Evaluating policy form filings that limit policyholders' litigation rights

Consumer Liaison 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/Arbitration

- Appraisal provisions are standard in property policies and serve a useful purpose

- Voluntary/consensual arbitration is useful in some circumstances

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.”

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

Carriers  New York

The vast majority of choice of law clauses in commercial policies select New York as the governing law

For more information, see:

- *New York's Insurance Notice Statute and Contractual Choice of Law*, Michael T. Sharkey, Law Journal Newsletters, Insurance Coverage Law Bulletin, March 2015 and *Catlin Specialty Ins. Co. v. Am. Superconductor Corp*., 2014 WL 840693 (Mass. Super. Jan. 29, 2014)

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

Texas UPdate

- Texas Farm Bureau filed for approval to offer a discount for buying a version of a home insurance policy that includes a litigation waiver/agreement to arbitrate with one private arbitration company picked by TFB

- Strong opposition by TX homeowners and advocates

- Filing amended to add AAA as a second option for the binding arbitration. Opposition remains.

- TDI held a July 6th public hearing, matter still pending

Issues with the filing

- A home insurance policy is a contract of adhesion, unequal sophistication
- There is no parity between the amount of the discount and the value of litigation leverage
- Unclear from the way the endorsement is drafted whether it applies to both first party property *and* third-party liability claims
- The average litigation cost estimates provided by the carrier in the filing are about $2,100 per claim but arbitrators cost $300 an hour
  - If arbitrator spends 7 hours, that's $2,100

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
- Discounts will blind consumers to 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