Getting Through Your First UIM Proceeding

Last month I received several calls from lawyers who were about to handle their first underinsured motorist proceeding. I also received calls from lawyers having problems with the procedural aspects of UIM claims. Since many of the UIM claim procedures are governed by local custom, this month's column will discuss some of those customs, as well as how to make a UIM proceeding run smoothly.

Robert Dawson

Putting the UIM Carrier on Notice

Once you are aware that there may be a UIM claim you should put the UIM carrier on notice. You do this by sending a letter indicating that you believe that the wrongful party is uninsured or has insufficient insurance to pay for the harm done to your client.

Next you will gather the relevant evidence to prove the elements of the claim you would have made against the wrongdoer. You then submit a demand to the UIM carrier and attempt to negotiate the claim. If the negotiations fail, you will need to commence a UIM proceeding.

Read the Policy

Before starting a UIM proceeding you should review the UIM provisions of the policy under which your client is insured.These provisions may set forth the type of arbitration that will occur, what court rules apply, the selection of arbitrators, the scope of the arbitration, and other matters.

You should also read RCW 7.04 which governs arbitration. That chapter discusses how to commence an arbitration, what notice form to use, how the hearing is held, and how the award is entered.

Commencing the UIM Arbitration

There are at least three ways to commence a UIM arbitration proceeding. I believe that most attorneys prepare a Notice of Intent to Arbitrate (RCWA 7.04.060) and then send that notice to the adjuster along with a letter stating that they are demanding arbitration. This is the simplest way to begin an arbitration and will probably work in most cases. However, I do not recommend this procedure because the statutes governing arbitration appear to require formal service of the notice.

The second way to commence a UIM arbitration is to formally serve the Notice of Intent to Arbitrate upon the UIM carrier in the same manner you would serve a summons and complaint. Although RCW 7.04.020 may not require service of the Notice of Intent to Arbitrate in the same manner as a summons and complaint, doing so will surely satisfy the statute's service requirement. Service on a domestic insurance company is accomplished by serving any agent authorized by the company to solicit insurance in Washington. RCW 4.28.080(6). Service on a foreign insurer is made upon the Insurance Commissioner as described in RCW 48.05.200.

A third way to commence an arbitration proceeding is to prepare a Notice of Intent to Arbitrate and file a lawsuit in Superior Court to compel arbitration. This is often accompanied by an order for the insurer to

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show cause, if any, why the arbitration should not occur, what rules will apply to the proceeding, to establish a date by which a hearing will occur, and to resolve other issues. This procedure establishes a forum for resolution of the problems that may arise while the arbitration is pending and formally sets the ground rules under which the arbitration will occur.

Selection of Arbitrators

Most UIM policies call for arbitration by a panel of three arbitrators. The plaintiff selects an arbitrator and the defense selects an arbitrator. Those two arbitrators then consult and select a third arbitrator, commonly known as the "swing arbitrator." Typically, the attorneys for each party will consult with their arbitrator and advise as to who would be an acceptable swing arbitrator.

The use of three arbitrators to decide UIM claims may be somewhat less common in the future because of the decision in *Kenworthy v. Pennsylvania General,* 113 Wn.2d 309 (1989), which requires the UIM carrier to bear the cost of all three arbitrators.

Scheduling the Arbitration Proceeding

Once the three arbitrators have been selected, the plaintiff should call defense counsel, and all three arbitrators, and select a hearing date that is acceptable to all five attorneys. It usually takes about five months to obtain a date when all five attorneys are available.

The arbitration proceeding is usually held in the conference room of the swing arbitrator. Once the date, time, and place of the arbitration proceeding have been agreed upon plaintiff's counsel should send a letter to defense counsel and the arbitrators confirming the arrangements.

UIM Discovery Proceedings

Now that the UIM proceeding is formally underway, plaintiff's counsel should consult with defense counsel and determine the ground rules. For example, which rules will govern discovery? I usually reach an agreement with opposing counsel that the Civil Rules will govern discovery. Many ploicies say "local rules of precedure apply."

Now is also a good time to determine which rules will govern the admission of evidence. Nearly every arbitration proceeding I have been involved in has followed the Mandatory Arbitration Rules, meaning that you may present evidence by report instead of calling live witnesses. However, some attorneys assume that the regular evidence rules apply unless there is an agreement to the contrary.

Now is also a good time to see what stipulations can be entered into with defense counsel. Is fault going to be contested? Is it agreed that the medical bills were reasonable and customary and that the medical services were necessary because of an injury sustained in the collision?

If disputes arise during the discovery process, you can bring a motion before the arbitrators. These motions are usually heard by telephone conference call. Usually defense counsel will agree to a suggestion that the swing arbitrator will decide motions, rather than having to involve all three arbitrators.

Prehearing Statement

The plaintiff should submit a prehearing statement to the arbitrators that outlines the important aspects of the case and describes the evidence upon which the plaintiff will rely. Such a prehearing statement might contain headings that address the following items: Nature of Case, Factual Background, Personal Background, Liability, Medical Treatment, Special Damages, Witness List, Exhibit List, Conclusion.

To avoid sending bulky duplicative materials, consider reaching an agreement with defense counsel that one side or the other will submit depositions and other bulky attachments. It is also a courtesy to the arbitrators to let them know whether they should read thick attachments in detail or whether you will simply refer to them during the arbitration proceeding. When acting as an arbitrator it is somewhat frustrating to receive and read a 4 inch thick package only to learn that perhaps 15 pages contained all of the relevant information.

Arbitration Hearing

Although what you have to prove may be the same as in a third party jury trial, how you prove it is quite different. Often there is no opening statement since your prehearing statement will have given the arbitrators an outline of the case. The attorneys are experienced. You would make your points quickly and move on.

For example, you would not spend 20 minutes on the qualifications of an orthopedic surgeon who testifies live at a UIM proceeding. Just identify the witness as an orthopedic surgeon and perhaps make brief reference to any special training or experience that would make the witness especially well qualified to render an opinion.

Your closing argument will be different. It will probably be considerably shorter than it would for a jury trial. You should give forceful and logical reasons for why the plaintiff is entitled to the amount of money that you request. However, don't abandon all emotion. You are there to right a wrong.

Post-Arbitration Proceedings

Usually within a short time after the arbitration proceeding the arbitrators will issue an arbitration award determining the outcome of the case. This award may be vacated only on extremely limited grounds. See RCW 7.04.060. Usually the award is paid within a short time. If for some reason the award is not paid, then seek an order confirming the award. RCW 7.04.150.

Upon payment of an arbitration award defense counsel will often submit the same documents that they would have if the case had settled. They will send you a draft, release, a stipulation for dismissal of the claim, and a hold harmless agreement for your client to sign. After an arbitration proceeding we refuse to have our client sign a hold harmless agreement. A hold harmless agreement signed by the plaintiff is something that may be negotiated as a benefit to the defense if the case settles. The defense is not entitled to a hold harmless agreement if they force your client to go through an arbitration proceeding.

Conclusion

A UIM arbitration proceeding is often a favorable forum in which to resolve a claim. Arbitration is inexpensive, a decision can be obtained in a matter of months, and the risks are less than in a jury trial. If you are not able to negotiate a favorable settlement for your client, then schedule the matter for a UIM arbitration and prepare to prove the case.

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