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Discovery in uninsured and underinsured motorist cases

UM/UIM DISCOVERY IS SIMILAR TO STANDARD LITIGATION, BUT THE DEVIL IS IN THE DETAILS

The California Uninsured Motorist Law, Insurance Code section 11580.2, continues to confuse and frustrate practitioners when it comes to uninsured and underinsured-motorist discovery. Because of a huge number of uninsured motorists and the perilously low minimum-liability limits, many California motor-vehicle cases implicate an insured's own UM/UIM policy. Because the UM/UIM claim is ostensibly against an insured's insurer, it is confusing when discovery rights arise, understanding the nuances of UM/UIM discovery rights, and enforcement of discovery orders. This article will demystify the process and recommend best discovery practices. (Further statutory references are to the Insurance Code unless otherwise indicated.)

When does the right to discovery arise?

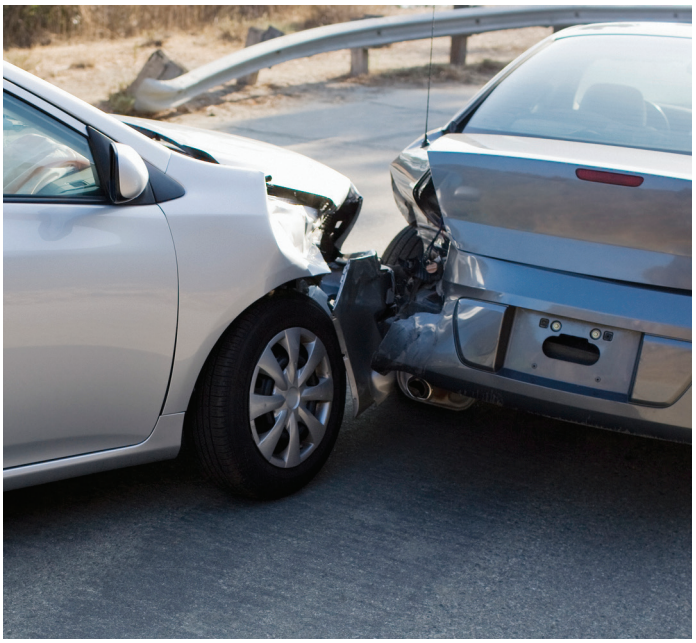
As a practical matter, discovery does not commence until a party formally demands arbitration. However, when it is clear in the adjustment process that liability and damages are disputed and the case will not be settled, it is not uncommon for an *insurer* to assign defense counsel and that counsel serves discovery requests. On the *insured's* side, it is most common for discovery to commence after a formal demand for arbitration has been communicated. Even then, insureds are usually forced to wait until the demand for arbitration is "accepted," and a defense counsel acknowledges the demand.

Section 11580.2, however, does not require that the arbitration process be formalized before discovery is permitted. Insureds' counsel may consider serving discovery immediately on the insurer's service of process agent, even before any defense counsel has appeared. In fact, early discovery is contemplated by the Uninsured Motorist Law, even if it is rarely utilized: "Depositions are permitted, without leave of court, as soon as 20 days after the subject accident." (§ 11580.2, subd. (f)(3).) This is consistent with the intent that the arbitration process be expedited as compared to traditional trial court litigation.

Is discovery "different" for UM/UIM cases?

Discovery is mostly the same for UM/UIM cases as it would be in the Superior Court. Section 11580.2, subdivision (f) mandates that the normal discovery statutes, commencing with the Code of Civil Procedure section 2016.010, apply to both proceedings. There are, however, unusual exceptions to the discovery statute in addition to the "early" deposition rule stated above.

Code of Civil Procedure section 2025.010 requiring a party to appear for a deposition by notice is *not* applicable. (§ 11580.2, subd. (f)(4).) Accordingly, witnesses and parties *must* be subpoenaed for their depositions. Note that insurers are considered "parties" (§ 11580.2) for discovery purposes. (§ 11580.2, subd. (f)(5).) Insureds and insurers uniformly ignore this rule and simply notice depositions.



Consider that a party cannot be compelled to attend a deposition without a properly served subpoena. This could create real havoc as the scheduled arbitration date approaches. Moreover, if a scheduling dispute arises, arbitrators are not given the power to decide those discovery disputes – such disputes must be decided in the trial court. (§ 11580.2, subd. (f)(2).) A party attempting to compel discovery near the arbitration date will be under significant pressure to obtain a trial court hearing date before the scheduled arbitration date.

There are special rules concerning wage-loss information, medical authorizations, and defense medical examinations in preparation for UM/UIM arbitrations. (§ 11580.2, subd. (o).) These rules are substantially different than the "normal" discovery rules contained in the Code of Civil Procedure.

Under subdivision (o), an insured must provide wage-loss information and medical authorizations within 15 days of an insurer's request. If the insured fails to provide that information, and it is not within 30 days before 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 for at least 30 days following compliance by the insured. An insured should serve wage-loss and medical authorizations with the demand for arbitration.

Also, an insured must submit to a medical examination within 20 days after the insurer's request. If the insured fails to submit to a requested medical examination, and it is not within

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30 days before the scheduled arbitration, the insurer can again request the insured to submit to a medical examination. This time, if the insured fails to 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.

Consider that an insurer often has difficulty obtaining an examination date with its chosen examiner within those 20 days. It is unclear what would occur if the examination were unilaterally demanded more than 20 days in advance. An insurer is well advised to demand a medical examination early in the process to both secure an examination date and to ensure that the examination will take place before discovery cutoff. At a minimum, the examination should be set within both the initial 20 days and the subsequent 20 days.

How is expert discovery handled in UM/UIM cases?

Technically, expert discovery is handled under the discovery codes, including Code of Civil Procedure section 2034.210 et seq. The code provides that after a "trial date" is set, any party may demand the simultaneous exchange of expert witness information other parties intend to testify at trial. Section 11580.2(f) considers references to "trial date" as the "arbitration date" for all purposes. Thus, the arbitration hearing date must allow time to complete expert discovery.

In this author's experience, no party has yet sent a demand for a simultaneous exchange of expert witness information, even in seven-figure cases. It may be because the parties simply do not have the foresight to worry about experts after receiving an arbitration demand. More likely, the parties innately acknowledge that the arbitration process is supposed to be a prompt and relatively inexpensive process. Having an expert exchange is both slow and expensive. Moreover, it simply has no meaningful place in smaller UM/UIM cases with a value under $50,000.

A more appropriate procedure for most UM/UIM arbitrations is contained in the California Arbitration Act (CAA), Code of Civil Procedure section 1282, et seq. That statute does not apply to contractual arbitrations like UM/UIM arbitrations. However, it is recommended the parties stipulate to be bound by the CAA as it applies to witness and evidence disclosures.

Code of Civil Procedure section 1282.2, subdivision (a)(2)(A), 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, the insured should serve the notice of hearing to trigger the exchange date.

Like Code of Civil Procedure section 2034.210, the obligation to exchange an expert list in UM/UIM cases is bilateral. However, under the CAA, the responses shall be served within 15 days after the demand, rather than the 50 days provided in section 2034. 210.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, rather than the 75 days provided in section 2034.210.

The listed documents shall also be made reasonably available for inspection before the hearing. It is most expedient to attach the documents to the response. For smaller cases, it may be best to not conduct expert discovery and each party can arbitrate without driving up the costs associated with the arbitration process.

As a practical matter, counsel usually discuss and agree in advance on how to handle expert discovery, if any. For bigger cases, or where the handling of expert discovery cannot be agreed upon, it is recommended that an early scheduling conference take place before the arbitrator. That way, the arbitrator can set the expert discovery schedule and signal how expert-related evidence will be handled at the arbitration.

Who verifies discovery for the insurer in UM/UIM cases?

The answer to the question "who verifies discovery for the insurer in UM/UIM cases?" demonstrates why an insured has a distinct advantage in most cases. The at-fault driver is not a party to the UM/UIM arbitration. The "dispute" is between an insured and his or her insurer. And for all intents and purposes, the insurer inserts itself in place of the at-fault driver. In many UM/UIM cases, the at-fault driver is neither present nor available for the arbitration hearing. Perhaps, more importantly, the at-fault driver has no desire to participate in the arbitration process.

Code of Civil Procedure section 2030.250 provides, in pertinent part, that:

> (a) The party to whom discovery is directed shall sign the response under oath unless the response contains only objections.
> (b) If that party is a public or private corporation (like an insurance company), one of its officers or agents shall sign the response under oath on behalf of that party. If the officer or agent signing the response on behalf of that party is an attorney acting in that capacity for the party, that party waives any lawyer-client privilege and any protection for work product. . . during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response.
> (c) The attorney for the responding party shall sign any responses that contain an objection.

There is some controversy about an insurance adjuster or defense lawyer verifying discovery responses. Many insureds' counsel are outraged by the verification of unsupported facts and immediately seek to depose the verifier to discover why certain factual contentions were made and upon what evidence those

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contentions were based. A fight necessarily ensues over trying to depose an insurance adjuster or defense counsel. Nothing significant is accomplished and the presumption of "bad faith" is rarely achieved.

How are discovery disputes handled in UM/UIM cases?

UM/UIM arbitration proceedings under "Insurance Code section 11580.2 [are] a form of contractual arbitration governed by the [CAA]." (*Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395, 1400.) One difference between UM/UIM arbitrations and most other arbitrations is that discovery disputes are resolved by a trial court – not the arbitrator. (§ 11580.2, subd. (f)(2); also, see *Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913, 923.)

On occasion, the parties may stipulate to submit a discovery dispute to the selected arbitrator to save time and money. However, this is rare, and a party risks alienating the arbitrator who will be deciding the substance of the case. Therefore, an aggrieved party must weigh the time and expense of bringing a discovery dispute to the Superior Court. The time and expense can be substantial. The party must file an opening document with the court, such as a petition or an initial filing to obtain a case number. That requires a filing fee and service of a summons on the opposing party. Technically, the aggrieved party must wait for the opposing party to appear in the action before filing a compelling motion, follow meet and confer requirements, and follow all informal court discovery dispute protocols. Then, the moving party must wait for a hearing date, which may well be scheduled after a date originally scheduled for the substantive arbitration.

If discovery disputes are anticipated, it is best practice to file a Petition to Compel Arbitration at the outset. Then, obtaining a hearing date for a Motion to Compel will be set much faster, because the file already has a Superior Court case number.

Because a court procedure is inefficient and slow, a practitioner may be ill-tempted to proceed with the arbitration and subsequently contest the trial court's discovery ruling when a motion to confirm the arbitration award is made. The recent case of *State Farm Mutual Automobile Ins. Co. v Robinson* (2022) 76 Cal.App5th 276 holds a confirming court has no authority to vacate an arbitration award based upon an erroneous *trial court* discovery order. Rather, the case held a writ of mandate is the exclusive method for challenging an erroneous trial court discovery order.

Conclusion

In sum, the parties are well advised to discuss and agree to various discovery methods and timing at the outset of the case and before the UM/UIM arbitration date is set.

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