



Watch your language!

998s and underinsured motorist arbitration

By RAMONA ATANACIO

When handling an underinsured motorist arbitration case, questions arise as to how it may differ from a third-party personal-injury case. One question is whether Section 998 Offers to Compromise can be used in underinsured motorist cases that are in arbitration and whether there are any important requirements to be prepared for. As the following case law demonstrates, plaintiff's attorneys must be absolutely clear on the specific language used in the arbitration agreement as it can dictate how, where and when one is required to later seek post offer costs pursuant to CCP section 998.

Underinsured motorist arbitrations under Insurance Code section 11580.2

California Code of Civil Procedure section 998 provides that a party who recovers a judgment through trial or arbitration that is more favorable to the party than its offer to compromise is entitled to recover its post offer costs. The statute's purpose is to "encourage settlement by providing a strong financial disincentive to a party – whether it be a plaintiff or a defendant – who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer." (*Pilimai v. Farmers Ins. Exch. Co.* (2006) 39 Cal.4th 133, 139 (citation omitted).) In addition, "by awarding costs to the putative settler the statute provides a financial incentive to make reasonable settlement offers." (*Ibid.*)

The California Supreme Court in *Pilimai* addressed whether section 998's cost-shifting applied in underinsured and uninsured motorist proceedings and to what extent. (*Pilimai, supra* at p. 136.) It held that the cost-shifting provisions of section 998 did apply to arbitrations conducted pursuant to Insurance Code section 11580.2 and that the costs, when added to the award, could exceed coverage limits. (*Id.* at 137.) It also held that costs can include deposition and exhibit preparation expenses. (*Ibid.*) However, the Court decided that prejudgment interest was not available because the uninsured and underinsured motorist claims under section 11580.2 are contractual disputes as opposed to actions to recover damages for personal injury. (*Ibid.*)

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The language of a particular policy can determine when and where a party must seek costs. In *Maaso v. Singer* (2012) 203 Cal.App.4th 362, 377 (*Maaso*), for example, the Court of Appeal held that the prevailing party in a contractual arbitration could not seek attorney fees and costs incurred in the arbitration from



the superior court without having first sought them from the arbitrator. This was because the parties had stipulated that "the claims and controversies alleged in this action" were submitted to "binding, contractual arbitration" and the medical malpractice complaint sought "damages according to proof, costs, and all proper relief." (*Ibid.*) The Court of Appeal concluded that "[b]ecause the submission was not limited, it included the issue of costs and interest and, where available, attorney fees." (*Ibid.*) "Under the statutory scheme, a party's failure to request the arbitrator to determine a particular issue within the scope of the arbitration is not a basis for vacating or correcting an award." (*Id.* at pp. 377-378, quoting *Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 706, citing §§ 1286.2, 1286.6.)

The California Supreme Court agreed with *Maaso* in *Heimlich v. Shiruji* (2019) 7 Cal.5th 350, 358 (*Heimlich*), and held that broad language in an arbitration agreement requires a party to seek costs through arbitration. The contractual language at issue committed the parties to arbitrate "all disputes or claims of any nature whatsoever, including but not limited to those relating to legal fees." (*Ibid.*) The Court further held that a request for costs under section 998 is timely if filed with the arbitrator within 15 days of a final award. (*Id.* at p. 365.)

While the prevailing party in *Heimlich* had timely sought costs before the arbitrator, the Court nonetheless concluded that he was not entitled to relief because arbitrator's mistaken belief



that he lacked jurisdiction to award costs was not reviewable. (*Id.* at p. 367.) In doing so, the Court reversed the Court of Appeal's decision that the arbitrator's error was reviewable because the rights of a party were substantially prejudiced by the refusal of the arbitrator to hear material evidence. (*Id.* at p. 368.) The Court observed that "by voluntarily submitting to arbitration, the parties have agreed to bear the risk [of uncorrectable legal or factual error] in return for a quick, inexpensive, and conclusive resolution to their dispute." (*Id.* at p. 368.) Using language with potentially far-reaching consequences, the Court specifically concluded that the "exceptions to the limits on review of awards protect against error that is so egregious as to constitute misconduct or so profound as to render the process unfair." (*Ibid.*)

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The Court of Appeal in *Storm v. Standard Fire Ins. Co.* (2020) 52 Cal.App.5th 636, 647 (*Storm*) distinguished *Heimlich* and concluded that the party was not required to seek costs pursuant to section 998 from the arbitrator. This was because the underinsured motorist arbitration agreement was "quite limited." (*Ibid.*) "Using the language set forth in section 11580.2 of the Insurance Code, the

arbitration provisions in the insurance agreement narrowed the arbitrator's power to the determination of two specific issues: 'Whether [Storm] is legally entitled to recover damages under this coverage,' and 'the amount of damages.'" (*Ibid.*, citing Ins. Code, § 11580.2, subd. (f).) The Court therefore held that the claimant was not required to request those costs from the arbitrator, and the proper forum to hear her request was the trial court that confirmed the arbitration award. (*Id.* at p. 648.)

The Court of Appeal in *Storm* further held that policy language, which stated that "[e]ach party will . . . [p]ay the expenses it incurs [in arbitration]" and "[b]ear the expenses of the arbitrator equally," did not preclude the recovery under section 998 of arbitration costs, or the recovery under section 1293.2 of post-arbitration costs. (*Id.* at p. 645.) The Court observed that "specifying how the costs are to be paid in first instance says nothing about whether such costs may be recouped later under the cost-shifting provisions of section 998 or 1293.2." (*Id.* at p. 640.) Since the agreement mirrored section 1284.2, which, as *Pilimai* held, does not limit cost recovery under section 998, the Court concluded that interpreting the agreement to include cost recovery under section 998 was consistent with the parties' reasonable expectations at the time that they executed the agreement. (*Id.* at p. 646.)

Conclusion

As the above cases make clear, plaintiff's attorneys must carefully review the contract language regarding arbitration. The language will determine the rules that apply and the authority provided to the arbitrator. Importantly, it will also then impose strict requirements on the prevailing party of a 998 when seeking to recover post-offer costs. Because underinsured motorist arbitrations are contractual in nature, it remains to be seen how the contract language may change in the future based upon developing case law. It will be important for plaintiffs' attorneys to stay abreast of changes to common arbitration agreements, as they are likely to affect litigation strategy.

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