Oscar Rene Gutierrez
LAW OFFICES OF OSCAR H. GUTIERREZ, APC

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2021

The "ABC's" of UM/UIM cases

BREAKING DOWN THE UIM CLAIM TO ITS BASIC RULES AND AUTHORITIES ALONG WITH PROCEDURAL STEPS

All of us who regularly handle automobile-accident cases have found ourselves in this scenario: A potential client calls and describes a horrible automobile accident in which the potential client and the other occupants of the vehicle were seriously injured. Liability was pinned squarely on the defendant driver by both third-party witnesses and the investigating officers. As you are eagerly signing the case up, your heart suddenly drops when the potential client reveals that the defendant driver produced the insurance card of a minimal-liability insurance carrier at the scene of the collision. Equally devastating is when your potential client says, "the other driver fled the scene of the collision without providing identification and insurance information," or "the other driver did not have valid insurance."

Due to the millions of uninsured or underinsured drivers on our roads in California, carrying uninsured/underinsured (UM/UIM) motorist coverage has become almost a requirement for California drivers. When catastrophic injuries are suffered because of a car accident with an uninsured or underinsured driver/vehicle, the available limits from an uninsured/underinsured motorist policy are often the only funds available to pay special and general damages for the people injured in those collisions.

Generally, UM/UIM claims are governed by the Uninsured Motorist Act and the California Insurance Code. This article is not an exhaustive summary of those statutes. Rather, the intent is to provide an overview of the basic rules and authorities, the "ABCs," to demystify the often-confusing nature of UM/UIM claims. We'll look at it from intake until the eve of the arbitration hearing.

Purpose and construction of the Uninsured Motorist Act

The purpose of the Uninsured Motorist Act (Ins. Code, §§ 11580.2-11580.5) is to ensure that the motorists injured by uninsured drivers are protected to the extent that they would have been protected had the at-fault driver carried the statutory minimum of liability insurance.

When bodily injury is caused by one or more motor vehicles, whether insured, underinsured, or uninsured, the maximum liability of the insurer providing the underinsured-motorist coverage cannot exceed the insured's own underinsured motorist coverage limits, less the amount paid to the insured by or for any person or organization that may be held legally liable for the injury. (Ins. Code, § 11580.2, subd. (p)(4); *Viking Ins. Co. v. State Farm Mut. Auto. Ins. Co.* (1993) 17 Cal.App.4th 540, 544 [per accident limits and offsets apply when more than one injured insured seeks underinsurance coverage].)

Uninsured motorist (UM) coverage defined

The minimum limits for liability coverage in California are $15,000 for the bodily injury or death of one person in any one accident and $30,000 for the bodily injury or death of two or more persons in any one accident. (Veh. Code, § 16056, subd. (a).)

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2021

Insurers must offer uninsured motorist coverage with limits at least equal to the underlying liability coverage, but they are not required to offer policies with limits in excess of $30,000 per person and $60,000 per incident. (Ins. Code, § 11580.2, subd. (m).)

Underinsured motorist (UIM) coverage defined

Underinsured motorist coverage applies when bodily injury is caused by an "underinsured motor vehicle" – a vehicle that is insured, but for an amount less than the uninsured motorist limits carried on the injured person's vehicle. (Ins. Code, § 11580.2, subd. (p)(2).)

An insurer who pays an underinsured-motorist claim is entitled to reimbursement or credit in the amount received by the insured from the vehicle owner or operator. (Ins. Code, § 11580.2, subd. (p)(5).) This is often referred to colloquially as an "offset" or "set off."

Who is covered under the Uninsured Motorist Act?

The Uninsured Motorist Act (Ins. Code, §§ 11580.2-11580.5) applies to named insureds. A "named insured" is the person or organization named in the declaration of the automobile liability insurance policy. (Ins. Code, § 11580.2, subd. (b).)

If the named insured is a person, "insured" means (Ins. Code, § 11580.2, subd. (b)):

The named insured

A "named insured" is the person or organization named in the declaration of the automobile liability insurance policy. (Ins. Code, § 11580.2, subd. (b).)

The spouse of the named insured.

A spouse must be legally married to the named insured for coverage to apply. (See *Menchaca v. Farmers Insurance Exchange* (1976) 59 Cal.App.3d 117, 128.) However, Insurance Code section 11580.2, subdivision (b) does not require that the spouse reside in the same household.

Relatives of the named insured or his or her spouse, if they are residents of the same household while occupants of a motor vehicle

Although Insurance Code section 11580.2 does not define "relative," courts ordinarily require some type of formal relationship. The relative must be a "resident of the same household" as the insured at the time of the accident. (Ins. Code, § 11580.2, subd. (b).) However, the physical place of residency is not necessarily controlling.

A passenger who leaves a vehicle may lose the status of "occupant." For example, a passenger who leaves a vehicle is no longer "occupying" the vehicle for insurance purposes.

Heirs and any other person while in or upon or entering into or alighting from an insured motor vehicle

The term "heirs" means persons entitled under law to succeed to the property of an intestate decedent. (Prob. Code, §§ 6400-6414.) When an insured dies as a result of an accident, the heirs become "insureds" for the purpose of recovering wrongful death damages. (Ins. Code, § 11580.2, subd. (a)(1), (b).) Regardless of the number of heirs affected, if there is only one decedent, the amount recoverable under an uninsured motorist wrongful death claim cannot exceed the statutory or policy limit (whichever is greater) for amounts recoverable for bodily injury to one person. (*Westfield Ins. Co. v. Desimone* (1988) 201 Cal.App.3d 598, 602.)

The phrase "any other person" includes guests and all other users or occupants who are there with the express or implied consent of the named insured. (*Cocking v. State Farm Mut. Automobile Ins. Co.* (1970) 6 Cal.App.3d 965, 970.)

Courts have construed the term "upon" broadly, e.g., as any position of contact with the automobile other than beneath it. (*Utah Home Fire Ins. Co. v. Fireman's Fund Ins. Co.* (1970) 14 Cal.App.3d 50,54 [pedestrian hit by uninsured motorist while standing at door of insured's vehicle and conversing with insured was "upon" insured's vehicle].) However, some courts have refused to apply such a physical contact test, and instead determine the question by analyzing whether a plaintiff was merely "using" the automobile. (*Cocking*, at p. 969 [extending coverage to permissive driver who was injured when struck by car while standing one to four feet from rear of automobile, preparing to put chains on tires].)

Persons who are injured after leaving an insured automobile may or may not be covered. (See, e.g., *Revesz v. Excess Ins. Co.* (1973) 30 Cal.App.3d 125, 128 [driver was not "in or upon" automobile when he left it for about 30 seconds to ask directions].)

Any person with respect to damages he or she is entitled to recover for care or loss of services because of bodily injury to which the policy provisions or endorsements apply

The clause "any person" does not create a new and independent cause of action against insurance companies. Under the clause, a person may recover damages from an insurer only if that person would be legally entitled to recover those damages in tort directly from the owner or operator of the uninsured vehicle. (*Tara v. California State Auto. Assn.* (1979) 93 Cal.App.3d 227, 231.)

What constitutes an uninsured motor vehicle?

For an insured claimant to recover damages for bodily injury or wrongful death under an uninsured-motorist policy, the claimant must show that the tortfeasor was the owner or operator of an uninsured motor vehicle. (Ins. Code, § 11580.2, subd. (a)(1).)

Hit-and-run accidents

If the responsible party for the car accident flees the scene and fails to identify himself/herself, certain steps must be taken to preserve the uninsured-motorist claims of any injured victims.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2021

To recover for injuries sustained in a hit-and-run accident, an uninsured-motorist claimant must first show that the owner or operator of the motor vehicle that struck him or her is unknown. (Ins. Code, § 11580.2, subd. (b).)

In a hit-and-run situation in which the owner or operator of a motor vehicle is unknown, the claimant must show physical contact with the vehicle, report the accident to police within 24 hours, and file a claim with the insurer within 30 days. (See Ins. Code, § 11580.2, subd. (b).)

Show physical contact with the vehicle

The bodily injury resulting from a hit-and-run accident must have arisen from the physical contact of the unknown or unidentified automobile with the insured or the automobile that the insured is occupying. (Ins. Code, § 11580.2, subd. (b)(1).) Physical contact exists when either part of an automobile or an object that the automobile is carrying strikes the insured or his or her automobile.

A collision with objects other than a vehicle will generally not allow recovery under the Act. For example, in *Barnes v. Nationwide Mut. Ins. Co.* (1986) 186 Cal.App.3d, the court rejected uninsured-motorist coverage for an insured injured after her car hit a box of chairs lying on the freeway and held that coverage requires a "direct application of force" from an uninsured motor vehicle. Similarly, a driver who crashed into a building after swerving to avoid being hit by an uninsured motor vehicle was precluded from recovering uninsured motorist benefits because there was no physical contact between her vehicle and the uninsured vehicle. (*Boyd v. Interinsurance Exchange* (1982) 136 Cal.App.3d 761.)

Report the accident to police within 24 hours

Within 24 hours after a hit-and-run accident, the insured or someone on his or her behalf must report the accident to the police department of the city where the accident occurred. If the collision occurred in an unincorporated area, it must be reported either to the sheriff of the county where it occurred or to the local office of the California Highway Patrol. (Ins. Code, § 11580.2, subd. (b)(2).)

Failure to file an accident report within 24 hours may not constitute prejudice to the insurer as a matter of law. (*California State Auto. Asso. v. Blanford* (1970) 4 Cal.App.3d 186, 190.) If the insurer is denying the claim on the ground that the claimant did not report the accident to the police within 24 hours, the insurer should be prepared to show prejudice by the delay. If such a showing is made by the insurer, the claimant will then have to rebut that showing.

File a claim with the insurer within 30 days

In a hit-and-run accident in which the owner or operator of a motor vehicle is unknown, a vehicle will qualify as an uninsured motor vehicle only if the insured or someone on his or her behalf has filed with the insurer within 30 days after the accident, a statement under oath that the insured (or legal representative or heirs) has a cause of action arising from the accident for damages against a person or persons whose identity is unascertainable and setting forth facts supporting that assertion. (Ins. Code, § 11580.2, subd. (b).) The statement should include facts showing both why the tortfeasor's identity cannot be ascertained and why the insured has a cause of action against him or her.

Failure to file such a statement with an insurer may result in a finding of prejudice to the insurer. (*California State Auto. Assoc., supra;* see also *Hanover Ins. Co. v. Carroll* (1966) 241 Cal.App.2d 558,570 [issue of prejudice is one of fact, not of law, and burden of proof is on insurer].)

If operator of vehicle is unknown, but owner of vehicle is known

If the operator of a motor vehicle is unknown but the owner is known, an insured victim should pursue his or her uninsured motorist rights as well as file an action against the known owner and the unknown operator within the two-year limitation period. (See Ins. Code, § 11580.2, subd. (i).) If the operator of the adverse vehicle is later identified, the claimant may amend the complaint by substituting the defendant's name for a "DOE" defendant, then prosecute accordingly.

When there is a known insured owner and an unknown operator of the alleged uninsured vehicle, the insurer on the uninsured motorist policy will normally require exhaustion of remedies against the insured owner before the insurer will process the uninsured motorist claim.

Under the Financial Responsibility Law (Veh. Code, §§ 16000-16560), the owner of the vehicle is financially responsible for the damages caused by any permissive user up to only $15,000 and $30,000, regardless of the policy limits. The primary insurance will be an offset in the uninsured motorist claim.

Statutory prerequisites

Accrual of action

No cause of action will accrue to the insured under any bodily injury liability policy or endorsement provision issued under Insurance Code section 11580.2 unless one of the following three actions has been taken within two years after the date of the accident (Ins. Code, § 11580.2, subd. (i)):

i. Suit for bodily injury has been filed against the uninsured motorist, in a court of competent jurisdiction;
ii. Agreement as to the amount due under the policy has been concluded; or
iii. The insured has formally instituted arbitration proceedings by notifying the insurer in writing sent by certified mail, return receipt requested.

For a cause of action to accrue based on an insured's formal institution of arbitration proceedings, the insured must notify the insurer in writing sent by certified mail, return-receipt requested, of his or her action within two years after the date of the accident. The insured must send notice to

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2021

the insurer or to the insurer's designated agent for service of process filed with the state Department of Insurance. (Ins. Code, § 11580.2, subd. (i)(1)(C).)

All demands or petitions for arbitration must contain a declaration, under penalty of perjury, stating whether:

- The insured has a workers' compensation claim;
- The claim has proceeded to findings and award or settlement on all issues reasonably contemplated to be determined in that claim; and, if not,
- What reasons amounting to good cause are grounds for the arbitration to proceed immediately.

(Ins. Code, § 11580.2, subd. (f).)

To trigger arbitration, an insured must make a formal demand that complies with Insurance Code section 11580.2, subdivision (f). Thus, a letter from an insured's attorney to an insurer, stating that the insured wanted to proceed with uninsured motorist arbitration, is technically insufficient. (*Allstate Ins. Co. v. Gonzalez* (1995) 38 Cal.App.4th 783.)

"Time limitations"

The Insurance Code section 11580.2, subdivision (i)(1) requirement that an action be brought within two years under the uninsured-motorist provisions of an automobile policy creates an absolute prerequisite to the accrual of any cause of action under the statute. (*Kortmeyer v. California Ins. Guarantee Assn.* (1992) 9 Cal.App.4th 1285.)

But the "two-year statute of limitations" on a demand for arbitration under Insurance Code section 11580.2, subdivision (i)(1)(C) does not apply to underinsured-motorist claims. In short, claimants must bring an action for underinsured-motorist benefits within "a reasonable time" after exhaustion of the claims against the underinsured tortfeasors. An insured may not make a demand for UIM benefits before settling with the underinsured motorist(s).

The filing of a lawsuit, even if the lawsuit fails to specifically identify uninsured defendants by name, tolls the period during which an insured can demand arbitration to resolve a claim for uninsured motorist insurance. (*California State Auto. Assoc., Inter-Insurance Bureau v. Cohen* (1975) 44 Cal.App.3d 387.)

"Waiver of rights"

Failure to formally institute arbitration proceedings according to these statutory guidelines may result in a waiver of the right to arbitrate. (See *Mayflower Ins. Co. v. Pellegrino* (1989) 212 Cal.App.3d 1326.) However, when the arbitration agreement does not specify time within which arbitration must be demanded, a "reasonable time" is allowed and the party who does not demand arbitration within that time is deemed to have waived right to arbitration.

Issues subject to arbitration

California uninsured/underinsured motorist law requires all automobile liability insurance policies to provide for mandatory arbitration of disputes between insurers and insureds regarding liability, damages, or both. (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th.) Specifically, Insurance Code section 11580.2, subdivision (f) requires bodily injury liability policies or endorsements to provide that the determination whether the insured is legally entitled to recover damages, and, if so, the amount of damages to which he or she is entitled, must be made by agreement between the insured and the insurer or, in any disagreement, by arbitration.

Other issues will be decided by a court. (*Bouton v. USAA Casualty Ins. Co.* (2008) 43 Cal.4th 1190, 1201.) This includes any issues or claims for "bad faith."

Pre-arbitration discovery

Generally speaking, 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 detailed below, which is by no means, a complete list:

Arbitrators and discovery disputes

Arbitrators do not have the power to decide discovery disputes, which must be decided in superior court. (Ins. Code, § 11580.2, subd. (f)(2).) However, the parties can agree to have the arbitrator resolve discovery disputes.

Depositions

Depositions can be taken, without leave of court, as soon as 20 days after the subject accident. (Ins. Code, § 11580.2, subd. (f)(3).)

Code of Civil Procedure section 2025.280 does not apply to uninsured/underinsured motorist arbitration proceedings. (Ins. Code, § 11580, subd. (f)(4).) Insurance Code section 11580.2, subdivision (f)(4) does not require the service of a subpoena upon the claimant in order to compel his or her deposition.

Requests for medical records and wage-loss information

Per Insurance Code section 11580.2, subdivision (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.

The claimant should not sign a blank release form for the insurer to obtain medical records. Claimant's attorney(s) should make sure that the release is limited to records related to treatment for injuries incurred in the accident with the uninsured/underinsured motorist.

Written discovery

Interrogatories and requests for admissions can be served 20 days after the subject accident. (Ins. Code, § 11580.2, subd. (f)(6).)

Code of Civil Procedure section 998 "offers to compromise"

Section 998 applies to an "arbitration as provided in Code of Civil Procedure section 1281," which includes uninsured

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2021

motorist arbitrations. (*Pilimai v. Farmers Ins. Exch. Co.* (2006) 39 Cal.4th 133, 150.)

If the insured obtains a more favorable arbitration award than the section 998 offer, the insurer may be responsible for certain claim costs, including deposition costs, exhibit costs, as a penalty – even if it brings the total recovery above the uninsured limits. (*Id.* at 139-42.)

However, pre-judgment interest is not recoverable in an uninsured/underinsured motorist arbitration seeking personal injury damages, because it is not a "personal injury action sounding in tort." Rather, the arbitration is to enforce a contract right – the right to underinsured motorist benefits under the insurance policy. (*Id.* at 147.)

Settlements before the arbitration hearing

Before settling an uninsured/underinsured motorist matter, be mindful of the following:

No signed release required

An insured who is entitled to recovery under an uninsured/underinsured motorist endorsement or coverage must be reimbursed without being required to sign any release or waiver of rights to which he or she may be entitled under any other applicable insurance coverage. (Ins. Code, § 11580.2, subd. (h).)

Selected "set off" situations

•Uninsured motorist benefits

Insurance Code section 11580.2, subdivision (h)(2) authorizes an insurer to set off amounts that it has paid to a passenger in an insured vehicle under uninsured motorist coverage against any amounts to which that passenger later becomes entitled under the bodily injury provision of the same policy as long as the policy or an endorsement to the policy provides for such a setoff. (*Criterion Ins. Co. v. Welish* (1985) 167 Cal.App.3d 62.)

•Underinsured motorist benefits

Insurance Code section 11580.2, subdivision (p)(4) provides that when bodily injury is caused by one or more motor vehicles, whether insured, underinsured, or uninsured, the maximum liability of the insurer providing the underinsured motorist coverage must not exceed the insured's underinsured motorist coverage limits, less the amount paid to the insured by or for any person or organization that may be held legally liable for the injury.

•Workers' compensation

An insurer is entitled to limit the amount of uninsured/underinsured motorist benefits payable to or for any person by the amount paid and the present value of all amounts payable to him or her, or his or her executor, administrator, heirs, or legal representative under any workers' compensation law, exclusive of nonoccupational disability benefits. (Ins. Code, § 11580.2, subd. (h)(1).) However, an insurer does not have the right to the reduction without a specific policy provision to this effect. (*Coltherd v. Workers' Comp. Appeals Bd.* (1990) 225 Cal.App.3d 455.) It is important to remember that an insurer has no duty to pay uninsured/underinsured motorist benefits until an insured's workers' compensation claim is resolved. (*Rangel v. Interinsurance Exchange* (1992) 4 Cal.4th 1.)

The workers' compensation offset applies to the policy limits and not to the total amount of damages that an insured is entitled to recover from an uninsured motorist as a result of an accident.

•Medical payments, aka "med-pay"

Generally speaking, any available med-pay benefits will serve as an offset against the available UM/UIM limits unless the value of the UM/UIM claim exceeds the available UM/UIM limits.

Conclusion

Breaking down a UM/UIM case to its basics helps to simplify and streamline the often-confusing UM/UIM arbitration process for trial attorneys representing injured consumers. Sticking to the "ABC's" will hopefully result in a prompt, favorable settlement for your client(s) prior to the arbitration hearing or set you up for success at the actual UM/UIM arbitration hearing.

Oscar Rene Gutierrez practices law as a trial attorney with his father, Oscar H. Gutierrez in the Highland Park neighborhood of Los Angeles. Their practice focuses exclusively on litigating and trying catastrophic personal injury, wrongful death, and brain-injury matters across the state of California. Oscar Rene served as the 2019 President of the Mexican-American Bar Association of Los Angeles County. He completed his undergraduate studies and U.S.C. and graduated from Pepperdine University School of Law.