

WILL THE COLORADO SUPREME COURT PREVENT A  
POTENTIAL STATEWIDE AUTO INSURANCE CRISIS? THE  
IMPACT OF THE COURT OF APPEALS' DECISION IN  
*FISHER V. STATE FARM*

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On May 7, 2015, the Colorado Court of Appeals dramatically changed how auto insurers must pay benefits under uninsured and underinsured motorist (UIM) policies. In *Fisher v. State Farm Mutual Automobile Insurance Co.*,<sup>1</sup> the court interpreted two general insurance-penalty statutes enacted in 2008 to require every UIM insurer statewide to operate effectively as a first-party health insurance operation.

After *Fisher*, UIM insurers must pay covered medical expenses caused by auto accidents on a current basis, meaning as the bills accrue. While requiring auto insurers to pay like a health insurer, *Fisher* offers them none of the safeguards against runaway costs that health insurers enjoy. Predictably, since *Fisher*, Colorado consumers have seen a dramatic spike in auto insurance premiums and the return of the inefficiencies that led to the repeal in 2003 of Colorado's no-fault auto insurance system—a legislatively designed piecemeal-payment system for auto-accident medical costs.

The Colorado Supreme Court has granted certiorari in *Fisher*.<sup>2</sup> If *Fisher* is affirmed, the premium spike will likely persist and contribute to higher rates of uninsured motorists on Colorado roads. But if *Fisher* is reversed and longstanding UIM law restored, the baleful effects of *Fisher* may retreat.

I. WHAT IS UIM INSURANCE?

UIM insurance protects the insured against the risk that an at-fault driver who has caused harm may have been “financially irresponsible” and failed to carry adequate liability insurance to pay the insured’s damages such a medical bills, lost wages, and non-economic damages.<sup>3</sup> “This coverage is designed to place a driver who is injured by an uninsured or underinsured motorist in the same position as if the uninsured or underinsured motorist had liability limits in amounts equal

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<sup>1</sup> No. 13CA2361, 2015 WL 2198515 (Colo. App. May 7, 2015), *cert. granted*, State Farm Mut. Auto. Ins. Co. v. Fisher, No. 15SC472, 2016 WL 3207869 (Colo. June 6, 2016).

<sup>2</sup> *State Farm*, 2016 WL 3207869, at \*1.

<sup>3</sup> *Kral v. Am. Hardware Mut. Ins. Co.*, 784 P.2d 759, 765 (Colo. 1989); COLO. REV. STAT. §§ 10-4-609 to -610 (2016).

to the insured's coverage."<sup>4</sup> UIM insurance allows the injured party to make a claim against his or her own insurance company to receive the same payment he or she would have recovered from the at-fault driver if the driver had carried adequate liability insurance.<sup>5</sup> The coverage is paid when the insured proves liability and damages, in the same manner that an injured party proves a tort case against an at-fault driver.<sup>6</sup> Because making a UIM claim involves proving up liability and damages to one's own insurer, UIM insurance necessarily causes the insurance company and the insured to be adverse.<sup>7</sup>

UIM coverage is typically paid like liability insurance—all at once pursuant to a settlement or judgment. In the Supreme Court's words, Colorado UIM coverage gives "Coloradans the opportunity to recover compensation for losses from their UIM insurer 'in the same manner' and 'to the same extent' as they would recover for such losses from a tortfeasor who was insured in amounts equal to the insured's UIM coverage."<sup>8</sup> Accordingly, UIM insurance policies commonly provide that the insurance company will pay out the coverage as they do in liability cases, meaning all at once under a settlement, judgment, or arbitration award.<sup>9</sup>

In light of these considerations, insurance companies tend to equip their UIM claim professionals with the same types of tools for claim handling that they would provide to adjusters handling liability claims, as opposed to the more elaborate medical-management apparatus employed in health or workers-compensation insurance.

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<sup>4</sup> *USAA v. Parker*, 200 P.3d 350, 358 (Colo. 2009); *see also Sunahara v. State Farm Mut. Auto. Ins. Co.*, 280 P.3d 649, 657 (Colo. 2012).

<sup>5</sup> *See Kral*, 784 P.2d at 763–65.

<sup>6</sup> *State Farm Mut. Auto. Ins. Co. v. Brekke*, 105 P.3d 177, 187–88 (Colo. 2004) (noting that UIM coverage "applies only if the insured is 'legally entitled' to damages" and "a finding of no liability or of limited damages on the part of the uninsured motorist will eliminate or limit a claim under the insurance provider's UM coverage"); *Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 493 (Colo. 1998) (holding that the insured "has the burden to prove liability and damages").

<sup>7</sup> *Bailey v. Allstate Ins. Co.*, 844 P.2d 1336, 1339 (Colo. App. 1992).

<sup>8</sup> *USAA*, 200 P.3d at 353 (emphasis added); *see also id.* at 359 (noting that Colorado Supreme Court precedent "has emphasized that the purpose of the UM/UIM statute is to provide Coloradans with the opportunity to 'gain compensation [within policy limits] for loss due to the negligent conduct of non-insured motorists in the same manner as the insured would be compensated for loss due to the negligent conduct of insured motorists'" (alteration in original) (quoting *Kral*, 784 P.2d at 762); *id.* ("[T]he legislature intended that an injured insured recover 'in the same manner' and 'to the same extent' in either case.") (quoting *Kral*, 784 P.2d at 763).

<sup>9</sup> *See, e.g., Williams v. Owners Ins. Co.*, 621 F. App'x 914, 918 (10th Cir. 2015) (quoting UIM policy: "Whether an injured person is legally entitled to recover damages and the amount of such damages shall be determined by an agreement between the injured person and us."); *Sidney v. Allstate Ins. Co.*, 187 P.3d 443, 449 (Alaska 2008) (quoting UIM policy: "[T]he right to benefits and the amount payable will be decided by agreement between the insured person and Allstate. If an agreement can't be reached, the decision will be made by arbitration.") (alteration in original).

## II. COLORADO'S EXPERIENCE WITH A NO-FAULT PIECEMEAL-PAYMENT SYSTEM FOR PAYING MEDICAL COSTS FROM AUTO ACCIDENTS

Because UIM insurance is fault-based insurance that is typically paid all at once under a settlement or a judgment, it fundamentally differs from insurance coverage that pays as losses accrue, in a piecemeal fashion. From 1974 to 2003, Colorado experimented with a no-fault insurance system requiring payment of medical bills and other damages from auto accidents as they accrued.<sup>10</sup> Under Colorado's No-Fault Act, insurers were required to make periodic payments of medical bills incurred as a result of car accidents in a piecemeal fashion.<sup>11</sup>

The no-fault piecemeal-payment system resulted in high premiums and medical costs that decreased only after General Assembly repealed the No-Fault Act in 2003.<sup>12</sup> According to a February 18, 2008 study prepared for the Colorado governor, the "average auto insurance premiums in Colorado decreased 35 percent in the period July 2003 to December 2007," in the period following the repeal of the piecemeal-payment system.<sup>13</sup> In the last full year of that system in 2002, Colorado had the ninth most expensive auto insurance in the U.S., but two years after its repeal Colorado was ranked number twenty-one.<sup>14</sup>

Colorado's experience with a piecemeal-payment system of medical costs resembles the experiences of other states. A study by the RAND Corporation of such systems concluded that their excessive cost is "driven primarily by medical costs."<sup>15</sup> Auto insurers are poorly equipped to control rising costs in a piecemeal-payment system that is essentially "a first-party health-insurance operation."<sup>16</sup> The result is runaway medical expenses and, in turn, skyrocketing premiums: "Total injury costs per insured vehicle gradually began to diverge across systems in the late 1980s, with no-fault becoming substantially more expensive than tort."<sup>17</sup> "Medical treatment in no-fault states was vastly more expensive than in other states."<sup>18</sup> Claimants making piecemeal-payment claims saw more, and more types of, medical providers, but even "the same medical care costs more to the auto-insurance system in no-fault states than in tort

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<sup>10</sup> BBC RESEARCH & CONSULTING, AUTO INSURANCE/TRAUMA SYSTEM STUDY: STATE OF COLORADO 1 (2008).

<sup>11</sup> *LaBrenz v. Am. Family Mut. Ins. Co.*, 181 P.3d 328, 331 (Colo. App. 2007) ("Under § 10-4-706(1)(b) of the No-Fault Act, insurers are required to pay reasonable and necessary expenses for medical care performed within five years after an accident . . . . Under § 10-4-706(1) of the No-Fault Act, an insurer has thirty days to pay benefits after receiving reasonable proof of the fact and amount of expenses incurred."); 3 C.C.R. § 702-5:5-2-8(4)(B) (repealed 2016).

<sup>12</sup> *Miller v. Brannon*, 207 P.3d 923, 929 (Colo. App. 2009) (piecemeal-payment system repealed in 2003); BBC RESEARCH & CONSULTING, *supra* note 11, at 1 (reduction in premium costs).

<sup>13</sup> BBC RESEARCH & CONSULTING, *supra* note 11, at 5.

<sup>14</sup> *Id.* at 7.

<sup>15</sup> JAMES M. ANDERSON, PAUL HEATON & STEPHEN J. CARROLL, THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE 143 (2010).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at xv; *id.* at xvi ("No-fault's high claim costs are the result of very high medical costs.").

<sup>18</sup> *Id.* at xv.

states” that do not institute piecemeal-payment requirements.<sup>19</sup> Piecemeal-payment systems inflate medical costs.

In 2015, when *Fisher* was decided, Colorado had abandoned a system of piecemeal-payment of medical costs arising from auto accidents. Premiums had come down for a time, making insurance more affordable in Colorado.

### III. FISHER INTERPRETS THE 2008 PENALTY STATUTES TO REQUIRE UIM POLICIES TO PAY MEDICAL EXPENSES AS THEY ACCRUE

In May 2015, *Fisher* judicially re-imposed a system of piecemeal-payment of medical costs resulting from car accidents.<sup>20</sup> To reinstitute a piecemeal-payments regime, the court of appeals relied on two general insurance-penalty statutes, Colo. Rev. Stat. §§ 10-3-1115 and -1116 (Penalty Statutes), that were enacted and made effective in 2008.<sup>21</sup>

The Penalty Statutes provide that “[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.”<sup>22</sup> “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.’”<sup>23</sup>

Although the statutes state unequivocally that the delay of a “claim” may create liability, *Fisher* concluded that a penalty may be assessed based on “a duty to pay *some* of the claim that is not reasonably in dispute”<sup>24</sup> including “one component of a UIM claim . . . .”<sup>25</sup> To find such a “duty to pay *some*” of a “claim,”<sup>26</sup> the court relied on the “standard of reasonableness”<sup>27</sup> from the Penalty Statutes, which consists of one word (“unreasonably”), to conclude that that “under section 10-3-1115, State Farm was legally obligated to not unreasonably delay or deny payment of [the insured’s] medical expenses, notwithstanding that other components of his UIM claim may have been subject to reasonable dispute.”<sup>28</sup>

The court of appeals further held that consumers and insurers cannot opt out of the piecemeal-payment system in their insurance

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<sup>19</sup> *Id.*

<sup>20</sup> *Fisher v. State Farm Mut. Auto. Ins. Co.*, No. 13CA2361, 2015 WL 2198515, at \*3–7 (Colo. App. May 7, 2015).

<sup>21</sup> *Id.*

<sup>22</sup> COLO. REV. STAT. § 10-3-1115(1)(a) (2016).

<sup>23</sup> *Fisher*, 2015 WL 2198515, at \*2 (quoting § 10-3-1116(1)).

<sup>24</sup> *Id.* at \*5.

<sup>25</sup> *Id.* at \*6.

<sup>26</sup> *Id.* at \*5.

<sup>27</sup> *Id.* at \*6.

<sup>28</sup> *Id.* at \*7.

contracts. Any language attempting to opt out of the partial-payment regime is “unenforceable.”<sup>29</sup>

*Fisher* did not simply require UIM insurers to make piecemeal payments, it also prohibited them from relying on existing insurance regulations for guidance.<sup>30</sup> The court of appeals required insurers to operate a piecemeal-payment system but without the detailed regulations and instructions necessary to operate such an inherently complex compensation system. The court of appeals held that the word “unreasonable” from the Penalty Statutes adequately guides insurers in managing an ongoing piecemeal-payment system that must compensate (i) insureds, (ii) lawyers, and (iii) healthcare providers, all of whom may have competing claims or liens on insurance proceeds.

#### IV. THE MEDIA NOTICES A SUBSTANTIAL INCREASE IN AUTO INSURANCE PREMIUMS IN 2016 AND 2017

Not long after *Fisher*, Colorado auto insurance premiums began to spike. The media noticed. “Who, What’s To Blame For Spiking Auto Insurance Costs?,” asked a headline on June 20, 2016.<sup>31</sup> These media stories reported substantial increases that were greater than the increases seen in traditionally high-cost insurance states such as California (7% increase) and Florida (10% increase).<sup>32</sup> In January 2017, more stories appeared identifying still further substantial increases in six-month auto insurance premiums.<sup>33</sup>

In media reports, some consumers called the increases “[o]utrageous,” “unfair,” and “[o]ver the top.”<sup>34</sup> Even low-risk drivers who had received no traffic citations and been involved in no accidents for years saw substantial premium increases.<sup>35</sup> Unfortunately, the journalists who produced the stories did not interview legal experts to determine the effect of legal changes on insurance rates. As a result, their stories ignored the potentially powerful effect of legal rules on insurance rates and premiums.<sup>36</sup>

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<sup>29</sup> *Id.* at \*6 n.2.

<sup>30</sup> *Id.* at \*6.

<sup>31</sup> Brian Maass, *Who, What’s to Blame for Spiking Auto Insurance Costs?*, CBS DENVER (June 20, 2016), <http://denver.cbslocal.com/2016/06/20/spiking-auto-insurance-costs/>.

<sup>32</sup> Whitney Wild, *Colorado Car Insurance Jumps 15% on Average*, 9NEWS (June 21, 2016), <http://www.9news.com/money/personal-finance/consumer/colorado-car-insurance-jumps-15-on-average/251394618>.

<sup>33</sup> *E.g.*, Ashley Michels, *Colorado Car Insurance Rates Increasing 15 Percent or More*, FOX31 (Jan. 31, 2017), <http://kdvr.com/2017/01/31/colorado-car-insurance-rates-increasing-15-or-more/>.

<sup>34</sup> Maass, *supra* note 32.

<sup>35</sup> *Id.*

<sup>36</sup> The effect of the law on premiums has been acknowledged by the Colorado Supreme Court. *Travelers Prop. Cas. Co. of Am. v. Stresscon Corp.*, 370 P.3d 140, 144 (Colo. 2016) (noting that legal rules governing insurers have “important practical implications for the risks that insurers undertake and the premiums that insureds pay”); *Craft v. Phila. Indem. Ins. Co.*, 343 P.3d 951, 961 (Colo. 2015) (noting expansion of insurer obligations causes insurers to, “out of necessity, increase their premiums”).

V. DATA FROM DIVISION-OF-INSURANCE RATE FILINGS SHOWS A SPIKE  
IN PREMIUM THAT COINCIDES WITH *FISHER*

Data from the Colorado Division of Insurance supports the conclusion that *Fisher* is responsible for a premium spike. A search of publicly available data from the Colorado Division of Insurance rate filings from seven of Colorado's largest auto insurers by market share confirms a premium spike that coincides with *Fisher*. The authors searched for UIM rate-increase data at the Colorado Division of Insurance and located such data since *Fisher* for seven of the top ten auto insurers by market share:

- (i) State Farm Mutual Automobile Insurance Company (State Farm),
- (ii) Farmers Insurance Exchange (Farmers),
- (iii) American Family Mutual Insurance Company (AmFam),
- (iv) GEICO Casualty Company (GEICO),
- (v) Allstate Fire & Casualty Insurance Company (Allstate),
- (vi) United Services Automobile Association (USAA), and
- (vii) USAA Casualty Insurance Company (USAA CIC).

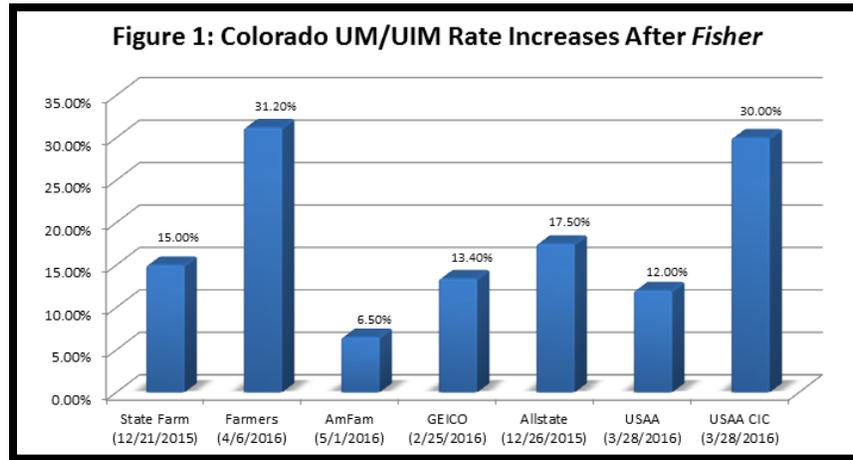
These auto insurers occupy 49.8% of the relevant insurance market.<sup>37</sup> Table 1 below sets forth these insurers' publicly available data for UIM rate increases since *Fisher*.

Table 1: Colorado UIM Rate Increases Since <i>Fisher</i> For Seven Large Insurers (Source: Colorado Division of Insurance public rate filings)		
Insurer Name	Date of Data	Increase Since <i>Fisher</i>
State Farm	December 21, 2015	15.00%
Farmers	April 6, 2016	31.20%
AmFam	May 1, 2016	6.50%
GEICO	February 25, 2016	13.40%
Allstate	December 26, 2015	17.50%
USAA	March 28, 2016	12.00%
USAA CIC	March 28, 2016	30.00%
Average		17.94%

The average of the Table 1 percentage-increase figures is 17.94% over a period of fifteen months or less. Figure 1 below graphically illustrates these UIM rate increases:

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<sup>37</sup> Division of Insurance Documents are on file with the *Denver Law Review*.



An average increase of 17.94% (or 14.35% per year), held constant over time, would cause UIM insurance rates to double in approximately five years. These increases are alarming.

These data strongly indicate that the UIM increases did not result from the general litigation or insurance climates in Colorado but rather from UIM-specific changes in the last fifteen months. Only the impact of *Fisher* credibly explains these increases. To test whether these increases resulted from *Fisher*, the authors gathered from the Division of Insurance post-*Fisher* data on the increase in overall auto insurance rates<sup>38</sup> for the same insurers from Table 1 over the same time period. Table 2 compares the large increases in UIM rates to the much smaller increases in overall auto insurance rates over the same period and for the same insurers.

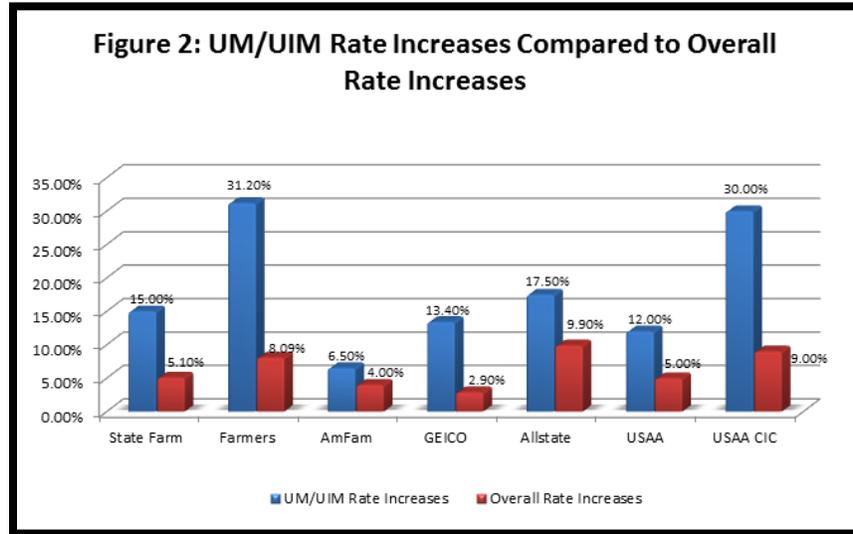
**Table 2: UIM versus Overall Auto Insurance Rate Increases Since *Fisher***  
(Source: Colorado Division of Insurance public rate filings)

Insurer Name	Date of Data	Overall Auto Increase	UIM Increase	Difference
State Farm	Dec. 21, 2015	5.10%	15.00%	9.90%
Farmers	April 6, 2016	8.09%	31.20%	23.11%
AmFam	May 1, 2016	4.00%	6.50%	2.50%
GEICO	Feb. 25, 2016	2.90%	13.40%	10.50%
Allstate	Dec. 26, 2015	9.90%	17.50%	7.60%
USAA	March 28, 2016	5.00%	12.00%	7.00%
USAA CIC	March 28, 2016	9.00%	30.00%	21.00%
Average		6.28%	17.94%	11.66%

As shown by Table 2 above, each and every one of the auto insurers whose post-*Fisher* rates was determined based on public data had a greater increase in UIM rates than overall auto rates. The overall auto rates increased an average of only 6.28%, as compared to an average

<sup>38</sup> "Overall auto rates" includes auto coverages other than UIM bodily injury coverage, such as liability, collision, property-damage coverage, and so on.

increase of 17.94% in UIM rates. Figure 2 below graphically illustrates the rate data from Table 2.



As shown above in Figure 2 and Table 2, the difference between overall auto and UIM rate increases since *Fisher* is large and striking—an average difference of 11.66%. Thus, the *difference* between the average UIM and general increases is itself almost *double* the average size of the general increases. The magnitude of these differences points to a UIM-specific cause in the last approximate fifteen months, and the only credible explanation is *Fisher*. These data indicate that *Fisher* has caused a dramatic UIM rate spike within a short time period.

Rate spikes, such as the one illustrated above in Tables 1 and 2 and Figures 1 and 2, harm consumers and the entire insurance system on which the public depends. Rate spikes increase the cost and unavailability of insurance, and they destabilize the system at a basic level. This is because the “more narrowly risk pools can be defined, the more broadly insurance can be offered in the society.”<sup>39</sup>

#### VI. THE COLORADO SUPREME COURT IS CURRENTLY REVIEWING *FISHER*

These data provide persuasive evidence that *Fisher* has already had a baleful effect on the Colorado insurance market. There is no basis to believe that the UIM rate spike that Colorado is currently experiencing will spontaneously level off. It may grow worse, because, as explained above, *Fisher* prohibits insurers and consumers from relying on

<sup>39</sup> George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1545 (1987).

regulation or opting out. And *Fisher* does not provide UIM insurers with the tools that other insurers have to control medical costs or otherwise manage expenses. When rates increase in this manner, the number of Coloradans unable to afford car insurance rises and the uninsured motorist population expands, leading to greater instability in the auto insurance marketplace.

The Colorado Supreme Court has accepted *Fisher* for certiorari review. If the Supreme Court reverses, Colorado's prior experience with no-fault insurance teaches that the premium spike, and its other consequences, can be reversed.