Mastering uninsured and underinsured motorist arbitrations

Initiating arbitration, conducting discovery, obtaining an enforceable award, and recovering allowable costs in UM/UIM arbitrations

By Barry Goldberg

Uninsured and underinsured motorist arbitrations should be relatively straightforward and self-executing. However, they are not. The California Uninsured/Underinsured Motorist Law, Insurance Code section 11580.2, set out 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. In fact, the law pre-dated the California Financial Responsibility Law and the operative discovery statutes. As such, there is no clear path to securing an arbitration and no set procedures for conducting the actual arbitration.

This article will clarify what is established by statute and case law and provide valuable suggestions to allow the process to proceed smoothly. The insured's counsel can master UM/UIM arbitrations by creating a workable timeline, conducting reasonable discovery, and presenting a compelling case. Even though UM/UIM arbitrations are relatively common, the procedural gaps can trip up even the most experienced trial lawyer. Insurers routinely exploit the lack of guidelines and established procedures to delay and frustrate the goal of the UM/UIM law – to provide a prompt and relatively inexpensive resolution.

Claims subject to arbitration

In order to take advantage of the prompt and relatively inexpensive arbitration procedure, the claim must first qualify as either "uninsured" or "underinsured." Uninsured/underinsured motorist coverage is a part of every automobile liability policy issued in California unless specifically deleted in writing by the insured.

An insured includes the "named insured" and the spouse of the named insured and, while residents of the same household, relatives of either while occupants of a motor vehicle or otherwise, heirs and any other person while in or upon or entering into or alighting from an insured motor vehicle. If the named insured is an entity other than an individual, "insured" means any person while in or upon or entering into or alighting from an insured motor vehicle.

An "uninsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance or use of which there is no bodily injury liability insurance or bond applicable at the time of the accident, or there is the applicable insurance or bond but the company writing the insurance or bond denies coverage thereunder or refuses to admit coverage thereunder except conditionally or with reservation. . . ." (Ins. Code, § 11580.2, subd. (b).)

"Underinsured motor vehicle" means a motor vehicle that is an insured motor vehicle but insured for an amount that is less than the uninsured motorist limits carried on the motor vehicle of the injured person. (Ins. Code, § 11580.2, subd. (p) (2).)

As will be discussed more fully herein, the arbitrator is *not* empowered to decide whether the claimant is either insured or whether the adverse vehicle is uninsured or underinsured unless the parties grant the arbitrator that authority by stipulation or abdication. Therefore, it is essential to obtain that stipulation prior to any arbitration. The arbitrator decides "whether the insured shall be legally entitled to recover damages, and if so entitled, the amount thereof . . . ." (Ins. Code, § 11580.2, subd. (f).)

Securing an arbitration

No cause of action shall accrue to the insured unless one of the following actions has been taken within two years from the date of the accident:

The suit for bodily injury has been filed against the uninsured motorist, in a court of competent jurisdiction;

An agreement as to the amount due under the policy has been concluded; or

The insured has formally instituted arbitration proceedings by notifying the insurer in writing sent by certified mail, return receipt requested.

(Ins. Code, § 11580.2, subd. (i)(1).)

Most attorneys opt to make an "unequivocal demand" for arbitration within the two years as the formal institution of arbitration proceedings. Surprisingly, though, there are no clear guidelines in the statute as to what constitutes "instituting" arbitration. Mentioning arbitration or threatening arbitration in correspondence has been found to be insufficient. Even if a lawsuit is filed within two years, it is still not clear how one moves from merely preserving of the statute of limitations to obtaining an arbitrator and an arbitration date.

In either event, a "demand" for arbitration must be sent, certified return receipt requested, to the proper representative of the insurer. Writing the insurance company that, "We would like to proceed with an uninsured motorist arbitration in this matter," has been held insufficient. The demand for arbitration must be more

"formalized." (*Allstate Ins. Co. v. Gonzalez* (1995) 38 Cal.App.4th 783.)

Any demand or petition for arbitration shall contain a declaration, under penalty of perjury, stating whether: 1) The insured has a workers' compensation claim; 2) The claim has proceeded to findings and award and, if not, what reasons amounting to good cause are grounds for the arbitration to proceed immediately. (The insurer can reduce a UM payment from worker's compensation claims that the insured was eligible for at present or in the future, regardless of the insured's submission to those claims, by using the term "payable" in the contract. (See, Ins. Code, § 11580.2, subd. (h)(1) which states loss payable can be reduced by all amounts *payable* by worker's compensation. *Case v. State Farm Mut. Auto. Ins. Co*. (2018) 30 Cal.App.5th 397.)

The cost of the binding arbitration shall be borne equally by the insured and the insurer. "The arbitration shall be conducted by a single neutral arbitrator." (Ins. Code, § 11580.2, subd. (f).) Interestingly, that section neither explains nor suggests how such an arbitrator should be selected. Most policies are silent on the issue. At least one major carrier in California writes into its policies that the arbitration must be conducted by the American Arbitration Association. (The AAA arbitrator selection process is unique to that organization.)

Selecting the arbitrator

In order to move the process along and make it self-executing, 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. It is advisable to make the response time limited. If the insurer unreasonably fails to respond timely, the table is set to involve the Superior Court. Insurers routinely delay claims at this crossroad.

A 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 follow shortly after the petition. The petitions and motions are rarely heard because the insurers eventually snap into action to avoid first-party bad-faith delay claims. (Code Civ. Proc., § 1281.6, the court may appoint an arbitrator under certain circumstances; see also, *Bosworth v. Whitmore* (2006) 135 Cal.App.4th 536, 546-547; Code Civ. Proc., § 1283.8 authorizes the trial court to fix deadline for completion of arbitration proceeding and award rendered in order to prevent undue delay in completing arbitration.)

Once an arbitrator is selected, it is advantageous to immediately select an arbitration date. If the insurer will not agree to immediately set a date, a short scheduling conference with the arbitrator should be held. Insurers routinely argue that the arbitration date should not even be set until discovery is complete. This could add weeks or months to final resolution. Insured's counsel should recommend a date certain to the arbitrator, depending on the complexity of the case, and assure the arbitrator that the date can be continued if the insurer cannot promptly complete discovery.

The arbitrator has the right to schedule the matter as he or she sees fit. (Code Civ. Proc., § 1282.2, subd. (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.

How will the arbitration be conducted?

The UM/UIM law 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. Failing to establish the rules for the arbitration is a major mistake.

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.

If counsel will not agree to a fair set of rules, the arbitrator should be enlisted to help, possibly at the initial scheduling conference. In the end, the arbitrator will appreciate the organized and predictable conduct of the arbitration.

CCP 1282.2

The parties should agree to utilize Code of Civil Procedure section 1282.2, subdivision (a)(2)(A). That section 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, subdivision (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 one actually intends 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.

California Rules of Court

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 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. 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, subdivision (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.

"Normal" discovery – with a few exceptions

Insurance Code section 11580.2, subdivision (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 exceptions.

Depositions can be taken, without leave of court, relatively shortly after the subject accident, within 20 days. (Ins. Code, § 11580.2, subd. (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, subd. (f)(6).)

Beware 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, subdivision (f)(4). Accordingly, witnesses and parties should 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.

Section 11580.2, subdivision (o) provides that 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 Superior Court has jurisdiction over discovery disputes – unless agreed otherwise

If a dispute arises, arbitrators are not given the power to decide those discovery disputes, which must be decided in the Superior Court. (Ins. Code, § 11580.2, subd. (f)(2); see also, *Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913, 923.) 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 parties can agree to have the arbitrator resolve discovery disputes. Depending on the issues of the particular case, this may or may not be a good idea. However, a party cannot force an arbitrator to become a discovery referee.

Can an insured receive an award above the policy limits?

Obtaining an award in excess of the policy limits is one of the most controversial issues concerning UM/UIM arbitrations. Many ambitious attorneys compare the arbitration process to "opening up" a policy limit in a third-party context. It can be argued that it can be established – with an exclamation point – that an insurer committed first-party bad faith, if the arbitrator renders an award above the UM/UIM policy limits. Accordingly, insureds' counsel attempts to prevent the arbitrator from learning the limits of the applicable insurance policy.

In support, it is contended that section 11580.2, subdivision (f) requires the arbitrator to simply determine liability and damages. Implicit in that argument is that the determination of damages could be reformed post-arbitration to conform with the actual policy limits. There is tangential authority for this position in *Furlough v. Transamerica Ins. Co.* (1988) 203 Cal.App.3d 40. This issue and section (f) were called into question in *Weinberg v. Safeco Ins. Co. of Am.* (2004) 114 Cal.App.4th 1075. That court noted that there is no established "mechanism" as to what an arbitrator should do when asked to determine the insurer's liability, as opposed to the uninsured/underinsured.

Insurers point to section 11580.2, subdivision (a)(1) that requires UM/UIM policies to be limited to "all sums *within the limits* that he, she, or they, as the case may be, shall be legally entitled to recover as damages for bodily injury or wrongful death from the owner or operator of an uninsured motor vehicle." (Emphasis added.) For insureds' counsel, it is difficult to procedurally advance the excess position without alienating the arbitrator. The most elegant solution is to provide the arbitrator with a sealed envelope containing the policy limits information. After the arbitrator fixes damages, he or she may open the envelope and conform the award to the amount of the policy limits, if necessary.

If the insured serves an offer to compromise under Code of Civil Procedure section 998 at least 35 days before the arbitration and obtains a more favorable award, the insurer may be responsible for certain 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.) The insured is not entitled to the arbitrator's cost because it is statutory that the costs of the arbitrator shall be borne equally.

Costs and post-arbitration proceedings

Generally, § 998 costs and other costs, including Code of Civil Procedure section 1293.2 confirmation costs, can be awarded by the superior court in confirming the award. (See *Storm v. The Standard Fire Ins. Co*. (2020) __ Cal.App.4th __ (July 24, 2020, 2nd Dist.).) If the arbitration agreement/policy so provides, an application for costs can be submitted directly to the arbitrator within 15 days, before the arbitration award becomes final. (*Heimlich v. Shivji* (2019) 7 Cal.5th 350, 359 [a request can be made up to 15 days after the final award but it can also be made during the arbitration without being a concern of evidence. If an arbitrator has the jurisdiction to award costs, judicial review of such a decision is limited. Ordinary errors in an arbitrator's decision, such as not knowing their jurisdiction over an issue such as costs, does not serve as a basis for vacating an award].) A motion to correct or vacate an award must be made in the superior court within 100 days. A petition to confirm an award into an enforceable judgment must be served and filed at least 10 days, and no later than 4 years, after service of the award on the petitioner. (Code Civ. Proc., §§ 1288, 1288.4.) The only viable grounds

to correct or vacate the award is that the arbitrator acted in excess of his power.

Counsel should be aware that it is very difficult to "undo" a binding arbitration award. "The trial court may not set aside a final award even where it is based on mistakes of law." (*Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395, 1401.) "Contractual arbitration, as noted, generally results in a binding and final decision." (*Mercury Ins. Grp. v. Superior Court* (1998) 19 Cal.4th 332, 345.) "Limited judicial review of private arbitration awards to those cases in which there exists a statutory ground to vacate or correct the award." (*Porter v. Golden Eagle Ins. Co.* 1996) 43 Cal.App.4th 1282, 1288.)


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Counsel can master UM/UIM arbitrations by creating a workable timeline, conducting reasonable discovery, and presenting a compelling case.

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