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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LIMESTONE

10 URSULA JONES,

11 Petitioner,

12 vs.

13 SUCCOR INSURANCE CO.,

14 Respondent.

Case No. 54321

PETITIONER'S ARBITRATION BRIEF
ON STATUTE OF LIMITATIONS

Date:
Time:
Place:

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19 **1. Petitioner's claims are not barred by the statute of limitations.**

20 **A. The statute of limitations will not expire until after arbitration is concluded.**

21 The five-year statute of limitations set out in Insurance Code § 11580.2 does not
22 expire until April 20, 20__, which is five years from the date petitioner submitted her
23 formal demand for arbitration. The parties are in the midst of arbitration in this matter, and
24 it will certainly be concluded by April 20, 20__.

25 In *Santangelo v. Allstate Ins. Co.* (1998) 65 Cal.App.4th 804, the court considered
26 what constitutes the initiation of arbitration proceedings, and concluded that the "formal
27 demand for arbitration" that complies with § 11580.2(i)(1)(C) marks the initiation of
28

1 arbitration proceedings. *Id.* at 812.

2 Here, the September 7, 20__ letter is not a formal demand for arbitration that
3 complies with the requirements of § 11580.2. In fact, this letter does not even mention the
4 word “arbitration”; it is merely former counsel’s status letter, updating respondent
5 regarding the settlement with the underlying defendant, and informing respondent that a
6 demand package would be forwarded. Likewise, the January 30, 20__ letter does not
7 constitute a formal demand for arbitration under the code. Again, there is no mention of
8 arbitration or a demand that the matter be referred to arbitration. This letter is simply a
9 notification of representation from petitioner’s new counsel and a request to open a file.
10 The only piece of correspondence between petitioner and respondent that even mentions
11 arbitration is the April 20, 20__ “Demand for Arbitration.” Hence, this is the only letter
12 that can reasonably be interpreted as a formal demand for arbitration, starting the running
13 of the five-year statute of limitations.

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15 **B. Defendants are estopped from raising the statute of limitations at this late date.**

16 The Petition to Compel Arbitration was filed on January 13, 20__. Respondent did
17 not oppose it, and particularly did not raise the issue of the statute of limitations in its
18 response. Respondent is estopped from doing so now because, in the interim, petitioner
19 has expended considerable time and expense preparing for a full-blown arbitration. *See*
20 *Berman v. Health Net* (2000) 80 Cal.App.4th 1359 (discussing prejudice resulting from
21 delay in compelling arbitration). Thus respondent should be estopped from asserting the
22 statute of limitations at this late date, since it has seemingly voluntarily acquiesced to
23 arbitration and petitioner was thereby prejudiced by fully preparing for it on the merits.

24
25 **C. The statute of limitations is not arbitrable.**

26 Statutes of limitations are generally not arbitrable in uninsured and underinsured
27 motorists cases. *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473. The
28 *Freeman* court held that the language of Insurance Code § 11580.2(f) requires arbitration

1 of only two issues: (1) whether the insured is entitled to recover against the uninsured
2 motorist; and (2) if so, the amount of recoverable damages. *Id.* at 481. Thus the statute of
3 limitations issue was for judicial determination before the arbitration. This issue could
4 have—and should have—been raised in opposition to the petition to compel arbitration,
5 but respondent elected not to pursue this theory in the proper forum at the appropriate time.
6

7 **D. Respondent asserted the statute of limitations argument in bad faith.**

8 Considering that respondent’s statute of limitations argument is wrong on the law
9 and the facts, and was raised at the last possible minute and in the wrong forum, there
10 should be little question that it was not raised in good faith under Insurance Code
11 § 11580.26. Thus it breaches the covenant of good faith and fair dealing respondent owes
12 to its insured.
13

14 **2. Defendant admitted there was no evidence of contributory negligence.**

15 Code of Civil Procedure § 2030.410 provides that responses to interrogatories may
16 be used at trial against the responding party. Admissions contained in interrogatories are
17 admissible in evidence to establish any material fact. *Leasman v. Beech Aircraft Corp.*
18 (1975) 48 Cal.App.3d 376, 380. Here, defendant responded to form interrogatories 20.9
19 and 20.10 by stating that she had no information regarding any defect in petitioner’s
20 vehicle that contributed to the accident. But when petitioner was deposed some eight years
21 after the accident, and well after defendant served these responses, respondent seemed to
22 be attempting to establish a contributory negligence defense concerning the condition of
23 petitioner’s vehicle. The admissions contained in defendant’s discovery responses
24 preclude such an argument.
25

26 **3. The accident was a substantial factor in causing petitioner’s injuries.**

27 California Jury Instruction 430 states that a substantial factor in causing harm is a
28 factor that a reasonable person would consider to have contributed to the harm. It does not

1 have to be the only cause of the harm, but it does have to be more than a remote or trivial
2 factor. Instruction 430 further states that conduct is not a substantial factor in causing
3 harm if the same harm would have occurred without the conduct. In a personal injury
4 action, causation must be proved within a reasonable medical probability based on
5 competent expert testimony. *Espinosa v. Little Co. of Mary Hosp.* (1995) 31 Cal.App.4th
6 1304, 1316. A possible cause only becomes a probable cause when, in the absence of
7 other reasonable causal explanations, it becomes more likely than not that the injury was
8 the result of that action. *Ibid.*

9 Here, respondent's expert admitted that the accident caused petitioner's
10 asymptomatic back problems to become symptomatic, but drew the legal conclusion that it
11 was only a "minor" cause. Having conceded that the accident was a factor in causing
12 petitioner's injuries, he then testified that he could not cite to any other reasonable cause
13 for petitioner's current disability from her back condition. And, although he opined that
14 petitioner's symptoms would have subsided in three months had she not had a pre-existing
15 condition, the expert also testified that he could not say with any degree of medical
16 certainty that petitioner would have been disabled from her pre-existing condition had this
17 accident not happened. The expert's testimony here demonstrates that this accident must
18 be deemed a substantial factor in causing petitioner's current condition—since there is an
19 absence of other reasonable causal explanations, this possible cause becomes a probable
20 cause, and it becomes more likely than not that the accident caused petitioner's condition.

21
22 **4. Certain evidence here should be viewed with distrust.**

23 Evidence Code § 412 provides that, if weaker and less satisfactory evidence is
24 offered when it was within the party's power to produce stronger and more satisfactory
25 evidence, the evidence offered should be viewed with distrust. Likewise, California Civil
26 Jury Instruction 203 provides that the jury may consider the ability of each party to provide
27 evidence, and if a party provides weaker evidence when it could have provided stronger
28 evidence, the jury may distrust the weaker evidence.

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Here, the underlying defendant never revealed the identity of two additional witnesses to the accident. Two passengers traveling in defendant's vehicle at the time of the accident fled the scene. Defendant refused to identify the individuals who were in his car, and in response to discovery requests simply said that their names remained unknown, but that investigation was continuing. Thus defendant, and now respondent, was in a position to produce stronger evidence as to how the accident occurred, through the testimony of two additional percipient witnesses who are, arguably, independent witnesses. But defendant did not do so. Since it was within defendant's and respondent's power to produce this evidence, the evidence that was offered instead of it should be viewed with distrust.

Dated:

Attorneys for Petitioner