

DRAFT

BULLETIN

TO: ALL PROPERTY AND CASUALTY INSURERS WRITING PERSONAL LINES INSURANCE PRODUCTS IN [STATE]

SUBJECT: ARBITRATION CLAUSES AND CHOICE OF LAW/VENUE PROVISIONS IN PERSONAL LINES INSURANCE

Section 1. Authority

This bulletin is adopted by [title of supervisory authority] pursuant to Section [insert applicable section] of the [insert state] insurance code.

Section 2. Purpose of this Bulletin

The purpose of this bulletin is to establish standards for arbitration clauses contained in the forms reviewed and approved by the [title of supervisory authority]. To ensure that consumers entering into insurance contracts are protected, the [title of supervisory authority] guidance is that “pre-dispute mandatory arbitration provisions” will not be allowed in “personal lines insurance” policies, but that insurers may later request in writing that policyholders consent to arbitration when a dispute occurs. These suggested guidelines are intended to balance the goal of ensuring consumer protection while providing insurers the flexibility of offering arbitration to policyholders in personal insurance contracts when a specific dispute arises. This prohibition does not apply to “commercial lines insurance.”

Section 3. Definitions

“**Arbitration Provision**” means a clause in the insurance contract that requires the parties to resolve disputes as to their rights or liabilities arising out of or concerning the contract through arbitration. The purpose of such a provision is to avoid having to litigate disputes that might arise.

“**Choice of Law Provision**” means a contractual provision in which the parties specify the state whose law will govern disputes arising under the insurance contract.

“**Choice of Venue Provision**” means a contractual provision in which the parties establish the location where either party may require the dispute to be tried or arbitrated.

“**Commercial Lines Insurance**” means insurance within the scope of [state’s] commercial lines rating statutes that is not “personal lines insurance” insurance.

“**Personal Lines Insurance**” means homeowners, tenants, private passenger non-fleet automobile, mobile manufactured home and other property and casualty insurance for personal, family or household needs except workers’ compensation insurance.[property and casualty state-specific definition].

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Deleted: is providing guidance to insurers concerning the parameters of those provisions typically included in mandatory “arbitration provisions.”

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Comment [1]: These two sentences are somewhat duplicative and could be merged into one. I kept them as 2 in this draft to try to minimize proposed changes to the original bulletin.

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Deleted: “**Arbitration Disclosure**” means the process, as further set forth in Section 5 below, by which the insured is informed that disputes arising under the policy of insurance will be resolved by the alternative dispute mechanism of arbitration in which one or more neutral third parties (arbitrators) renders a decision after a hearing at which both parties have an opportunity to be heard.

“Pre-dispute mandatory arbitration clause” means a provision in an insurance policy, rider, endorsement, or any other part of the contract requiring that future disputes involving the insurance policy or claims thereunder must be resolved through arbitration by allowing one party to the dispute to so require when the dispute arises. [This definition does not apply to arbitration provisions specifically authorized or required by state statute.](#)¹

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Comment [2]: This provision could also be part of Section 4 instead of in the definition section, as the industry might request.

Section 4. Pre-dispute Mandatory Arbitration Clauses

The Insurance Code was enacted to regulate the business of insurance and for the protection of the insurance-buying public.² Under [Forms Review Statute, e.g. Oregon Revised Statutes 742.005] the [insurance commissioner] shall disapprove any form if, in the [insurance commissioner’s] judgment, its use would be prejudicial to the interests of the insurer’s policyholders or if the [insurance commissioner] finds it contains provisions which are unjust, unfair, or inequitable. It is also unlawful to engage in this state in any trade practice that, although not expressly defined and prohibited in the Insurance Code, is found by the [commissioner] to be an unfair or deceptive act or practice in the transaction of insurance that is injurious to the insurance-buying public.³

“Pre-dispute mandatory arbitration clauses” in “personal lines insurance” policies preclude policyholders from exercising their rights to a trial by jury.⁴ Because these policies are contracts of adhesion, inclusion of a “pre-dispute mandatory arbitration clause” forces the consumer to waive a fundamental constitutional right without a meaningful opportunity to bargain for other benefits or consideration. “Arbitration provisions” also typically require confidentiality. This may unacceptably interfere with the [insurance department’s] ability to regulate insurance claims handling by discouraging policyholders from seeking assistance with the [insurance department].

The [insurance commissioner] finds this practice to be unfair and injurious to the insurance buying public. “Pre-dispute mandatory arbitration clauses” in “personal lines insurance” products are prohibited.

The [insurance commissioner] recognizes that the use of arbitration and other alternative dispute resolution methods may be of great value in certain instances. For example, arbitration may be faster and less costly than court proceedings. Parties may still avail themselves of these benefits by electing to arbitrate after the dispute arises.

Section 5. Choice of Venue and Choice of Law Provisions

Longstanding state and federal policy dictate that insurance transacted in this state shall be governed and interpreted under [jurisdiction] law. While businesses with operations across multiple states may find benefit in negotiating to have their “commercial lines insurance” contracts governed under the laws

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¹ [For example, some states require disputed valuations of auto property damage claims or disputes over UM/UIM damages be resolved through arbitration.](#)

² See [Cite to section of insurance code discussing purpose and effect of federal law. e.g., ORS 731.008, ORS 731.012].

³ 1 See [Cite to section of insurance code discussing purpose and effect of federal law. e.g., ORS 731.008, ORS 731.012].

⁴ See e.g., [Cite to relevant state court decision. e.g., Molodyh v. Truck Ins. Exchange, 714 P. 2d 992, 997 (1987).]

of another jurisdiction, consumers of “personal lines insurance” policies placed in [insurance commissioner] expect to be afforded the protections and benefits under the [jurisdiction] Insurance Code. “Choice of law provisions” in “personal lines insurance” policies that import foreign law upend consumer expectations, cause confusion among the insurance buying public, and may result in consumer harm. Similarly, “choice of venue provisions” that require the insured to travel out of state pose an unfair barrier to adjudicate their claims.

The [insurance commissioner] finds the inclusion of “choice of law provisions” that import foreign law and “[choice of venue](#)” provisions that require adjudication out-of-state in “personal lines insurance” policies to be unfair and injurious to the insurance buying public. Including such provisions in a “personal lines insurance” policy constitutes an unfair trade practice in violation of [Citation to state UTPA law. e.g., ORS 746.240]. “Choice of law provisions” and “[choice of venue provisions](#)” that import foreign law or venue may not be included in “personal lines insurance” policies and will be disapproved.

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Comment [3]: I think our argument here is: (1) difficult to think of any situation where a consumer would benefit from a choice of venue provision that would set jurisdiction outside of the consumer’s state; (2) disclosure will not resolve this problem nor provide consumers a valuable option.

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