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Recovering costs in UIM cases without the need for an arbitration award

MADRIGAL V. HYUNDAI MOTOR AM. MAKES CLEAR THAT COST-SHIFTING PROVISIONS OF § 998 CAN APPLY EVEN IF A CASE RESOLVES IN SETTLEMENT

“I once partied with this guy who said, ‘don’t take life too seriously, you will never get out alive.’ He always used to ramble on about the difference between light beer and dark beer. Weird, but good advice.”— Van Wilder (Becker, 2002). Earlier in the movie, the editor of the school paper shows an article written in the school paper about the difference between light and dark beer, written by a writer who later goes on to win a Pulitzer Prize.

I’m not a Pulitzer Prize-winning writer, or even a high school English class-level writer, but anyone who has been around me in the past year knows that I tend to ramble about *Madrigal v. Hyundai Motor Am.* (2025) 17 Cal. 5th 592. While *Madrigal* was a Lemon Law case, it has amazing implications for uninsured and underinsured-motorist arbitration cases. *Madrigal* makes clear that no judgment or arbitration award is necessary to receive costs pursuant to Code of Civil Procedure section 998 (§ 998).

In a recent uninsured-motorist arbitration case I handled with two claimants, the available policy limits were \$500,000. Section 998 offers were served early in the arbitration in the amounts of \$249,000 for one claimant and \$99,000 for the other. Both were allowed to expire. Over one year later, and after claimants incurred significant costs, two days before arbitration the carrier tendered the full available \$500,000 policy limits and sent checks for \$400,000 to one claimant and \$100,000 to the other claimant.

We moved for costs pursuant to § 998, citing the decision in *Madrigal*. In our case, the arbitrator had the power to determine costs. In the order granting claimants’ costs, the arbitrator stated,

“Respondent contends that no costs may be awarded because the case settled prior to arbitration and no award was issued. That argument is inconsistent with the California Supreme Court’s recent holding in *Madrigal v. Hyundai Motor America* (2025) 17 Cal.5th 592. In *Madrigal*, the Court confirmed that the cost-shifting provisions of section 998 apply even when a case is resolved through settlement rather than trial or arbitration, so long as the statutory requirements are satisfied. Accordingly, claimants are not barred from recovering costs simply because the matter settled prior to arbitration.”

Thus ended a favorite tactic of the insurance industry in uninsured and underinsured-motorist cases. Previously, insurance companies would delay payment as long as possible, even if the case was worth more than the available limits. Unless the value of a case was many times in excess of the available limits, insurance carriers would rely on their own interpretation of the “genuine dispute doctrine” to avoid paying claims in a timely manner, while also making a subsequent bad-faith case difficult. They knew that not paying limits timely forced claimants to expend costs in preparation for arbitration, which would ultimately lower the recovery. As an example, with a \$100,000 policy, if the claimant spent \$15,000 in costs and the carrier tendered the available \$100,000 limits shortly before arbitration, the actual recovery would only be \$85,000 unless costs could be recovered. Armed with this knowledge, insurance carriers would attempt to bully claimants into accepting less than their claim was worth: “You are going to have to spend \$15,000 in costs, so accepting \$10,000 less than the policy limits is like

your client is recovering an extra \$5,000!” If that did not work, on the eve of arbitration the carriers would tender the remaining available policy limits and say, “Because there was no award, no costs can be recovered via § 998.”

With no clear way to recover costs, claimants were left in a position where their recovery was reduced by the amount of costs spent because of the actions of the insurance company. In addition to delaying recovery, this disincentivized claimants to properly prepare their case, as they understood that any costs incurred could lessen their recovery.

Even absent outright malfeasance, before *Madrigal* the carrier had no incentive to pay uninsured and underinsured-motorist arbitration cases promptly. I have been in multiple roundtables as an adjuster where the discussion boiled down to “It might be worth the policy limits, but since this is an uninsured/underinsured motorist case, the most the claimant can recover is the policy limits, so let’s do some more investigation.” *Madrigal* changed that.

Madrigal

The big picture ruling in *Madrigal* is that the cost-shifting provisions of § 998 can apply even if a case resolves in settlement, as long as there is no settlement agreement that addresses costs. The reason that this fits so well into the uninsured/underinsured motorist case context is that releases are not required in these cases. So, when a carrier decides to tender policy limits on the eve of trial, they just send correspondence advising that the limits are being tendered and include the check. No release is necessary. Because no release is involved, the issue

of costs is left unaddressed. That is where *Madrigal* fits in.

Before talking about how to put this to use in your cases, I must warn that uninsured and underinsured-motorist arbitration cases can be both very simple and extremely complex. This article is limited to how to utilize *Madrigal* to your advantage, but as they say in *Hamilton*, “Everything is legal in New Jersey” or, in this case, “Everything is legal in [arbitration].” Arbitration is subject to the agreement of the parties. Be careful what you agree to before stepping in. Make sure you understand who has the power to address costs before you seek to have them reimbursed.

Proper venue for seeking costs

Before talking *Madrigal*, we must address *Storm v. Standard Fire Ins. Co.* (2020) 52 Cal.App.5th 636, because it tells us the proper venue for seeking costs. *Storm* makes clear that the determination is based on the policy language and any agreement between the parties. Absent an agreement between the parties, the policy language controls.

Generally, most policy language regarding uninsured and underinsured motorist arbitration states that an arbitrator will decide (1) whether the claimant is legally entitled to recover damages, and (2) the amount of damages. In *Storm*, the court determined that because of these provisions “the arbitrator’s powers were expressly limited and did not give the authority to rule on Storm’s requests for arbitration costs under section 998. Hence, Storm was not required to request those costs from the arbitrator; and the proper forum to hear her request is the trial court that confirmed the arbitration award.” (*Id.* at 648.)

Most policy language for uninsured and underinsured- motorist cases is similar, so the power to award costs will typically rest with the trial court and not the arbitrator, absent an agreement otherwise. You need to read and reread your policy language multiple times

before proceeding with arbitration. Often the defense attorney assigned by the carrier will have no idea what the policy language states, and you can use that to your advantage in coming to agreements as to the scope of the arbitration and the powers of the arbitrator.

Because *Storm* is clear that the arbitrator does not have the power to determine costs absent agreement between the parties, as a matter of practicality, I recommend filing a Petition for Assignment of Superior Court case at the beginning of the arbitration proceedings, because the Superior Court case is also the proper venue for discovery disputes. Because the scope of arbitration is subject to the agreement between the parties, I also recommend attempting to come to an agreement with the insurance carrier that the arbitrator also has the power to address costs. The arbitrator is typically involved in the proceedings more than the trial court and therefore can usually obtain a more holistic view of the arbitration.

Given the tendency for insurance carriers to behave badly, I prefer the arbitrator to be the one to determine costs. They will have seen that throughout the proceedings the claimant has been reasonable, while the defense has been attempting to delay the claim. A trial court judge will only have whatever written materials are provided to them. The arbitrator will also have their personal experience with the attorneys as well as a big-picture understanding of the entire case.

Recovering costs

The other important thing to take from *Storm* is that costs of the actual arbitration are also recoverable (but check your policy language!), “but, as case law makes clear, section 1284.2 provides only for the equal payment of arbitration costs; it does not limit a party’s ability to recover those costs under section 998.” (*Id.* at 646.)

Now that proper venue for seeking

costs has been addressed, we can turn to actually recovering those costs. *Madrigal* involved a Lemon Law case. During the litigation, the defendant made multiple § 998 offers, which were not accepted. After pretrial motions, the parties reached a settlement agreement which was for an amount less than the Defendant’s second § 998 offer and orally placed it on the record. The settlement stated that plaintiffs could seek their costs and attorney’s fees via motion, but made no other mention of costs and no mention of § 998.

It is worth mentioning again that *Madrigal* only applies in a situation where costs have not been addressed by the settlement agreement. So, make sure you aren’t signing a release in your uninsured/ underinsured motorist cases if you plan on recovering costs.

In *Madrigal*, the California Supreme Court held that § 998’s cost-shifting penalty provisions apply when an offer to compromise is rejected and the case ends without a verdict at trial or arbitration. The Court specifically stated: “nowhere does section 998(a) require that the case be resolved *by trial* before it comes into play. Nor does it exclude from its reach cases resolved by a post-rejection but pretrial, settlement” (*Id.* at 604.) *Madrigal* further states: “there is no requirement in the statute that the case be resolved *by trial* in order to penalize a nonaccepting offeree for continuing the case after a superior offer was properly made.” (*Id.* at 605.)

Madrigal clearly outlines that a judgment for the purposes of costs and interest relating to § 998 can include a settlement, or a tendering of full available limits prior to receiving an arbitration award, such as what regularly happens in uninsured and underinsured motorist arbitration cases. As long as there has been no agreement on costs, a claimant who recovers more than their § 998 offer as a result of settlement can recover costs pursuant to § 998.

The main takeaway from *Madrigal* is that “the clear policy behind section 998

is to encourage the settlement of lawsuits before trial” (*Id.* at 603.) *Madrigal* clearly outlines the policy considerations at play:

Rewarding the making of reasonable offers, by imposing liability for post-offer costs on a rejecting offeree, is enhanced by an understanding that section 998 applies even to cases that settle before trial but after rejection of an offer. Offerors will be encouraged to make reasonable offers earlier; the better the offer, the more likely it is to be more favorable than the eventual result. There is little incentive to make one’s best offer early if there is no cost-shifting benefit unless a case goes to trial.

(*Id.* at 606.)

Discussing the policy considerations and the intent of the Legislature more, the Court states, “As noted, one of the Legislature’s goals in enacting section 998 was to encourage early settlement and to avoid the cost to both parties and the court when litigation is protracted even after a reasonable offer has been made.” (*Id.* at 607.)

Uninsured and underinsured-motorist arbitration cases highlight a perfect example of the Legislature’s intent behind § 998. *If insurance companies are allowed to tender the full available limits on the eve of arbitration with no penalty, there is little incentive for insurance companies to ever consider settling a case before the eve of arbitration.* This is especially true in the context of uninsured and underinsured motorist arbitrations, where the claimant cannot recover more than the available policy limits.

If claimants were not permitted to recover their costs pursuant to § 998 without an arbitration award, insurance companies would continue to refuse to tender the available policy limits until the eve of arbitration without penalty.

Conclusion

Madrigal makes clear that carriers can no longer delay paying on uninsured and underinsured motorist cases until the

last minute and then claim that no costs can be recovered because there was no arbitration award. If the claimant recovers more than their § 998 offer, even if via settlement, the claimant can recover costs as long as costs are not addressed in any settlement agreement.

As a practical matter, I recommend sending correspondence along with any § 998 offer advising that claimant will be pursuing costs pursuant to *Madrigal*. Anecdotally, this approach appears to be having some success in getting carriers to timely tender uninsured and underinsured motorist policy limits when warranted. More importantly, it makes clear up front what the claimant’s intentions are with their § 998 offer and makes a good exhibit for the judge or arbitrator who will be determining costs.

Also, make sure that any § 998 offer sent in the uninsured/underinsured motorist context is for less than the full available limits so that the case can be resolved for more than claimant’s § 998 offer, triggering the costs provisions. If the policy limits are \$100,000, and the § 998 is for \$100,000 the carrier tendering the full \$100,000 means that the resolution is not more than the § 998 offer, and no costs can be recovered.

One other case worth mentioning: *Pilimai v. Farmers Ins. Exchange Co.* (2006) 39 Cal.4th 133. *Pilimai* makes clear that the claimant can recover costs above the available policy limits. Even when the full policy limits are tendered, costs can be recovered. Unfortunately, *Pilimai* also states that prejudgment interest pursuant to § 998 cannot be recovered in the uninsured/underinsured-motorist arbitration context.

The main takeaway is that *Madrigal* significantly altered how claimants should approach uninsured and underinsured motorist arbitrations. Claimants can recover costs pursuant to § 998 even if the case resolves in settlement. These costs include, but are not limited to, the costs of the actual arbitration. Lastly, the recovery of costs is not limited by the

policy limits. The *Madrigal* case provides claimants with a lot more leverage in uninsured and underinsured motorists cases. Use it to pressure insurance carriers to do the right thing in a timely manner. And if they don’t, know that even if they tender on the eve of arbitration, you can recover costs.



Kieran Doherty is an attorney with SHK Law Corporation. Prior to handling plaintiff injury cases, he worked for over a decade inside the insurance industry as a bodily injury adjuster, supervisor, and defense attorney. He now tries to make up for his time on that side of the industry by providing insights into how insurance carriers think, and how to get the best outcomes for clients.