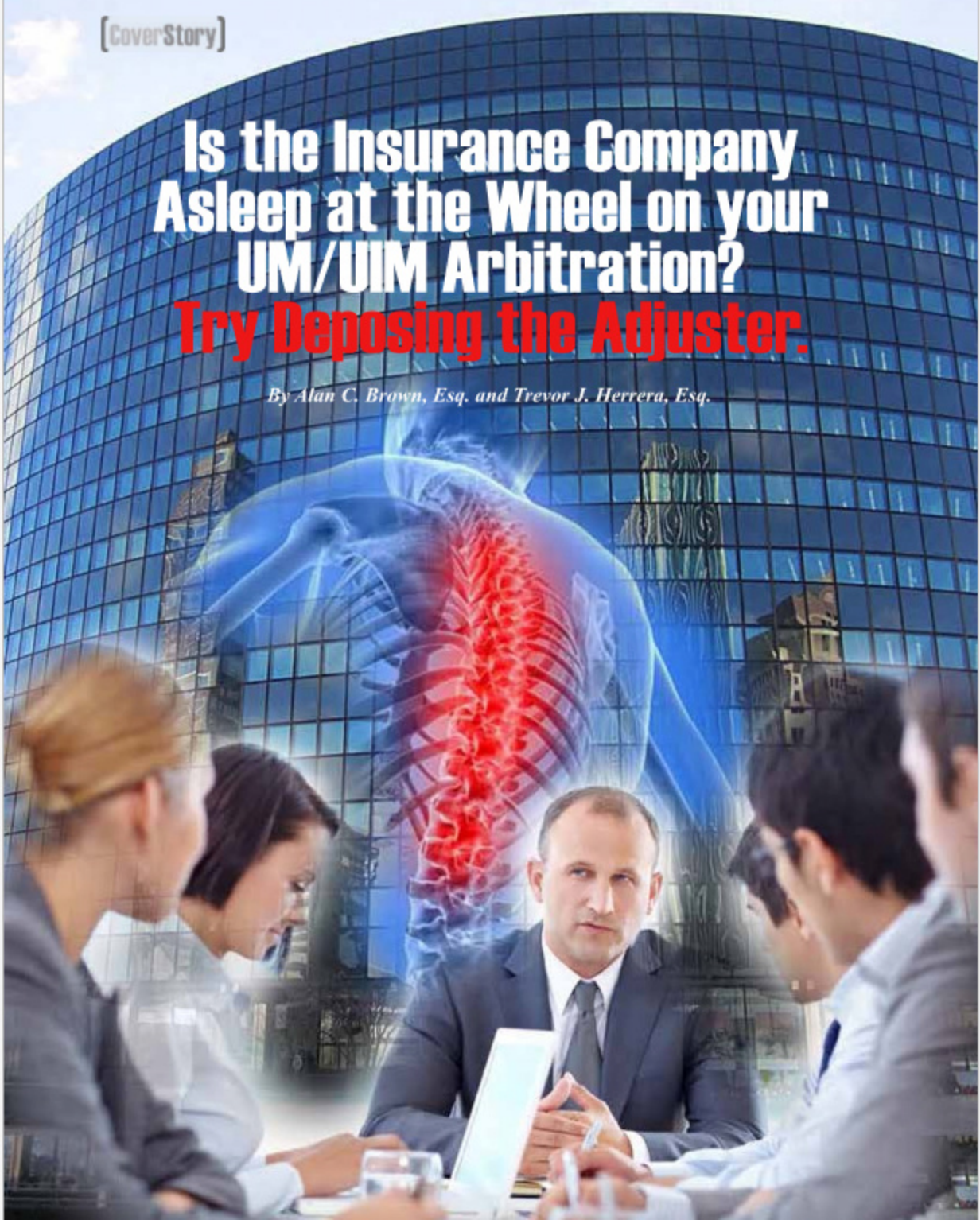
Is the Insurance Company Asleep at the Wheel on your UM/UIM Arbitration? Try Deposing the Adjuster.

By Alan C. Brown, Esq. and Trevor J. Herrera, Esq.



Each year, our nation's most prominent insurance companies spend hundreds of millions of dollars – respectively – in advertising their services to the public. From talking geckos to bubbly cashiers, the central premise is almost always the same: we've got your back when you need it most.

As trial attorneys know too well, such is not always the case, especially in the context of first party Uninsured Motorist (UM) Under-Insured Motorist (UIM) arbitration. At times, insurers can unnecessarily delay their insured's claim, even despite clear liability and medical expenses near the policy limits.

Naturally, notions of a future bad-faith lawsuit spring to mind, but what if the opportunity never presents itself? As the Court in *State Farm Mut. Auto Ins. Co. v. Superior Court (Balen)* (2004) 123 Cal. App.4th 1424 holds, once the insurer pays the policy limits in an uninsured motorist arbitration – regardless of the length of delay – the petitioner cannot thereafter arbitrate the claim for the purposes of a future bad faith lawsuit. Essentially, an insurer can unnecessarily delay a claim for months and/or years, pay the policy, and then be absolved from any bad faith lawsuit.

Such a "cat and mouse" game can leave the petitioner – and her attorneys – in the frustrating state of limbo. This note serves as a brief example of how, in comparable circumstances, the plaintiff's attorney can successfully pressure a defiant insurer into paying the policy limits in a more expeditious manner. Should you find yourself in such a scenario, try noticing the deposition of the claims handler.

The basic facts are as follows:

The client (let's call her "Jane") was in a serious automobile accident occurring on April 25, 2013, causing significant cervical and lumbar injuries. Jane quickly settled her third party claim for the $15,000.00 policy limits, and thereafter filed an (UIM) claim with her own insurance company (let's call them "Doe Ins."), with a remaining $85,000.00 policy limit. By September 21, 2013, Doe Ins. was notified that Jane had incurred over $32,000.00 in paid medical bills. On January 29, 2014, Doe Ins. was provided with additional records and billing, as well as a demand for the policy.

Shortly thereafter, Doe Ins. outright rejected Jane's claim, appearing to indicate that Jane had failed to mitigate her damages. Shocked, Jane's original attorney sent additional correspondence to Doe Ins., re-emphasizing the extent of her injuries and demanding a further explanation for the denial. Doe Ins. did not respond.

On April 20, 2014, Doe Ins. was informed that Jane was suffering cervical and lumbar disc protrusions impinging on her spinal cord. At this point, Doe Ins. was well advised that Jane had already undergone three (3) cervical epidural injections and required lumbar facet block injections. On May 22, 2014, Doe Ins. was provided with $81,664.00 in past medical expenses, only $3,336.00 short of the policy limits. Once again, Jane inquired as to the basis for the denial, and Doe Ins. did not respond.

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Bewildered, Jane demanded formal arbitration on June 4, 2014, and by August 25, 2014, Doe Ins. was advised that Jane would need lumbar surgery, costing approximately $100,000.00. Still, Doe Ins. refused to make an offer on the case or further explain its basis for the denial.

For over 1.5 years, Doe Ins. was well aware not only of the severity of Jane's collision, but that she had incurred substantial past medical expenses (totaling nearly the policy limits) and that she required future lumbar surgery. Doe Ins. was consistently provided with updated medical and billing records, and Doe Ins. had completed full discovery, including Jane's deposition. This, coupled with Doe Ins.' refusal to make an offer, left Jane feeling scared and betrayed: "Why would my own insurance company do this to me?" she would ask in desperation. Her attorneys – no less – were left scratching their heads. A low offer may have been expected, but no offer at all despite constant updates and efforts from her attorneys? Puzzling indeed.

Compounding Jane's frustration was Doe Ins.' responses to Form Interrogatories in early 2015, wherein Doe Ins. stated in response to Interrogatory Numbers 16.3 to 16.5 ("Defendant's Contentions" questions) that "because respondent has not received claimant's medical records . . . respondent is unable to respond at this time." In reality, Jane had consistently given Doe Ins. updated medical records and billing over the 1.5 year span, so this response was clearly unfounded.

The Deposition Notice

By early 2015, it became clear that Jane's constant letters and demands had fallen on deaf ears. Fed up with Doe Ins.' apparent stall tactics, Jane served a deposition notice on the adjuster handling her claim to inquire as to the basis for Doe Ins. claims and defenses. Given the lengthy stalemate, it was certainly worth a shot.

Shortly thereafter – and along with a threatening letter demanding that the deposition notice be taken off calendar – Doe Ins. filed a Motion to Quash said notice. Doe Ins. argued that the adjuster could not be deposed because he did not possess "percipient knowledge" regarding the amount and reasonableness of Jane's damages. Further, and relying heavily on *State Farm Mut. Auto Ins. Co. v. Superior Court (Balen)* (2004) 123 Cal.App.4th 1424, Doe Ins. argued that the deposition of the adjuster was improper in the context of arbitration and was merely an attempt to litigate a bad faith action.

In opposition, Jane argued that because

Doe Ins. indicated that Jane had failed to mitigate her damages, and because Doe Ins. had made untruthful representations in their responses to Form Interrogatories, the claims adjuster indeed possessed "percipient knowledge" as to the amount and reasonableness of Jane's damages. How else could the adjuster have claimed that Jane failed to mitigate?

Moreover, Jane argued that, pursuant of Code Civil Procedure section 2017.010, "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action." Simply because respondent was an insurance company, Jane argued, did not preclude her from discovering the basis for their defenses via deposition, just like any other case with any other defendant. Because Doe Ins. claimed that Jane failed to mitigate, Jane argued that Code Civil Procedure section 2017.010 expressly authorized further discovery as to that defense.

Lastly, Jane argued that Doe Ins.' reliance on *State Farm* was misplaced. The central issue for the Court in *State Farm* was whether, in an uninsured motorist arbitration, the insurer could be forced to arbitrate after it had paid the policy limits to its insured in an untimely fashion. Because Doe Ins. had yet to pay Jane anything at the time she noticed the adjuster's deposition, this case was quickly distinguished and rendered inapplicable.

Doe Ins. argued heatedly at the hearing, but to no avail. The Judge agreed with Jane and her attorneys that Jane had a right to inquire as to the basis for Doe Ins.' defenses, especially in light of Doe Ins.' apparent stall tactics. Doe Ins. stormed from the courtroom, and the case was settled for the full $85,000.00 policy limits the very next morning.

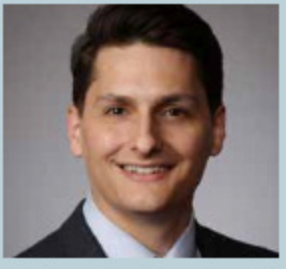
Closing Thoughts

For over a year and a half, Doe Ins. continued to drag its feet, seeming not to care whether Jane's claim was progressing forward or not, and leaving Jane and her attorneys in the stress-inducing state of limbo. One simple deposition notice, however, forced Doe Ins. to turn its attention to the case and lead to an expeditious resolution to an aging claim.

As the plaintiff's attorney knows too well, going toe-to-toe with an insurance company can feel like an uphill battle, especially in cases with a lazy or stalling insurer. Sending a deposition notice to the claims handler, however, can be a nifty tool in the plaintiff attorney's repertoire to get the case moving.

Admittedly, successfully defeating a near certain Motion to Quash from an insurer may come as a bit of a rarity, and, it is unclear which facts – or combination thereof – were the precise determining factor for the Judge in ruling in Jane's favor. Even if unsuccessful, however, the plaintiff's attorney has at least forced the insurer to turn their attention to the case.

Should you find yourself in a situation similar to the one above, notice the adjuster's deposition – you might just get somewhere.



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