GOLDBERG
BARRY P. GOLDBERG
A PROFESSIONAL LAW CORPORATION

Effectively Preserving the Statute of Limitations in California Uninsured Motorist Cases

#

It is a relatively simple proposition that an insured has 2 years from the date of the accident to preserve the Statute of Limitations by; 1) Filing suit within 2 years, and providing the insurer with notice within a "reasonable" time thereafter; or 2) Making an unequivocal demand for arbitration, in writing, within 2 years. Since most standard claims are resolved well before the limitations period expires, it is not normally a significant issue. However, it is not uncommon for an insured handling his own case or an attorney who will not succumb to a low offer, but is loathe to engage in litigation, to be "pressed up" against the statute date.

When the statute date gets close, it becomes confusing how to ensure that you have fully complied with the limitations date. Of course, it is not difficult to file suit within two years and provide an insurer with such notification within a reasonable time thereafter. However, such an option is more expensive with the rising filing fees and is also somewhat perilous. Sometimes court filings are rejected for reasons we cannot anticipate and unless you have a very close relationship with your attorney service, you may not be able to learn of the rejection, fix it, and get it filed immediately. Filing a lawsuit is not desirable.

Accordingly, most practitioners opt to make an "unequivocal demand" for arbitration within the two years as the formal institution of arbitration proceedings. Insurance Code sec. 11580.2(h)(i)(1) states:

> "No cause of action shall accrue to the insured under any policy or endorsement provision issued pursuant to this section unless . . . within two years from the date of the accident:
>
> . . . .
>
> (C) The insured has formally instituted arbitration proceedings by notifying the insurer in writing sent by certified mail, return receipt requested. Notice shall be sent to the insurer or to the agent for process designated by the insurer filed with the department."

Since most insurers will readily discuss settlement without a formal institution of arbitration proceedings, many practitioners may be lulled into a false sense of security that the code section need not be formally complied with. Moreover, many unsuspecting lawyers may think that a quick last minute e mail or facsimile to the claims adjuster stating that the communication is a "request to arbitrate" should suffice to protect that statute of limitations---it will not.

Not only is it unclear whether you can institute arbitration proceedings directly with an adjuster, but the demand for arbitration must be more "formalized." *See, Allstate Ins. Co. v. Gonzalez* (1995) 38 Cal.App.4th 783. In that case, Gonzalez's attorney wrote Allstate that Gonzalez was making a claim for uninsured motorist benefits and stated: "We would like to proceed with an uninsured motorist arbitration in this matter." (*Id.* at 791.)

Among other reasons, the Court held that such an informal statement was insufficient as a formal institution of arbitration proceedings because; "Any demand or petition for arbitration ***shall contain a declaration, under penalty of perjury, stating whether (i) the insured has a workers' compensation claim;*** (ii) the claim has proceeded to findings and award ...; and (iii) if not, what reasons amounting to good cause are grounds for the arbitration to proceed immediately." (Original Italics.) In view of what the statute required, the attorney's letter was found not a proper demand. (*Id.* at 792.)

It is absolutely imperative that every demand for arbitration be accompanied by a proper declaration under penalty of perjury even though the adjuster obviously knows workers compensation is not implicated and has been actively discussing settlement. Otherwise, the demand is not in compliance with what the statute requires.

As to where to send the demand, in writing, certified return receipt requested, most attorneys will try to obtain unequivocal permission in writing from the adjuster to send the formal demand to him or her and that the statute will be deemed satisfied. After receipt of the permission, it is wise to confirm that permission, in writing, and state that the insured is reasonably relying on the adjuster's representation by not serving any other insurance representative or the agent for process. Sometimes, all of this is difficult to obtain at the last minute.

Accordingly, as to providing proper notice, there are two alternatives. First, the policy itself has a contact for all formal notifications, usually the home office. But, this can be problematic because there is no actual person (or sometimes actual street address) to send the written notice to receive a signature. The code also allows the written notice to be sent to ***the agent for process designated by the insurer filed with the department***. This person is relatively easy to find. Go to the department of insurance web site (www.insurance.ca.gov/) and look up the agent for service of process for the appropriate company. Make certain that you have the exact name of the insuring company as many insurers have multiple companies that sound very similar. Believe it or not, sometimes the different company names have different agents for process designated by the insurer with the department!

There is some question as to whether complying exactly with the code is still sufficient to preserve the statute of limitations. For example, it is possible to ***send*** a fully compliant written demand for arbitration to the correct party ***before*** the limitations date. It is also possible for the insurer to receive and sign for that fully compliant written demand for arbitration ***after*** the limitations date. Under that circumstance, it is a legitimate question whether that letter is ***"notifying the insurer***" "***within two years from the date of the accident.***" Clearly the notification is ***after*** two years as will be evidenced by the signature on the return receipt.

To solve this anomaly, I took the advice of a seasoned coverage counsel for a major insurance company (who shall remain nameless). He recommended that the insurer be "notified" notwithstanding receipt of the actual written demand. His practical advice was to also "notify" the insurer by sending a copy of the demand for arbitration by facsimile before the limitations period expired. Further, he recommended to "notify" the insurer by sending a facsimile of the post mark on the Certified Mail Receipt from the post office showing the demand was sent ***before*** the limitations period expired.

Given the holding in *Allstate Ins. Co. v. Gonzalez* (1995) 38 Cal.App.4th 783, and given the precise language contained in Insurance Code sec. 11580.2, practitioners must be extra careful to properly and "formally" institute arbitration proceedings "within two years from the date of the accident." As the limitations period approaches, it is advisable to re-check the file to make certain that arbitration has been instituted correctly and without question.