. Geico* that a fact question exists whether Geico committed bad faith by failing to disclose that UIM coverage was available for thirteen months.[7] The Court in *Nelson* emphasized that the insurance company must fully disclose all pertinent benefits, and that even if a third party told the insured that UIM coverage might be available, it would not relieve Geico of its own duty to disclose the UIM coverage under WAC 284-30-350.

Insurers may fail to disclose other benefits too, such as wage loss or loss of services benefits (these are typically included under PIP). Be on the lookout for undisclosed coverages. Failure to disclose coverages sometimes results from inadequate investigation. When discovered, undisclosed coverages can provide leverage when negotiating PIP subrogation reductions, and may be grounds for an independent lawsuit if the resultant damages are substantial.

***UIM Carriers May Not Force Insureds to Litigate By Making Low-Ball Offers***

UIM carriers may not "compel[] a first party claimant to initiate…litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings." WAC 284-30-330(7).

While this WAC may appear to confer a cause of action whenever a plaintiff recovers "substantially" more at trial or arbitration than what is offered by the UIM carrier to settle, courts are reluctant to simply compare the numbers in hindsight. Instead, the question is: what information did the UIM carrier have, and was its offer to settle reasonable at the time it made it? For example, in *Morella v. Safeco*, it was held unreasonable to offer $1,500 to settle a case where an arbitrator eventually awarded $62,000. The court was not "overly persuaded" by the fact that the plaintiff received $62,000, rather, it focused on the fact that the insurance company's internal evaluation of the claim was between $11,194.80 and $15,694.80, yet it offered a small fraction of that amount. [8]

In *Taylor v. Unigard*, a UIM insurer made an offer of $27,000, but eventually settled for $500,000 (policy limits) after the insured filed suit. While the difference between the amount offered and the amount eventually obtained after filing was substantial, the court held that the insurance company had evidence to challenge causation, and a good faith basis to assert a causation defense. As a result, it was a fact issue for the jury whether the offer was made in bad faith.[9]

In spite of these opinions, a substantial disparity between amount offered and amount recovered is still an important fact, without which a bad faith/IFCA claim may not survive summary judgment under WAC 284-30-330(7). But it is not the only consideration. Courts are more interested in knowing what the UIM carrier knew (or should have known) at the time the offer is made, and whether the UIM carrier ignored obvious evidence that should have led to a higher offer.

Practitioners can better position their cases by making sure that the carrier has all of the information it would need to reasonably value a claim <u>before</u> initiating litigation. A "last chance"

letter that outlines what information you have provided the carrier, and asking it whether it wants anything further (an EUO? record stips? witness contact information?) before it makes its final pre-litigation offer is one idea. This can prevent the carrier from being able to later raise the defense of, "we would have offered more if you would have given us the information we needed."

***Know The Rules, Protect Your Clients***

UIM carriers are supposed to be your client's ally, but they can and do cross the line sometimes. You can arm yourself by reviewing the applicable WAC provisions and the cases that interpret them. Being aware of how far a carrier is allowed to push the envelope in asserting defenses can help you protect your clients and maximize case value.

[1] *Hews v. State Farm Mut. Automobile Ins. Co.*, 2016 WL 3144397 (W.D. Wash. 2016).

[2] *Id.*

[3] The law is unsettled on whether WAC violations are *per se* IFCA violations. The Washington Supreme Court is currently reviewing the issue. *See Isidoro Perez-Crisantos v. State Farm Fire & Casualty*, Supreme Court No. 92267-5 (oral argument held on 10/5/2016; opinion pending). Western District and some Eastern District federal courts are in apparent conflict on whether a WAC violation alone gives rise to an IFCA claim. *Compare Langley v. GEICO General Ins. Co.*, 2015 WL 778619 (E.D. Wash 2015) with *Oganessova v. Mutual of Omaha Life Ins. Co.*, 2014 WL 5782260 (W.D. Wash 2014).

[4] *Edmonson v. Popchoi*, 155 Wn. App. 376, 228 P.3d 780 (2010).

[5] *McGee-Grant v. Am. Family Mut. Ins.*, 157 F. Supp. 3d 939, 943–44 (W.D. Wash. 2016).

[6] *Bridgham-Morrison v. National General Assurance Company*, 2016 WL 2739452 (W.D. Wash. 2016) (appeal pending).

[7] *Nelson v. Geico General Ins. Co.*, 192 Wn. App. 1007 (not reported in P.3d) (Div. 1, 2016); *citing Anderson v. State Farm Mutual Insurance Co.*, 101 Wn. App. 323, 2 P.3d 1029 (2000).

[8] *Morella v. Safeco Ins. Co. of Illinois*, 2013 WL 1562032 (not reported in F.Supp.2d) (W.D. Wash. 2013).

[9] *Taylor v. Unigard*, 2016 WL 5341967 (slip copy) (W.D. Wash 2016).

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