RECENT CHANGES TO ARBITRATION PROVISIONS IN UTAH UNINSURED AND UNDERINSURED MOTORIST STATUTES

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INTRODUCTION

One thing both plaintiff's attorneys and defense attorneys can agree upon is that all drivers should get ample and significant Uninsured Motorist (UM) and Underinsured Motorist (UIM) insurance coverage. These insurance provisions add extra layers of protection for parties injured in automobile accidents, and can help ensure that the injured party is more fully compensated for their injuries.

In recent years, as the court system has become increasingly backlogged, the Utah Legislature has turned to alternative dispute resolution (ADR) procedures to resolve disputes. In 2010 and again in 2011, the legislature made significant changes to U.C.A. §§ 31A-22-305 and 31A-22-305.3, the sections dealing with arbitration procedures in UM and UIM claims. These new provisions outline the procedures that both the plaintiff and the UM or UIM carrier must follow in both arbitration and litigation.

In order to discuss the changes to the UM and UIM statutes, it is first necessary to outline the existing UM and UIM arbitration provisions prior to the 2010 changes. We will then examine the 2010 changes in greater detail.

ARBITRATION PROVISIONS PRIOR TO 2010

Prior to the 2010 amendments, provisions regarding arbitration in UM and UIM claims were found in U.C.A. § 31A-22-305(8) (dealing with UM Insurance) and U.C.A. § 31A-22-305.3(7) (dealing with UIM Insurance). These subsections deal primarily with four areas: (1) the election to either arbitrate or litigate the claim; (2) the selection of the arbitrator or the arbitration panel; (3) arbitration procedures; and (4) provisions regarding the trial de novo process.

1. Election to Arbitrate or Litigate

The arbitration provisions in U.C.A. §§ 31A-22-305(8) (dealing with Uninsured Motorist Insurance) and 31A-22-305.3(7) (dealing with Underinsured Motorist Insurance) were and are virtually identical. When a claim is brought by a named insured or a covered person against the UM of UIM carrier, the claimant **may** elect to resolve the claim through either: (1) binding arbitration; or (2) litigation.[1] This election is available to the **claimant** only, unless otherwise provided for in the policy itself.[2] Once the claimant has elected to litigate the claim, he or she may not later elect binding arbitration without the written consent of the UM or UIM insurance carrier.[3] If the case involves multiple UM and/or UIM insurance policies, the claimant **may** elect to arbitrate all such claims in one hearing.

2. Arbitrator Selection

Unless the parties agree otherwise in writing, UM and UIM claims submitted to arbitration **shall** be resolved by a single arbitrator, and that arbitrator shall be agreed upon by all parties.[4] If the parties cannot agree on a single arbitrator, the claim shall be resolved by a panel of three arbitrators.[5] Each party shall select one arbitrator, and these two arbitrators shall select the third member of the panel.[6]Unless the parties agree otherwise in writing, the fees and costs of the arbitrator shall be divided evenly between them.[7] If the claim is resolved by an arbitration panel, each party will pay for the arbitrator they selected, and the costs of the third arbitrator will be shared equally between them.[8]

3. Arbitration Procedures

Unless the parties agree in writing otherwise, or unless provided for elsewhere by statute, all UM and UIM arbitration proceedings are governed by the Utah Uniform Arbitration Act, U.C.A. §§ 78B-11-101 et seq.[9] In addition, UM and UIM arbitrations shall be conducted pursuant to Utah R. Civ. P. 26-37, 54 and 68.[10] Any discovery issues shall be resolved by the arbitrator or arbitration panel.[11] Any written decision made by the arbitrator or the arbitration panel **shall** be considered a **final decision.**[12]

The arbitration award may not exceed the UM or UIM policy limits of all applicable policies, including umbrella policies. If the arbitration award exceeds the policy limits, it **shall** be reduced to an amount equal to the combined policy limits of all applicable UM or UIM policies.[13] The arbitrator or arbitration panel may not decide coverage issues or issues of extra-contractual damage, including: (1) whether the

claimant is a covered person; (2) whether the policy covers the loss in question; (3) consequential damages; and (4) bad faith liability.[14] Arbitration for UM and UIM claims is not available on a class-wide or class-representative basis.[15] If the arbitrator or the arbitration panel finds that the action is not brought, pursued or defended in good faith, reasonable attorneys' fees and costs may be awarded to the other party.[16]

The arbitration award shall be the final resolution of all claims, with two exceptions. The award may be set aside if it was procured by corruption, fraud or other undue means. In addition, either party may request a trial de novo within 20 days after the service of the arbitration award, by filing a complaint requesting trial de novo with the district court and serving the non-moving party with a copy of the complaint requesting trial de novo.[17]

4. Trial de Novo Procedures

Once a trial de novo is requested, litigation will proceed pursuant to the Utah Rules of Civil Procedure and the Utah Rules of Evidence.[18] If the plaintiff moves for trial de novo and **does not** obtain a verdict that is at least $5,000.00 **and** at least 20% **greater** than the arbitration award, he or she will be responsible for the defendant's costs.[19] If the UM or UIM carrier moves for trial de novo and **does not** obtain a verdict that is at least 20% **less** than the arbitration award, the carrier is responsible for the plaintiff's costs.[20] In determining whether the verdict in trial de novo is greater than or less than the arbitration award, the district court may **not** consider damages that were not: (1) fully disclosed in writing before the arbitration proceedings; or (2) disclosed in response to discovery contrary to the Utah Rules of Civil Procedure.[21] As with the arbitration award, if the district court determines that the moving party's use of the trial de novo process was conducted in bad faith, it may award reasonable attorney's fees to the nonmoving party.[22]

For the purposes of these sections, costs include the following: (1) any costs allowed by Utah R. Civ. P. 54(d); (2) the arbitrator or arbitration panel's fee; and (3) costs of expert witnesses and depositions used in arbitration or litigation. The award of costs may not exceed $2,500.00.[23] In 2011, subsections 305(8)(q)(iv) and 305.3(7)(q)(iv) were amended to read "An award of costs under this Subsection may not exceed $2,500.00 unless [Subsections 305(9)(h)(iii) or 305.3(8(h)(iii)] applies." These subsections state that the award of costs by the arbitrator or arbitration panel may not exceed $5,000.00.[24]

NEW REGULATION REGARDING ARBITRATION (ADDED IN 2010)

In 2010, the Utah Legislature amended U.C.A. §§ 31A-22-305 and 31A-22-305.3, adding subsections 305(9) and 305.3(8). These provisions are virtually identical, and address the following issues related to arbitration claims: (1) the initial disclosures required by the plaintiff; (2) the process of identifying health care providers and collecting health care records; (3) the insurance carrier's obligations regarding the arbitration process; (4) the options available to the plaintiff after receiving the insurance carrier's response; (5) the limitations to any final arbitration or litigation award; and (6) the submission of the final affidavit of costs.

These provisions apply whether the plaintiff elects to arbitrate or litigate, and puts the initial burden on the plaintiff to have the main elements of the case established from the outset. They apply to all motor vehicle accidents that occur on or after March 30, 2010.[25]

1. Initial Disclosures Required by Covered Person

Within 30 days of the election to arbitrate or litigate, the plaintiff must provide the UM or UIM insurance carrier with the following disclosures:

- A written demand for payment of the UM or UIM coverage benefits. This demand must set forth the monetary amount of the demand and the factual and legal basis for the demand, with supporting documentation.[26]

- A written statement under oath, disclosing information concerning the plaintiff's injury and damages claims:[27]

    - Names and last known addresses of all health care providers who have provided health care services to the plaintiff related to the UM or UIM claim for a period of five years preceding the date of the accident up to the time the plaintiff elected to arbitrate or litigate the claim;
    - Whether the plaintiff has seen other health care providers for health care services unrelated to the UM or UIM claim during the same period that have not been disclosed;
    - Names and last known addresses of all health care insurers or other entities to whom the plaintiff has submitted claims for health care services or benefits related to the UM or UIM claim for the same period of time;

- o Whether the identity of any health insurers or other entities to whom the plaintiff has submitted claims for health care services or benefits unrelated to the UM or UIM claim during the same period have not been disclosed;
- o All employers of the plaintiff for a period of five years preceding the date of the accident up to the time the plaintiff elected to arbitrate or litigate the claim (if lost wages, diminished earning capacity or similar damages are claimed);
- o Other supporting documentation; and
- o All state and federal statutory lienholders, including a statement as to whether the plaintiff is a recipient of Medicare or Medicaid benefits, Utah Children's Health Insurance Program benefits, or any other applicable state or federal statutory liens.

- Signed authorizations allowing the UM or UIM carrier to obtain records and billings from the individuals or entities disclosed.[28]

2. Identifying Health Care Providers and Collecting Health Care Records

As stated above, the plaintiff must make initial disclosures of all health care providers and claims that are relevant to the UM or UIM claim, and state whether there are undisclosed health care providers and claims that are allegedly immaterial to the UM or UIM claim. If the UM or UIM insurance carrier determines that it is necessary to identify and disclose these undisclosed health care providers and claims, the carrier may make a request for the disclosure of the identities of the health care providers and insurers, and may make a request for authorizations to allow the carrier to obtain records and billings from the individuals or entities not disclosed.[29]

If the plaintiff does not provide the requested information or authorizations within ten days, the plaintiff is required to disclose, in writing, the factual or legal basis for the failure to disclose the information or authorizations. Either party may request that the arbitrator or arbitration panel resolve the issue.[30] The time period for the insurance carrier to respond to the demand letter (discussed below) is tolled pending the resolution of this dispute.[31]

3. Insurance Carrier's Obligations Regarding Arbitration

After the plaintiff provides his or her initial disclosures, the UM Or UIM insurance carrier has a "reasonable time," not to exceed sixty days, to respond.[32] The carrier must provide the following to the plaintiff:

- A written response to the written demand for payment.[33]

- The amount, if any, of the UM or UIM carrier's determination of the amount owed to the covered person, less the amount of any state or federal statutory liens.[34]

    - If the exact amount of the state or federal statutory lien is established, this amount shall be deducted from the UM or UIM carrier's determination of the amount owed to the covered person.[35]
    - If the amount of the state or federal statutory lien is not established, the UM or UIM carrier shall deduct two times the amount of the medical expenses subject to the state or federal statutory lien until such time as the exact amount of the state or federal statutory lien is established.[36]

These provisions put the burden on the UM or UIM insurance carrier to adequately assess the claim at an early stage. The timely and accurate exchange of information between the parties is crucial at this point in the process.

If the UM or UIM insurance carrier tenders the total amount of the policy limits, the tendered amount **shall** be accepted by the plaintiff.[37] This does not preclude the plaintiff from accepting the amount tendered as partial payment of the claim, and continuing to arbitrate or litigate the remaining claim (see below).

4. Options for Covered Person After Receiving Insurance Carrier's Response

After receiving the UM or UIM insurance carrier's response, the plaintiff has two options: (1) he or she may elect to accept the amount tendered by the insurance carrier as payment in full for all UM or UIM claims;[38] or (2) accept the amount tendered as partial payment of the UM or UIM claims, and litigate or arbitrate the remaining claims.[39]

Should the plaintiff accept the amount tendered as partial payment of all claims, the final award received through later arbitration, litigation or settlement shall be reduced by any amount tendered by the UM or UIM insurance carrier.[40] Further, in any arbitration proceeding on the remaining claims, the parties may not disclose to the arbitrator or the arbitration panel either the amount initially tendered by the insurance carrier or the applicable insurance policy limits.[41]

5. Final Arbitration or Litigation Award Limitations

If the final award obtained through arbitration of litigation is greater than the average of the plaintiff's initial written demand and the UM or UIM insurance carrier's initial written response, the insurance carrier shall pay the following:

- The final award obtained through arbitration or litigation, except that if the award exceeds the policy limits of the subject UM or UIM policy by more than $15,000.00, the amount shall be reduced to an amount equal to the policy limits plus $15,000.00.[42]

- Any of the following applicable costs:[43]

    - Any costs set forth in Utah R. Civ. P. 54(d);
    - The arbitrator or the arbitration panel's fees; and
    - The reasonable costs of expert witnesses and depositions used in the presentation of evidence during arbitration or litigation.

- Note, however, that the costs awarded by the arbitrator or the arbitration panel may not exceed $5,000.00.[44]

This formula, although appearing fairly simple, has presented some problems in application.[45] So perhaps a few examples would help demonstrate its application. Assume for the purposes of this discussion the following: (1) the policy limits are $100,000.00; and (2) the plaintiff's initial demand is for the policy limits of $100,000.00.

- **Example 1:** The defendant's initial written response is for $50,000.00. Thus, the average of the demand and the response is $75,000.00. The final arbitration award is $90,000.00. The insurance carrier shall pay $90,000.00, plus costs up to $5,000.00.

- **Example 2:** The defendant's initial written response remains $50,000.00, and the average remains $75,000.00. This time, the final arbitration award is for $150,000.00. The insurance carrier shall pay $115,000.00 (the policy limits plus $15,000.00), plus costs up to $5,000.00.

- **Example 3:** The defendant's initial written response remains $50,000.00, and the average remains $75,000.00. This time, the final arbitration award is $110,000.00. This is the tricky case. Is the award reduced to $100,000.00, plus

costs up to $5,000.00 (because the award does not exceed the policy limits of the subject UM or UIM insurance policy by **more than** $15,000.00)? Or does the plaintiff receive $115,000.00, plus costs, because the final award exceeded the policy limits by any amount? It may be argued this provides an unfair windfall to the plaintiff. Or was the statute's intent that the final award could not exceed the policy limits by more than $15,000.00? If so, then in this case the insurance carrier shall pay $110,000.00, plus costs. This seems to be the more likely interpretation. Otherwise, a gap is created. Those plaintiffs whose final awards fall below the policy limits get the award. Those whose final awards exceed the policy limits by the magic $15,000.00 figure get the policy limits plus $15,000.00. Those who fall in between, however, are penalized by having their awards reduced to the policy limits, which does not seem logical considering the purpose of the legislation.

- **Example 4:** Now, let us suppose that the defendant's initial response is $70,000.00, making the average $85,000.00, and that the final arbitration award is $50,000.00. In this case, the insurance carrier shall only pay the $50,000.00. The carrier is not liable for the costs, as the award did not exceed the average.

Example 4 illustrates one of the hidden advantages of these arbitration provisions. They put the burden on the insurance carrier not to underestimate or "low ball" their initial response. The lower the initial response, the lower the average, and the more likely that the plaintiff will receive at least the reasonable costs of the suit. In order to keep the final payout to the absolute minimum, the carrier must engage in an honest evaluation of the case, and make a reasonable initial response.

6. Affidavit of Costs

After the final arbitration award has been served, the plaintiff has five days to provide the insurance carrier with an affidavit of costs.[46] In the affidavit, the plaintiff must include all material information; otherwise, the plaintiff may not recover costs **or** any amounts in excess of the policy limits under Subsection 305(9)(g) or 305.3(8)(g).[47]

If the UM or UIM insurance carrier objects to the costs, it may object to the affidavit. The objection must specify with particularity the costs to which the insurance carrier objects.[48] The dispute over the affidavit shall be resolved by the arbitrator or the arbitration panel.[49]

CONCLUSION

Arbitration of UM and UIM claims has benefits for both plaintiffs and defendants.[50] Arbitration can provide greater efficiency and confidentiality than litigation. Arbitration is usually quicker than litigation, and is usually cheaper by comparison. This allows a greater portion of the arbitration award to go to the client. Arbitration also does not require the strict evidentiary and procedural standards required by the Utah Rules of Civil Procedure and Evidence.

> It is surprising that many lawyers are reluctant to recommend arbitration to their clients; particularly in UM and UIM claims. Arbitration Agreements can be drafted to address the concerns of the lawyers or their clients. A blanket condemnation of arbitration ignores its potential value as a means of dispute resolution. Arbitration should be considered as a means to avoid the expense, delays, complexities, stress and continuances of the court process.

The provisions of U.C.A. §§ 31A-22-305(9) and 31A-22-305.3(8) provide more detail to the process of arbitrating UM and UIM claims. These provisions should encourage both plaintiffs and insurance carriers to consider electing to arbitrate instead of litigating these types of claims. It is our opinion that arbitration can provide a quicker, cheaper, more efficient, and, in many cases, a more beneficial resolution of UM and UIM claims for all parties.

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[1] *See* U.C.A. § 31A-22-305(8)(a) (Uninsured Motorist Insurance); U.C.A. § 31A-22-305.3(7)(a) (Underinsured Motorist Insurance).
[2] U.C.A. §§ 31A-22.305(8)(b) and 31A-22-305.3(7)(b).
[3] U.C.A. §§ 31A-22.305(8)(c) and 31A-22-305.3(7)(c).
[4] U.C.A. §§ 31A-22.305(8)(d)(i) and (ii), and 31A-22-305.3(7)(d)(i) and (ii).
[5] U.C.A. §§ 31A-22.305(8)(d)(iii) and 31A-22-305.3(7)(d)(iii).
[6] U.C.A. §§ 31A-22.305(8)(e) and 31A-22-305.3(7)(e).
[7] U.C.A. §§ 31A-22.305(8)(f)(i) and 31A-22-305.3(7)(f)(i).
[8] U.C.A. §§ 31A-22.305(8)(f)(ii) and 31A-22-305.3(7)(f)(ii).
[9] U.C.A. §§ 31A-22.305(8)(g) and 31A-22-305.3(7)(g).
[10] U.C.A. §§ 31A-22.305(8)(h) and 31A-22-305.3(7)(h).
[11] U.C.A. §§ 31A-22.305(8)(i) and 31A-22-305.3(7)(i).
[12] U.C.A. §§ 31A-22.305(8)(j) and 31A-22-305.3(7)(j).
[13] U.C.A. §§ 31A-22.305(8)(k) and 31A-22-305.3(7)(k).
[14] U.C.A. §§ 31A-22.305(8)(l) and 31A-22-305.3(7)(l).
[15] U.C.A. §§ 31A-22.305(8)(m) and 31A-22-305.3(7)(m).
[16] U.C.A. §§ 31A-22.305(8)(n) and 31A-22-305.3(7)(n).
[17] U.C.A. §§ 31A-22.305(8)(o) and 31A-22-305.3(7)(o).
[18] U.C.A. §§ 31A-22.305(8)(p) and 31A-22-305.3(7)(p).
[19] U.C.A. §§ 31A-22.305(8)(q)(i) and 31A-22-305.3(7)(q)(i).
[20] U.C.A. §§ 31A-22.305(8)(q)(ii) and 31A-22-305.3(7)(q)(ii).
[21] U.C.A. §§ 31A-22.305(8)(r) and 31A-22-305.3(7)(r).
[22] U.C.A. §§ 31A-22.305(8)(r) and 31A-22-305.3(7)(r).
[23] U.C.A. §§ 31A-22.305(8)(q)(iii) and (iv) and 31A-22-305.3(7)(q)(iii) and (iv).
[24] *See* S.B. 174.
[25] U.C.A. §§ 31A-22.305(9)(k) and 31A-22-305.3(8)(k).

[26] U.C.A. §§ 31A-22.305(9)(a)(i) and 31A-22-305.3(8)(a)(i).
[27] U.C.A. §§ 31A-22.305(9)(a)(ii) and 31A-22-305.3(8)(a)(ii).
[28] U.C.A. §§ 31A-22.305(9)(a)(iii) and 31A-22-305.3(8)(a)(iii).
[29] U.C.A. §§ 31A-22.305(9)(b)(i) and 31A-22-305.3(8)(b)(i).
[30] U.C.A. §§ 31A-22.305(9)(b)(ii) and 31A-22-305.3(8)(b)(ii).
[31] U.C.A. §§ 31A-22.305(9)(b)(iii) and 31A-22-305.3(8)(b)(iii).
[32] U.C.A. §§ 31A-22.305(9)(c)(i) and 31A-22-305.3(8)(c)(i).
[33] U.C.A. §§ 31A-22.305(9)(c)(i)(A) and 31A-22-305.3(8)(c)(i)(A).
[34] U.C.A. §§ 31A-22.305(9)(c)(i)(B) and 31A-22-305.3(8)(c)(i)(B).
[35] U.C.A. §§ 31A-22.305(9)(c)(i)(C)(I) and 31A-22-305.3(8)(c)(i)(C)(I).
[36] U.C.A. §§ 31A-22.305(9)(c)(i)(C)(II) and 31A-22-305.3(8)(c)(i)(C)(II).
[37] U.C.A. §§ 31A-22.305(9)(c)(ii) and 31A-22-305.3(8)(c)(ii).
[38] U.C.A. §§ 31A-22.305(9)(d)(i) and 31A-22-305.3(8)(d)(i).
[39] U.C.A. §§ 31A-22.305(9)(d)(ii) and 31A-22-305.3(8)(d)(ii).
[40] U.C.A. §§ 31A-22.305(9)(e) and 31A-22-305.3(8)(e).
[41] U.C.A. §§ 31A-22.305(9)(f) and 31A-22-305.3(8)(f).
[42] U.C.A. §§ 31A-22.305(9)(g)(i) and 31A-22-305.3(8)(g)(i).
[43] U.C.A. §§ 31A-22.305(9)(g)(ii) and 31A-22-305.3(8)(g)(ii).
[44] U.C.A. §§ 31A-22.305(9)(g)(iii) and 31A-22-305.3(8)(g)(iii).
[45] As we were discussing these provisions in our office, there was a wide divergence in their interpretation. Four attorneys, two paralegals, one law clerk and one legal secretary could not agree on exactly what the legislature intended. Mr. Black hopes that through this demonstration he can convince Ms. Dunn that her interpretation is incorrect.
[46] U.C.A. §§ 31A-22.305(9)(h)(i) and 31A-22-305.3(8)(h)(i).
[47] U.C.A. §§ 31A-22.305(9)(i) and 31A-22-305.3(8)(i).
[48] U.C.A. §§ 31A-22.305(9)(h)(ii)(A) and 31A-22-305.3(8)(h)(ii)(A).
[49] U.C.A. §§ 31A-22.305(9)(h)(ii)(B) and 31A-22-305.3(8)(h)(ii)(B).
[50] For a more detailed discussion of the potential advantages and disadvantages of arbitration, see Tim Dalton Dunn and W. Lewis Black, "Arbitration in General and U.C.A. § 31A-22-321 Arbitrations in Third Party Motor Vehicle Accident Cases," 34 *Utah Trial Journal* 8 (Winter 2011).