THE IMPACT OF INSURANCE ADVERTISING ON JURORS

A Lizard, Flo, and Mayhem Cause a Revolution

By Matthew J. Smith, Esq.

Geico's famous "spokesperson," a hugely popular gecko named Martin, turned 16 years old this year. Assuming that Martin is an average gecko, he'd likely weigh in at a whopping 2.5 ounces. With Geico topping all insurers in spending more than $1 billion annually in advertising over the past several years, Martin's impact would more appropriately place him in the category of his long-extinct cousin, the Titanosaur, which weighs in at more than 50 tons. Such has been the impact of this little creature on the world of insurance advertising.

Martin's unofficial owner is none other than Berkshire Hathaway's Warren Buffett. In his address to shareholders only a few years ago, Buffett credited the little green lizard for helping increase Geico's share of the personal auto insurance market from 2.5 percent to more than 10 percent and then added, "When I count my blessings, I count Geico twice." So, too, did Geico's Chief Marketing Officer Ted Ward, who recalled Buffett telling him and other managers, "The one thing I don't want you to have stand in your way is money. That's what I've got."

There is no doubt that, in addition to reshaping Geico, Buffett and his money have also revolutionized the world of insurance advertising. In a television galaxy not too many years ago, advertising by auto and property/casualty insurers was rare and limited. With the exception of State Farm, with its 1971 jingle written by Barry Manilow titled "Like a Good Neighbor, State Farm Is There," most Americans have little recollection of television advertising for insurers prior to the onslaught of recent years.

What exactly did Buffett bring to the world of insurance? When Berkshire Hathaway acquired Geico in 1996, its annual advertising expenditures were $31 million. Since then, Ward took Buffett up on his offer, and Buffett, in turn, delivered on his promise. Today and in recent years, Geico has outspent every other insurance advertiser with a budget topping $1 billion per year. By comparison, Allstate and State Farm fall next in line with roughly one half to one third of Geico's massive spending. According to advertising statistics, only 36 companies spend more than $1 billion a year on advertising, and of that group, Geico is at No. 23, outspending McDonald's, Nike, Honda, and even Apple.

The results have affected the entire property and casualty insurance industry. According to a 2013 digital marketing survey, the top sector in advertising spending based on a percentage of all revenue was the sector identified as insurance/financial services, registering in at 10.6 percent. Proving that insurers have found a home on the television screen, the same insurance sector scored at the bottom of all marketers in terms of digital spending identified as social media, quick response (QR) codes, and similar nontelevision-based advertising. America's P&C insurers are smitten with television advertising.

In answering the question of why auto insurance companies spend so much money on television advertising, Mitch Turck, marketing director at Nielsen Catalina Solutions, noted that insurers were not traditionally a sector known for large advertising expenses. He went on to point out that the most common reason for a surge of competitive market spending is when a company identifies a major gap or decline in their competitive edge. That certainly seems to be true for insurers. In 2014, several news reports noted that Progressive Insurance increased its advertising spending by nearly $70 million a year, which accounted for the largest aggregate dollar increase among all U.S. P&C insurers.

There are valid reasons insurers are willing to spend billions of dollars to lure new policyholders. In a 2013 report, McKinsey & Company noted those carriers that did not increase their market share paid out half of what was spent by other U.S. auto insurers on advertising during the prior decade. The McKinsey report also noted that consumers will consider only four or five brands when buying or changing insurance companies, so it's worth it for the top companies to continue to push to remain top of mind in the market.

In an article titled "How the Insurance Industry Got Into a $4 Billion Ad Brawl," E.J. Schultz noted that, because insurance is a mature category, insurers must steal market share from each other to grow. Evidencing the truth of that statistic, America today has approximately

190 million insured privately owned vehicles on the road. Insurance policy turnover from year to year measures approximately 11 percent of all consumers, while an additional 20 percent may shop their policy but do not actually make a change. While these statistics are relatively low, the combined effect is that more than 20 million people are in the market for a potential change of insurance every year. Competing to fall into the top four or five brands recognized in the category becomes intense.

Repeated ad themes tell consumers that other insurers delay, underpay, deny payment for claims, or do not truly care about their policyholders' best interests.

In the drive to reach those top spots, insurers, however, are not necessarily being polite to each other, nor are they simply promoting their own services or pricing. Repeated ad themes tell consumers that other insurers delay, underpay, deny payment for claims, or do not truly care about their policyholders' best interests. Today, the world of insurance advertising is certainly not one of "good neighbors" or "good hands" but instead one of all-out feuds and boxing.

One of the more notable television advertising campaigns of recent years has been Allstate's "mayhem" campaign. Putting it quite bluntly, Nina Abnee, executive vice president of the Leo Burnett Agency, which created the mayhem advertising series, stated, "We wanted to kick Flo's ass." Quoted in 2011, Abnee noted that Allstate's market share had fallen two straight years to 10.5 percent prior to the start of the campaign. She correctly observed, "Nobody wants to sit around and talk about car insurance. In order to combat that, we needed to entertain. We needed to get people's attention."

Not only did this and other campaigns catch the attention of the consuming public, but also major insurers have now become coveted clients and even "cool" accounts for ad agencies to place on their client list. Each insurer and its ad agency now strive to outpace the competition.

Insurers have every right to advertise and even, within reason, promote whatever themes most appeal to consumers. In the process, however, what may well be overlooked is the impact these billions of advertising dollars every year for multiple years create in the courtroom. Can jurors forget or erase all of the vitriolic attacks hurled from their televisions by insurers when they're sitting in court and are asked to rule on matters involving insurance coverage, extra-contractual claims, or punitive damages?

Jurors do pay attention. Several years ago, one of our firm's attorneys tried a case for a major national retail chain that also sponsored a NASCAR driver. The car and driver had been prominently featured in the retailer's advertising. In a meeting with jurors after securing a defense verdict, one juror wryly noted that he would "continue to support my favorite driver and I'll rule for you every time." The risk manager was in attendance and was struck by the comment, mostly because only a few months earlier, a very large verdict had been returned against the company and a juror made the comment, "If you can afford to sponsor NASCAR, you can afford to pay this lady for her damages."

At the current time, little statistical evidence exists regarding the impact of these ever-increasing levels of television campaigns on jurors' perceptions of insurance companies. After taking cases before juries for 30 years on behalf of insurance carriers, it is obvious that no juror's initial reaction is to favor the insurance company over an injured

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party or claimant. Winning an insurance case is truly rolling a snowball uphill. Intentionally or otherwise, we may well be making that even harder on ourselves.

While no known studies exist directly addressing the impact upon jurors of the estimated $5 billion spent annually by insurers, some in full-blown attack mode, research does exist on historical expenditures for advertising by insurers and the impact in the courtroom. The results are quite dramatic.

More than 25 years ago, Edith Greene, in writing for *Law and Human Behavior*, analyzed the influence of insurance advertising on jury verdicts. The research was conducted after St. Paul Insurance ran an ad campaign themed around "Do you really think it's the insurance company that's paying for all those large jury awards? When awards are out of line, everyone pays more in the form of higher insurance rates."

Greene noted that, based on this study and dating back to 1979, the effect of this advertising paid off. The study demonstrated that those who even once saw the ad dramatically lowered the amount they, as potential jurors, were willing to award in a personal injury case. The takeaway? Insurance advertising does impact jury verdicts.

While this is direct evidence of jurors being impacted by insurance advertising, Greene also noted there is no statistical way to measure the indirect influence upon juror habits and actions based on advertising. As she observed, "Many jurors will be unable to recognize or report on the ways that their attitudes have been influenced by the television they watch and the newspapers they read." The result is that we may well be impacting jurors with a negative image of our profession, thereby increasing their willingness to award high verdicts, all without their even being aware of why.

So the questions become, what seeds are we sowing and what harvest may we reap? To date, there is no statistical or empirical evidence to guide us. Especially as jury verdicts in the field of extra-contractual and bad faith claims continue to rise, the risk we take is one we should at least be cognizant of and willing to discuss. If we ignore this issue and rush to increase premium dollars by attacking other companies and their claims practices or policies and not acting as good neighbors in each other's good hands, we may find that Martin, the gecko, ultimately may cost all insurance carriers through the payment of higher jury verdict awards. CM

Matthew J. Smith is of counsel for CLM member firm of Smith, Rolfes & Skavdahl Co. LPA. He can be reached at msmith@smithrolfes.com.

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