



Suit limitations in policies that impose undue burdens on small businesses

**Market Regulation and Consumer Affairs
Committee**

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Types of limitations:

- Choice of law clauses
 - Dictate what law will apply if a dispute arises
- Forum selection clauses
 - Dictate where a dispute will be litigated
- Lawsuit waivers/Mandatory Arbitration
 - Force ph to forgo their right to use public courts to resolve claim/coverage disputes

History:

- Claim and coverage disputes are heard in public courts. Outcomes are recorded (other than confidential voluntary settlements)
- IIPRC standards: only provisions that permit *voluntary* post-dispute binding arbitration shall be allowed in policy forms.
- Published legal precedents govern outcomes and keep the law current

Appraisal/Voluntary Arbitration

- Appraisal provisions are standard in property policies and serve the useful purpose of resolving technical/valuation disputes
- Voluntary/consensual arbitration is useful in some circumstances

d. "Arbitration"

- (1) Notwithstanding any other provision of this Policy, if there is a disagreement as to the meaning or interpretation of this Policy or as to any actions taken or to be taken or any inaction by you or us, or our contractors or agents, or their or our respective officers, employees, or directors, under or pursuant to this Policy, it is mutually agreed that the dispute shall be submitted to binding "arbitration" before a panel of three (3) arbitrators consisting of two (2) party-nominated (non-impartial) arbitrators and a third (impartial) arbitrator (the "umpire") as the sole and exclusive remedy. In an "arbitration" of the meaning or interpretation of this Policy, each arbitrator must be an active or retired executive officer of an insurance or reinsurance company. The party desiring "arbitration" of a dispute shall notify the other party in writing. The notice must include the name, address, and occupation of the arbitrator nominated by the demanding party and full particulars in writing of the claims which such party proposes to submit to the arbitrators.

A typical forum/choice of law clause

- “In the event that the insured and [Insurer] have any dispute concerning or relating to this policy including its formation, coverage provided hereunder, or the meaning, interpretation or operation of any term, condition, definition or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the insured agrees with us that the internal laws of [State] shall apply without giving effect to any conflicts or choice of law principles.”

C. Arbitration. All disputes or claims involving the Company shall be resolved by binding arbitration, whether such dispute or claim arises between the parties to this Policy, or between the Company and any person or entity who is not a party to the Policy but is claiming rights either under the Policy or against the Company. This provision is intended to, and shall, encompass the widest possible scope of disputes or claims, including any issues a) with respect to any of the terms or provisions of this Policy, or b) with respect to the performance of any of the parties to the Policy, or c) with respect to any other issue or matter, whether in contract or tort, or in law or equity. Any person or entity asserting such dispute or claim (the "Claimant") must submit the matter to binding arbitration with the American Arbitration Association, under the Commercial Arbitration Rules of the American Arbitration Association then in effect, by a single arbitrator in good standing. If the Claimant refuses to arbitrate, then any other party may, by notice as herein provided, require that the dispute be submitted to arbitration within fifteen (15) days. Neither the Claimant nor any other party shall have the right to participate as a member of any class of claimants, and there shall be no authority for any dispute to be decided on a class action basis. In addition, an arbitration can only decide a dispute between the Claimant and the Company, and may not consolidate or join the claims of other persons who have similar claims. All procedures, methods, and rights with respect to the right to compel arbitration pursuant to this Article shall be governed by the Federal Arbitration Act. The arbitration shall occur in Orange County, California. The laws of the State of California shall apply to any substantive, evidentiary or discovery issues. Any questions as to arbitrability of any dispute or claim shall be decided by the arbitrator. If any party seeks a court order compelling arbitration under this provision, the prevailing party in such motion, petition or other proceeding to compel arbitration shall recover all reasonable legal fees and costs incurred thereby and in any subsequent appeal, and in any action to collect the fees and costs. A judgment shall be entered upon the arbitration award in the U.S. District Court, Central District of California, or if that court lacks jurisdiction, then in the Superior Court of California, County of Orange.

D. Application Warrant: The Named Insured warrants that he or she has made true, correct, and full answers to all questions propounded to him

Choice of law = stacking the deck

- Example:
 - *Chiariello v. ING* (N.D. Cal. 2006) 04-CV-01076-CW.
 - Boat sinks, carrier unreasonably denies the claim
 - California resident policyholder forced to litigate in New York under New York law
 - California policyholders can recoup attorney fees when they sue and win a claim dispute
 - New York policyholders can't
 - Policyholder incurs \$400,000 in attorneys fees held not recoverable under New York law but would have been under California law

Indian Harbor Ins. Co. v. City of San Diego,
586 Fed. Appx. 726 (2d Cir. 2014)

- Policy sold to the City of San Diego in CA
- Claim submitted but arguably late
- Carrier denies coverage
- NY Choice of law clause in policy forced PH to travel to NY to litigate dispute
- PH loses b/c NY decisional law allows a late-filed claim to be rejected even where no prejudice to carrier is shown

Monarch v. Nat'l Union (2015)

- Workers comp policy sold to a CA temp help business
- Policy required NY arbitration of *all* disputes
- PH challenged enforceability of the NY arbitration requirement
- NY court upheld carrier's position

Excess carriers = excess litigation

- Excess carriers won't agree to participate in the same arbitration as underlying carrier
- When one policy has a mandatory mediation/arbitration clause and another does not, you can't bring all insurers under one roof (e.g., D&O and E&O policy can both respond to the claim but one has a mandatory mediation/arbitration clause and one does not so the policyholder has to litigate the same issues twice)

Might versus right

- Common for arbitration provisions to require arbitration in London, which is the most expensive city in the world for policyholders to travel to
- London arbitrations usually apply New York law (again, not friendly to policyholders) and policyholder has to hire *both* New York and London counsel

Why we oppose mandatory binding arbitration in insurance contracts

- Arbitrators are selected by the insurance company from a pre-approved list (repeat customers, bias)
- When a ph cannot recover attorneys fees or extra-contractual damages there is little to deter bad faith conduct
- Arbitration proceedings are private and confidential so outcomes are hidden and misconduct can continue

Arbitration is NOT always cheaper

- In cases submitted to AAA under *pre-dispute* arbitration provisions from 1989-2000, the arbitration fees were as high as \$5,200 whereas disputes submitted under *post-dispute* provisions cost only \$300 (AAA's fees lower b/c they were competing for business with other arbitrators and courts)

Summary:

- Regulators should enforce the IIPRC standard that allows only voluntary arbitration provisions in standard policy forms
- Policyholders don't understand the magnitude of the leverage they are giving up when they waive their civil litigation rights
- Allowing mandatory pre-dispute arbitration wording in property policies strips policyholders of an essential protection