Barry P. Goldberg

The strange case of the UM/UIM arbitration

There are many twists and turns in Uninsured and Underinsured Motorist arbitration

The insured and insurer agree that there should be Uninsured or Underinsured Motorist arbitration in the claim – now what?

The California Uninsured/Underinsured Motorist Law (UM/UIM), Insurance Code section 11580.2 was designed to provide a prompt and relatively inexpensive resolution of disputes between an insured and his or her insurer as an alternative to full-scale litigation and a trial. For the most part, the UM/UIM law succeeds and is uniquely suited for resolving standard automobile collision cases. However, even though UM/UIM arbitrations are common, there is no clear uniform agreement on *how* these arbitrations should be handled. In fact, the nuances in the law, the competing rules, and the customs that have developed among counsel and arbitrators, can make for a "strange" experience if counsel is not fully aware of the various possibilities.

This article provides some suggestions to make the arbitration procedures uniform and how to reduce the arbitration time-table to achieve the prompt and inexpensive resolution envisioned by the UM/UIM law. In addition, there are some oddities in the various rules which may provide both pitfalls and opportunities to the successful completion of the arbitration.

The centerpiece of the UM/UIM law is that the cases are submitted to a binding arbitration with the cost borne equally by the insured and the insurer. Despite what the insurance policy may say, "The arbitration shall be conducted by a single neutral arbitrator." (Ins. Code, § 11580.2 (f).) Interestingly, that section neither explains nor suggests how such an arbitrator should be selected. Many policies are silent on the issue.

The selection process

When demanding arbitration, a party should provide a list of acceptable neutrals from which the responding party can select an acceptable candidate. The demand should also invite a competing list from the responding party in the event that the initial list is unacceptable. Care should be given to list candidates that have a reasonable chance of being selected by the other party. If the list is decidedly biased, the arbitrator selection process can be prolonged. This is contrary to the advantages in the UM/UIM law favoring a prompt resolution of claims.

If the selection process gets bogged down, either party is entitled to file a Petition to Compel Arbitration pursuant to section 1281.6 of the Code of Civil Procedure. An immediate notice of motion for an order selecting the arbitrator should accompany the petition. The original list of arbitrators should be presented as viable candidates from whom the court can make its selection.

Although the UM/UIM law sets out certain guidelines which should be followed, it is silent on many of the procedures which many attorneys assume apply to the arbitration. UM/UIM arbitrations are considered "private arbitrations" and therefore are not necessarily subject to the rules for judicial arbitrations as found in Code of Civil Procedure section 1282. Moreover, the California Rules of Court, concerning arbitrations, also do not necessarily apply for the same reasons. Absent an agreement in advance, arbitrators may apply a combination of some, all or none of the various procedures listed in those statutes and rules.

Acceptance of rules

The solution to these variables can be solved at the outset by agreement. Once the case has been accepted for arbitration, counsel should simply request in writing an agreement and signed acknowledgement that the proceedings will be governed by Code of Civil Procedure section 1282, Insurance Code section 11580.2 and California Rules of Court, rule 3.823. Acceptance of these rules by both parties will provide for an orderly and predictable sequence up to and including the arbitration.

Once an arbitrator is selected, the arbitration should be set as soon as reasonably possible. In the event that one party will not agree to a prompt date, the arbitrator should become immediately involved and set the date. The arbitrator has the right to schedule the matter as he or she sees fit. (Code Civ. Proc.., § 1282.2(a)(1).) Because most UM/UIM arbitrations involve limited witnesses and discovery, the arbitrator is likely to set the matter reasonably promptly, even over the objection of a party.

Odd exceptions

Insurance Code section 11580.2(f) mandates that the normal discovery statutes, commencing with section 2016.010 of the Code of Civil Procedure shall apply to the proceedings, with certain unfamiliar exceptions. The first odd exception of which counsel should be aware is that depositions can be taken, without leave of court, relatively shortly *after the subject accident,* within 20 days. (Ins. Code, § 11580.2(f) (3).) That means witnesses and parties can be deposed well before an insurer has the case designated as a UM/UIM file and before the claim has been assigned to counsel. In addition, interrogatories and requests for admissions can be served 20 days *after the subject accident,* as well. (Ins. Code, §11580.2(f)(6).)

The second odd exception is that Code of Civil Procedure section 2025.010, dealing with requiring a party to appear for a deposition by notice, is *not* applicable, pursuant to Insurance Code section 11580.2(f)(4). Accordingly, witnesses and parties *must* be subpoenaed to their depositions. Although insureds and insurers regularly ignore this rule and schedule depositions both informally and by notice, a deponent cannot be compelled to attend his or her deposition without a properly served subpoena. This can create a serious problem if a party waits until the last minute to notice an important deposition. By the time a subpoena can be served, it may be too late to take the deposition prior to the discovery cut-off, 15 days before the arbitration.

Moreover, specifically, if a dispute arises over scheduling depositions incorrectly set by notice, arbitrators are *not* given the

See Goldberg, Next Page

power to decide those discovery disputes, which must be decided in the Superior Court. (Ins. Code, §11580.2 (f)(2).) A party attempting to compel discovery near the arbitration date will be under significant pressure to obtain a hearing date in the Superior Court prior to the arbitration date. This is particularly true when the Superior Court was not previously assigned to the case by a Petition to Compel arbitration at the outset. A moving party must incur the expense and labor of filing an initial appearance document in order for a Superior Court judge to schedule and hear a discovery dispute.

The third odd exception is that there are peculiar rules concerning wage loss information, medical authorizations and defense medical examinations in preparation for UM/UIM arbitrations. (Ins. Code, § 11580.2(o).) These rules are substantially different that the "normal" discovery rules contained in the Code of Civil Procedure. According to Insurance Code section 11580.2(o), an insured must provide wage loss information and medical authorizations within 15 days of such request by an insurer. If the insured fails to provide that information and it is not within 30 days prior to the arbitration, the insurer can again request that information. This time the insured has 10 days to provide the information. If the insured fails to provide the information upon this second request, the arbitration shall be stayed at least 30 days following compliance by the insured. An insured would be well advised to have wage-loss information and medical authorizations ready to go if it cannot be served with the demand for arbitration.

An insured must also submit to a medical examination within 20 days after the insurer's request. If the insured fails to submit to a medical examination and it is not within 30 days prior to the arbitration, the insurer can again request that the insured submit to a medical examination. This time, if the insured does not submit to a medical examination within 20 days, the arbitration shall be stayed at least 30 days following compliance by the insured. Again, an insured would be well advised to submit to the examination when scheduled.

The "strange" circumstance presented is that an insurer often has difficulty obtaining an examination date with its chosen examiner within those 20 days. It is unclear what would occur if the examination is unilaterally demanded more than 20 days in advance. An insurer would be well advised to demand a medical examination early in the process to both secure an examination date and to ensure that the examination will take place before the discovery cut-off. At a minimum, the examination should be set within with both the initial 20 days and the subsequent 20 days.

Code of Civil Procedure section 1282.2(a)(2)(A) permits either party to demand in writing that the other party provide a list of witnesses it intends to call designating which witnesses will be called as experts *and* a list of documents it intends to introduce at the hearing. The demand shall be served within 15 days of receipt of the notice of hearing. If an insured plans to utilize this process, he should take it upon himself to serve the notice of hearing on behalf of the arbitrator.

The obligation is bilateral and the responses shall be served either in person or by certified mail *within 15 days after the demand*. This means that the actual arbitration witnesses and evidence potentially must be in place as early as 30 days after the arbitration date is initially set. The listed documents shall also be made reasonably available for inspection prior to the hearing. It is most expedient to attach the documents to the response. Section 1282.2(a)(2)(E) of the Code of Civil Procedure allows the arbitrator to hear witnesses or receive evidence not listed in the response if he so chooses. Best practice is to carefully list the witnesses and evidence you actually intend to use at the arbitration to eliminate the risk that witnesses and evidence could be excluded. Also, it demonstrates a level of preparation and confidence, and will make the arbitrator's job that much easier.

Whether or not Code of Civil Procedure section 1282.2 is utilized, California Rules of Court, rule 3.823, concerning rules of evidence at the arbitration hearing, is a must. Rule 3.823 (b)(1) allows introduction of written reports and other documents *without foundation*. In most cases, this will allow the parties to "make their case" without a significant expense. With some limited conditions, an arbitrator *must* receive these documents into evidence, including expert reports, medical records and bills, documentary loss of income, property damage repair bills and estimates, police reports and similar documents. The proponent must deliver these documents to the opposing party at least 20 days before the hearing. The opposing party has the right to subpoena the author or custodian of the document and conduct a cross-examination. The arbitrator is not to consider the opinion as to the ultimate fault expressed in the police report.

Rule 3.823 (b)(2) allows a party to introduce witness statements at the arbitration in lieu of a live appearance if they are made under penalty of perjury and have been delivered to the opposing party within 20 days before the hearing. Because of the "penalty of perjury" requirement, counsel should work with the witnesses early on and not rely on a mere letter or handwritten statement that may or may not be signed under penalty of perjury.

The permitted witness statements are an excellent way to provide the testimony of supporting liability witnesses and other peripheral witnesses who may not be able to attend an arbitration hearing in the middle of the day. A friend or co-worker may be more inclined to provide a statement, rather than appear, to help explain how the injury has affected the insured's life and ability to participate in various activities of daily living. Similarly, third-party automobile accident witnesses may also be more inclined to provide a witness statement rather than be inconvenienced by attendance at an arbitration hearing.

Although the opposing party may demand within 10 days that the witness appear in person, such a demand could actually "backfire" because the witness may be more motivated seeing that the opposing party will not accept his or her statement. In addition, the arbitrator may not appreciate the opposing party's insistence on inconveniencing witnesses and wasting valuable arbitration time for supporting testimony that is essentially undisputed.

Finally, rule 3.823 (b)(3) allows the use of a deposition transcript without the need to show that the deponent is "unavailable as a witness," as long as the proponent provides 20 days notice of his intention to offer the deposition into evidence. Such notice should be provided for every deposition transcript. In the unlikely case that the deponent fails to appear at the hearing for

See Goldberg, Next Page

some reason, it may still be possible to obtain a favorable arbitration award.

Once again, after receiving notice that a deposition transcript will be used, the opposing party has the option to subpoena the deponent in order to cross-examine him or her in person at the arbitration. Once again, the arbitrator may not appreciate the opposing party's insistence on inconveniencing witnesses and wasting valuable arbitration time for deposition testimony that is essentially undisputed and can be refuted by offering other portions of the deposition in rebuttal.

In the right case, the insured may consider using a videotaped deposition of a treating physician or other expert at the arbitration pursuant to section 2025.620 (d) of the Code of Civil Procedure. Such a videotaped deposition is extremely cost-effective in the right case. In addition, rule 3.823 (b)(3) excludes application of section 2025.620. In other words, a party is not permitted to subpoena such an expert witness to the arbitration. The videotaped expert deposition must be admitted without the opposing party having the opportunity to cross-examine the expert in person at the arbitration.

At least 35 days before the arbitration, the insured should always serve an offer to compromise under Code of Civil Procedure section 998. If the insured obtains a more favorable award, the insurer may be responsible for certain claim costs, including deposition costs, exhibit costs, and pre-judgment interest, as a penalty – even if it brings the total recovery above the UM/UIM limits. (*Pilimai v. Farmers Ins. Exch. Co.* (2006) 39 Cal.4th 133, 139-42.) Counsel will be hard-pressed to explain why possible recovery of deposition costs, exhibit costs and prejudgment interest, would be a bad idea.

In conclusion, with some planning, agreement of counsel at the outset, and knowledge of the unique rules, an insured can effectively bring a UM/UIM case to arbitration quickly and efficiently.

Barry P. Goldberg is the principal of Barry P. Goldberg, A Professional Law Corporation*, located in Woodland Hills. He has been in practice since 1984 and attended the University of California, Los Angeles undergraduate and obtained his law degree from Loyola Law School, Los Angeles. He is an experienced trial attorney and has extensive insurance coverage experience. He has handled hundreds of UM/UIM arbitrations.*

Appeared in the Advocate magazine
June 2011 issue

GOLDBERG
BARRY P. GOLDBERG
A PROFESSIONAL LAW CORPORATION

p: 818.222.6994
f: 818.226.9901
www.TheInjuryLawProfessionals.com
email: bpg@TheInjuryLawProfessionals.com
21650 Oxnard Street, Suite 1960, Woodland Hills, CA 91367