



**Reference Guide
to
Arbitration Forums'
Agreements and Rules
Effective 6/15/13**

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Chapter 1

Arbitration Forums, Inc.'s Background

The *Federal Arbitration Act of 1925* establishes the validity of agreements to arbitrate disputes arising out of maritime, interstate, or foreign commerce. This statute also allows parties to agree to arbitrate. Many insurers are signatories to agreements that provide for arbitration. The *Uniform Arbitration Act* and subsequent state acts further address arbitration agreements. Under the agreements, the involved parties agree to submit any applicable dispute that may arise between them to arbitration instead of litigation. These agreements mandate the disputes the parties must take to arbitration.

An effort by the **casualty insurance** industry to seek arbitration as an alternative to litigation began in 1943 in New York. The *New York City Claim Managers' Council* appointed a committee to serve as an arbitration board. Members of the Claim Managers' Council agreed to arbitrate certain automobile physical damage subrogation claim disputes arising among themselves. The arbitration board confined its service to members of the Association of Casualty and Surety Companies and the National Association of Mutual Casualty Companies in metropolitan New York.

By 1951, the **casualty insurance** industry throughout the United States recognized the success of this New York venture. The insurance companies improved their intercompany working relationships by reducing the amount of litigation and the related costs. Due to this local success, the Combined Claims Committee rewrote the original agreement and sponsored it as a nationwide program called the "Nationwide Inter-Company Arbitration Agreement" (predecessor to the Automobile Subrogation Arbitration Agreement).

During the 1950s, the Combined Claims Committee created two additional arbitration programs. The first program was the *International Reciprocal Arbitration Agreement*, which expanded the Automobile Arbitration program to accidents

involving U.S. and Canadian insureds. In 1957, the committee created the second program with the *Special Arbitration Agreement*.

Although the Combined Claims Committee established Special Arbitration to settle disputes between liability carriers of **casualty insurance** policies, it was to become the cornerstone for commercial disputes. Participants in commercial disputes may include **self-insured** businesses or commercial insureds with large retentions. Under joint and several statutes, a contractual obligation may bind a non-negligent party to a negligent tortfeasor that makes one or both obligated to pay damage to a third party. The negligent act may be one that causes personal injury or property damage. The Special Arbitration Forum's purpose is to determine *contribution* or *apportionment* of liability among third-party insurers and to resolve overlapping coverage disputes.

Through the early years, the arbitration programs grew to 480 participating companies. By the late 1960s, arbitration committees were hearing and closing almost 100,000 cases annually. The development and administration of the arbitration program continued to require more time at the Combined Claims Committee meetings. As a result, in 1967, the Combined Claims Committee transferred its arbitration sponsorship to an independent committee called the Committee on Insurance Arbitration.

The Committee on Insurance Arbitration represented all segments of the insurance industry. It included companies belonging to three trade associations, along with companies without any trade association affiliation. This insurance arbitration committee became the largest system of its kind in the world, and it recognized the need to create a legal entity to administer the arbitration programs. In 1981, this concern led to the incorporation of Insurance Arbitration Forums

(IAF), a not-for-profit company. With the formation of the corporation, the Board of Governors of the Committee on Insurance Arbitration became the Board of Directors for the new corporation.

Insurance Arbitration Forums, Incorporated remained the corporate name until 1986, when the Board of Directors resolved to eliminate “Insurance” from the name. This change reflected the expansion of AF’s programs to include arbitration situations outside the insurance company arena. These additional mediation and arbitration services fulfilled a direct need expressed by the insurance industry. Because AF always provided an objective, neutral administrative service, the Board felt the new name would better express its mission and goals.

AF is an integral part of the claim **settlement** process and provides an essential service as administrator of the arbitration process. Members created and control this corporation. Currently, the Board of Directors is comprised of representatives from the insurance trade associations. Two trade associations, representing nearly 1,000 different carriers, have permanently assigned positions on the Board. The associations are the American Insurance Association (AIA) and the Property Casualty Insurers Association of America (PCI)—formerly the National Association of Independent Insurers (NAII) and the Alliance of American Insurers (AAI). Each trade association selects additional board members from its small, medium, and large carriers.

As it grew, AF moved its corporate offices in 1983 from New York City to Tarrytown, New York. In 1992, it moved to its current corporate headquarters in Tampa, Florida. During the early 1990s, the Board of Directors and management became more responsive to member needs by re-engineering the corporation and developing automation systems.

AF continues to fulfill its role as a respected and efficient administrator of *alternative dispute resolution* (ADR) services. ADR collectively refers to various means of resolving controversies without litigation and is usually voluntary. When a company voluntarily signs the agreement to arbitrate future controversies within specific parameters, arbitration becomes compulsory for member companies for those controversies.

AF offers and maintains unsurpassed professional service to its members and other users at minimum cost. It is a service-oriented company with a roster of nearly 5,900 highly skilled and objective arbitrators, many of whom the member companies provide. Annually, these professionals hear and decide over 477,000 cases involving more than \$2.3 billion in claims.

Arbitration Forums has grown from an idea in 1943 to the recognized and respected corporation that it is today. The corporation is proud of its legacy and constantly strives to achieve the highest quality in every service offered. We hope that this reference guide attests to this fact.

Chapter 2

Definitions

The following definitions are provided to ensure a consistent understanding and interpretation of certain words used within the various AF Agreements and Rules. If a word is unique to only one of the programs, the program is identified in parentheses following the definition.

Adjournment – An interruption of a hearing at the arbitrator’s(s’) discretion for a maximum of 30 days.

Affirmative Defense – A complete defense that does not address the allegations, but instead, asserts reasons that preclude the arbitrator(s) from accepting jurisdiction and ruling on the disputed issue(s).

Affirmative Pleading – An issue or legal doctrine that reinforces the filing company’s position or refutes an affirmative defense asserted by an opposing party. Examples include *res ipsa loquitur*, which could support a company’s liability position, or bailment and joint and several liability, which could change how damages are awarded.

Casualty Insurance – (Special Arbitration) An insurance contract that provides indemnity (including UM coverage but excluding UIM coverage) and/or defense to the insured for legal liability arising from an accident, occurrence, or event for which the policy applies, resulting in bodily injury, property damage, personal injury, or advertising injury.

Clerical Error – An unintentional mistake made by Arbitration Forums’ staff or the arbitrator(s). Examples of AF staff errors include not providing proper notice of hearing or not assigning a requested three-person panel. Arbitrator errors include mathematical errors in applying the liability percentage against the amount of damages proven, switching the parties when recording the decision, and missing submitted evidence.

Collateral Estoppel – A bar by judgment that precludes the re-litigation of issues litigated by the same parties on a different or the same cause of action.

Commercial Property – (Property Subrogation Arbitration) Coverage for businesses, institutions, or organizations to protect their property and/or business. Commercial Property coverage includes, but is not limited to, risks such as fire, burglary, theft, goods in transit covered by inland marine insurance, floaters, or endorsements.

Companion Claim – Any additional claim(s) by or against a participating party arising out of the same accident, occurrence, or event, which falls under the same or another AF compulsory forum.

Concurrent Coverage – (Special Arbitration) Two or more policies of insurance and/or self-insureds providing coverage to the same party or parties or the same risk or risks for the same accident, occurrence, or event. Concurrent coverage includes primary/excess disputes.

Construction Defect Claim – (Special Arbitration) A construction defect claim includes both indemnity and expense, paid or prospective. For completed (paid) constructive defect claims, there is a combined award limit for indemnity and expense of \$250,000 per responding company’s insured per project. A prospective indemnity claim is not eligible for arbitration without consent of all parties. For prospective expense contribution issues, there is no monetary limit. All claimants (unit-residences) of a construction project, regardless of the manner or number of underlying claims, suits or “companion claims,” shall be considered as one claim for hearing and contribution limits.

Construction Defect Dispute – (Special Arbitration) A dispute among one or more casualty insurance companies or entities that are “self-insured” for a construction defect claim involving completed operations resulting in damages to real

property for which one or more Insurers or Self-Insurers provided defense and/or indemnity for the construction defect claim and allege that one or more other Insurers or Self-Insurers provided concurrent coverage for the same construction defect claim.

Counterclaim – A claim resulting from the same accident or loss filed by a responding company against the original filing company in an arbitration proceeding. (Not applicable in Special Arbitration)

Deferment – A postponement of a hearing for a one-year period from the date of filing.

Denial of Coverage – A company’s assertion that (a) there was no liability policy in effect at the time of the accident, occurrence, or event, or (b) a liability policy was in effect at the time of the accident, occurrence, or event, but such coverage has been denied/disclaimed to the party seeking coverage (i.e., alleged negligent party) for the claim in dispute. (This applies only to a complete denial of coverage based on the event in dispute. If the denial is based on what damages the policy covers, i.e., work product, the case will proceed to hearing to determine what damages, if any, are payable per the policy.)

Diminution of Value Claim – A claim asserting that the fact of physical damage resulting from an event covered by the policy can reduce the value of a vehicle, even if repairs return it to pre-loss condition in terms of appearance and function.

Jurisdictional Error – Occurs when an arbitrator fails to rule on an affirmative defense, asserts an affirmative defense not pled by a party, renders a decision on an issue not in dispute or over which arbitration lacks jurisdiction, or improperly dismisses a case for lack of jurisdiction where jurisdiction exists.

Legal Fees – Attorney fees, court costs, and all other expenses directly related to the prosecution or defense of a lawsuit.

Non-insurer – A “non-insurer member” or “self-insured member” shall mean a member who is neither a Trade Association member nor an insurer

member and who has direct financial interest in the claims being arbitrated.

Personal Property – (Property Subrogation Arbitration) Coverage to protect individuals for damage to their property other than automobile. Personal Property coverage includes, but is not limited to, homeowners insurance, tenant or renters insurance, watercraft or boat owners insurance and watercraft endorsements, and personal inland marine coverage.

Publication Date – The date AF posts a decision online and it is available to the parties.

Recovery Rights – (PIP Arbitration) Legal capacity to regain a loss to another through subrogation, reparations, reimbursement, indemnity, or direct action.

Res Judicata – A judgment, decree, award, or other determination that is considered final and bars relitigation of the same matter.

Reschedule – An extension of the hearing date granted by AF at the request of the party(ies), not to exceed 60 days.

Self-insured – An entity that meets the legal requirements of being self-insured; one that assumes the risks directly for covering losses involving its property, or one whose deductible or retention is equal to or exceeds the amount of loss in dispute.

Settlement – (Special Arbitration) The final disposition of a claim or suit wherein the claimant or plaintiff releases any and all causes of action against all alleged responsible parties involved in the Special Arbitration filing. Workers’ Compensation subrogation cases do not require a settlement and Uninsured Motorists’ settlements do not require a release of all parties.

Written Consent – An agreement to binding arbitration by the party(ies). May be in the form of a letter, e-mail, etc. Answering a filing without an objection to jurisdiction is considered implied written consent.

Chapter 3

Article First Compulsory Provisions

Signatory members must forego litigation and arbitrate claim disputes as specified by Article First of the respective Agreement. Each Agreement is a legal contract, and a signatory member accepts and binds itself to all of the Forum's Articles and Rules by signing it.

With new signatory companies a popular question is whether the accident date determines jurisdiction of Article First. The date of the loss is **not** controlling. What controls is the status of the claim on the signatory effective date. If it is a pending claim that meets the provisions of Article First, it is subject to compulsory arbitration, regardless of the accident date. The key word is **pending**. Pending is synonymous from the viewpoint of arbitration with active claims. Closed claims are excluded, as are claims that have been abandoned prior to a company's decision to participate in arbitration. Arbitration Forums specifies pending to avoid an overzealous representative going back in his or her company's archives to resurrect cases long dormant or closed. The ease with which arbitration can be initiated is not intended to be a vehicle for such action. Likewise, claims on which litigation has been instituted and is actually pending when a company becomes signatory are not considered pending claims. Therefore, they are not subject to compulsory arbitration.

Another point to clarify is each Agreement is independent and all members are not signatory to each Agreement. Before you file arbitration, make sure the parties are signatory to the specific Agreement in which the dispute is to be filed (unless intercompany arbitration is statutorily mandated).

Automobile Forum

The type of claim dispute heard under the Automobile Subrogation Arbitration Agreement is between a member with an automobile physical

damage claim and another member(s) who allegedly is liable for the damages. The dispute may concern liability, damages, or both.

A claim filed in the Auto Forum may consist of more than just a collision or comprehensive payment. A claim may include an itemized list of losses such as towing, storage, rental reimbursement, and salvage expenses, provided they were paid out of the insured's policy or paid by a self-insured pursuant to statute or judicial decision. However, the disputed claim amount cannot include a company's normal operating expenses or an insured's out-of-pocket expenses. In addition, diminution in value claims are only applicable to states where members are required to pay such claims out of the insured's policy pursuant to statute or judicial decision.

Another important point is that the member filed against (respondent) is not limited to an automobile liability insurer. A respondent may be a general liability carrier, homeowner's liability carrier, etc. Any member who may be liable for the applicant's damages may be named as a respondent.

Examples of disputes resolved in the Auto Forum:

- The driver of a vehicle traveling at an excessive rate of speed collides with another vehicle that changed lanes without signaling. Insurers cannot agree on the respective liability of the two drivers.
- The liability carrier for an at-fault driver disputes the severity and extent of the damages alleged by the collision carrier for the negligent-free vehicle. While liability is conceded, the matter is submitted to the Auto Program for resolution of the damages dispute.
- A car being used as a temporary replacement vehicle is returned to the rental car company with moderate damage to the

right quarter-panel. The renter's collision carrier denies the subrogation claim based on the insured's/renter's assertion that the damage was already there when the vehicle was rented. The matter is submitted to the Auto Program for resolution.

- A vehicle is damaged because of a malfunction at a drive-thru car wash. The insurer of the vehicle seeks recovery from the general liability insurer of the car wash.
- A defective part causes a driver to lose control of a vehicle and overturn. Auto Arbitration is filed against the auto manufacturer and/or part manufacturer to recover the vehicle damages.
- An insurer is required to pay a diminution in value damages out of the insured's policy and seeks reimbursement from the tortfeasor's carrier.

The following are some examples of claim disputes not allowed in the Auto Forum:

- An insurer seeks an administrative fee as "costs" for pursuing a claim.
- An automobile leasing company seeks diminution in value damages.

Property Forum

Article First in the Property Subrogation Agreement broadly describes the disputes that members must arbitrate to resolve personal or commercial property claims. The difference between personal property and commercial property exposures is significant to the point that both are defined under the Definitions Section (see Chapter 2, Definitions). Commercial property includes losses by businesses, institutions, and other organizations. These losses can originate from all types of perils, and the coverage forms can be many types. These might involve inland marine, transportation, and traditional fixed coverage forms. Personal property is coverage for individuals and can take the form of many different types just like commercial property. The disputes may concern liability, damages, or both.

Some examples of the types of disputes that qualify for Property Arbitration are:

- A member pays its insured for a fire covered under its homeowners policy. It is determined the fire started the first night after the installation of a new furnace. The member can file in Property Subrogation Arbitration against the insurer of the furnace installation business and/or against the self-insured manufacturer of the furnace.
- An insurer pays an apartment tenant for water damage to his insured property. The damage was caused by water leaking through the ceiling from the apartment above. The insurer then can file Property Arbitration against the insurer of the tenant above and/or the landlord's liability carrier.
- Two boats collide on the largest lake located in central West Virginia. The boat owner's insurer files arbitration against the insurer of the other boat to recover damages sustained in the accident.
- A woman has her expensive jewelry covered under a Personal Inland Marine Policy. While staying at a hotel on a business trip, she was forced to quickly evacuate the hotel because of a fire alarm. Upon returning to her room, she found that her diamond ring had been stolen. The insurance carrier paid for the loss and filed Property Arbitration against the hotel's insurer.
- A pizza restaurant caught fire in a strip mall, causing fire damage to the structure and contents of an adjacent furniture store. The furniture store's insurer files arbitration against the insurer of the pizza restaurant to recover its loss.
- An automobile driver loses control while turning at an intersection and drives the car into the front of a convenience store. The convenience store insurer can file Property Arbitration against the insurer of the automobile.
- A tractor-trailer overturns while striking a car in an intersection. The car allegedly did not stop for a signal light. The cargo, insured under a commercial inland marine endorsement, was completely destroyed. The inland marine insurer can file arbitration against the insurer of the automobile to recover the payment for the destroyed cargo.

These few examples emphasize the potential for property subrogation recovery. Claim personnel should be aware of and take advantage of these subrogation opportunities.

Special Arbitration

Article First describes the type of unresolved disputes that signatory companies must submit under the Special Arbitration Agreement. The first sentence of Article First specifies that the settlement of the claim or suits triggers the compulsory provisions. Settlement is defined as “the final disposition of a claim or suit wherein the claimant or plaintiff releases any and all causes of action against alleged responsible parties involved in the Special Arbitration filing.” This does not say that the insurance carrier must be named on the release, only that responsible parties are released. Though there is no specific requirement that a copy of the release be provided, it is highly recommended that a copy be submitted with Company 1’s evidence.

There are two important exceptions to the requirement for settlement. Workers’ compensation subrogation cases do not require settlement and Uninsured Motorists’ settlements do not require a release of all parties.

Article First, subsection (a) describes one type of unresolved dispute that signatory companies must submit to Special Arbitration. This article applies when each company provides casualty coverage either as an insurer or a self-insured for one or more parties who are allegedly legally liable for bodily injury and/or property damages to a third party arising from an accident, occurrence, or event resulting in a claim or suit. This occurs when two or more alleged tortfeasors cannot agree on the respective allocations of fault or negligence for the damages and could involve any type of casualty or liability coverage.

EXAMPLE: A dispute results when a leased car veers out of control and strikes a newsstand and several pedestrians. The driver’s insurer (Company 1), the leasing company’s insurer (Company 2), the insurer of the newspaper stand (Company 3), and the insurer of the automobile manufacturer (Company 4) are unable to agree on their respective liability.

EXAMPLE: Company 1 has made an Uninsured Motorists’ settlement with its insured because no liability insurance was identified for the tortfeasor. Company 2 subsequently acknowledges coverage for the tortfeasor but has been unwilling to reimburse Company 1. Note that in this example the carrier for the tortfeasor has now acknowledged coverage. If there were still a dispute over the denial of liability coverage, the case would be filed in the Uninsured Motorists’ Forum to determine the validity of that denial.

Article First, subsection (b) requires member companies to arbitrate concurrent coverage disputes. In this type of dispute, each company provides property or casualty coverage, either as an insurer or as a self-insured company, to the same party or parties. The same accident, occurrence, or event involves these insured parties and results in a first-party or third-party claim or suit for bodily injury or property damage. Concurrent coverage includes primary/excess disputes or disputes regarding the amount and/or extent of coverage provided.

EXAMPLE: Company 1 insured an individual under a homeowner’s policy, and Company 2 insured the same individual under an automobile policy. A neighbor injured his arm when it was thrust through a window in an entrance door to the garage on the premises of the insured. The injury occurred when the neighbor tried to rescue the insured who was carelessly working on his car with the engine running in a closed garage. The homeowner’s carrier raised the coverage defense that the automobile policy was answerable to the claimant because the accident arose out of the use of the vehicle. The auto carrier disputed that position. One or both of the carriers settled with the third party. The coverage question between the homeowners and automobile policies was submitted to Special Arbitration.

EXAMPLE: A condominium owner’s insurer, Company 1, paid for a fire loss. The Condominium Association also had fire insurance for the same loss with Company 2. Company 1 believed Company 2 should cover the insured’s loss. When both insurers are signatories to the Special Forum, this coverage

issue would be appropriate and compulsory for Special Arbitration.

Article First, subsection (c) provides the avenue for workers' compensation carriers or self-insured employers to subrogate for the workers' compensation benefits paid to an injured worker.

EXAMPLE: An employee of a delivery company is injured when he trips and falls making a delivery, resulting in a workers' compensation claim. The workers' compensation carrier makes a subrogation claim for the statutory benefits paid against the premises owner, whose carrier denies liability. The workers' compensation carrier submits the subrogation claim to Special Arbitration.

Because the workers' compensation carrier or self-insured employer may recover only its own payments made to and on behalf of the injured worker, the workers' compensation carrier or self-insured employer does not provide a release of the injured worker's rights against the tortfeasor. Further, in cases where the workers' compensation carrier has paid medical and lost time benefits but not made a lump sum settlement for permanency, we recommend Company 1 file Special Arbitration to toll the statute of limitations, when necessary, and request a one-year deferment based on the justification that the contribution sought amount is not yet finalized. Company 1 may file for supplemental damages after a decision has been rendered if supplemental benefits are paid for the same injury after the original filing. The original decision is *res judicata* on the issue of liability, and the sole issue in the subsequent filing is causation and damage (see Rule 5-3).

The last paragraph of Article First *recommends* (does not require) that each party pay an equal share to the claimant to complete the settlement, conclude the claimant's interest in the case, and release any causes of action against the alleged responsible parties. It further provides that settlement of a claim is made without prejudice to any party participating in the settlement. The arbitration panel will not consider the amount an insurer paid toward a settlement as an admission of any degree or percentage of liability. The amount of settlement is

not an issue unless one of the disputing parties contests the settlement amount.

PIP Forum

The type of claim dispute heard under this Agreement is between a member with PIP coverage and another member(s) who allegedly is liable for the damages. The dispute may concern liability, damages, or both. The Personal Injury Protection (PIP) Arbitration Agreement is the only Agreement AF offers that allows a company to select specific states in which it wishes to be signatory. All other AF Arbitration Agreements are national. In addition, it must be noted that some states (i.e., Delaware and Minnesota) statutorily mandate the use of arbitration to resolve intercompany PIP disputes; specifically designate Arbitration Forums, Inc. as the provider; and follow AF's [Arbitration Rules](#). New York, however, follows the [NY PIP Arbitration Rules](#).

A claim filed in the Personal Injury Protection Forum may consist of more than just a medical expense. A claim may include an itemized list of losses, such as medical expenses, funeral expenses, wage loss, loss of services, or child care expenses, provided they were paid out of the insured's policy. However, the disputed claim amount cannot include a company's normal operating expenses or an insured's out-of-pocket expenses (except in Massachusetts where the PIP statute allows for the recovery of operating expenses under allocated and unallocated expenses).

The following is an example of a Personal Injury Protection Forum claim dispute:

- Liability is in dispute when a pedestrian is struck by an automobile when crossing a street and local statute requires the pedestrian's automobile Personal Injury Protection to be primary.

Rule 1-3 limits compulsory arbitration to the monetary limit governed by the statute or endorsement creating the subrogation or direct action recovery right. An early decision was made when the PIP Agreement was first drafted in 1971 that jurisdiction of the Agreement for intercompany controversies would be based on the rights set out in the statute. This philosophy is woven through the fabric of all subsequent programs developed by

Arbitration Forums. Whatever rights are created by the statute are the rights available to the parties under the arbitration facility.

Medical Payments Forum

The Medical Payment Subrogation Forum resolves disputes arising from subrogation of medical payments coverage between insurance companies only. The interests of parties other than insurance carriers may not be arbitrated under this Agreement. Insureds of signatories who dispute values or coverages cannot be parties to the arbitration.

The jurisdiction of this forum is limited to those states that allow for medical payments subrogation recovery.

Uninsured Motorists Forum

The Uninsured Motorists' Arbitration Forum is the forum in which insurance companies bind themselves to arbitrate coverage questions under automobile liability policies in which a disclaimer results in a claim against another member company under its uninsured motorist endorsement. If one participating company denies coverage to its insured, and if its denial forces the filing company's insured to look to its own carrier under the uninsured motorists' coverage for recovery, and if the latter does not agree with merits of the disclaimer, we have a dispute to be resolved between the carriers under the compulsory provisions of this program.

The main criterion to determine whether a case is appropriate for the Uninsured Motorists Forum is to establish that a denial of coverage has been issued by Company 2 (the responding company). Company 1 (the filing company) must then present contentions that establish its basis for challenging Company 2's denial of coverage and the reasons why Company 2 should reimburse the Uninsured Motorists settlement. The coverage denial is the basic argument in the Uninsured Motorists Forum, as liability and damages will not be disputed; moreover, any affirmative defense raised must not argue coverage (except limits), liability, or damages.

EXAMPLE: Company 1 contends its vehicle was damaged as a result of Company 2's negligence and questions the validity of Company 2's denial of coverage. Company 2 doesn't argue that the vehicle was not involved in the accident but contends its vehicle was stolen and asserts a denial of coverage based on non-permissive use. Company 1 points out that the auto theft report was not made until approximately 7 to 8 hours after the actual impact between Company 1, Company 2, and an additional non-tortfeasor vehicle, and the police report narrative indicated Company 2's ignition was not punched out. Company 1's insured made a claim for UM benefits as a result of Company 2's denial of coverage.

Chapter 4

Article Second Exclusions

No company shall be required, without its written consent, to arbitrate any claim or suit if

- a) it is not a signatory company nor has given written consent; or**
- b) such claim or suit creates any cause of action or liabilities that do not currently exist in law or equity; or**
- c) its policy is written on a retrospective or experience-rated basis; or**
- d) any payment which such signatory company may be required to make under this Agreement is or may be in excess of its policy limits. However, a filing company may agree to accept an award not to exceed policy limits and waive its right to pursue the balance directly against the responding company's insured; or**
- e) it has asserted a denial of coverage; or**
- f) any claim, which a lawsuit was instituted prior to, and is pending, at the time the Agreement is signed; or**
- g) under the insurance policy, settlement can be made only with the insured's consent; or**
- h) it is a watercraft claim(s) arising from accidents on waters under federal or international jurisdiction. (Property Forum)**

Article Second lists the exclusions to the compulsory provisions contained in Article First of the respective Agreement. Each forum varies slightly, so review the specific Agreement when determining whether an exclusion applies to a case you are handling. If any of these exclusions apply to the dispute or suit in question, the members are not required to file arbitration. If arbitration is filed, the responding member must answer the filing and raise and support the exclusion as an Affirmative Defense in order for an arbitrator to consider removing the case. The responding member is also free to waive asserting the affirmative defense if it wishes the case to proceed to hearing and, as such, will abide by the decision and honor any award rendered against it.

Article Second, subsection (a) states a company is not required to participate in arbitration if it is not

a signatory to the specific Agreement under which the filing has been made or has not given its written consent. Article Fourth (Chapter 6) discusses how a non-signatory can participate by giving its written consent. Aside from a filing against a non-signatory insurer or self-insured, subsection (a) also applies to cases where a responding company's insured has a large liability deductible or self-insured retention. If the amount of damages sought by the filing company is less than the responding insured's liability deductible or self-insured retention, arbitration would lack jurisdiction if this is raised and supported as an affirmative defense. An arbitrator can consider only an amount in excess of the insured's deductible or self-insured retention. In these cases, the filing company can file arbitration versus the commercial insured if it is signatory or consents to arbitration.

One last point worth clarifying is, Article Second (a) does not apply to cases where the use of intercompany arbitration is mandated by statute. In these cases the reference to the respective AF Agreement is intended to define scope (Article First) and establish procedure (AF Rules), and all exclusions, except (a), is applicable.

Subsection (b) provides that by becoming a signatory to the Agreement, the member company does not forego any causes of action or defenses available to it in litigation. The filing company's opportunities for recovery and the responding company's opportunities for a defense are not diminished by participation as arbitrating parties. They must work within the statutes and case law that exist where the accident occurred. A company can also use all of the defenses that are available in a court of law, including affirmative defenses such as the expiration of the applicable statute of limitations or the absence of a right of recovery (i.e., Diminution in Value claims in the Automobile Forum or Workers Compensation subrogation in the Special Arbitration forum).

Example: Applicant is a self-insured leasing company seeking \$2,000 in property damage to a lessor's vehicle and respondent raises the affirmative defense of 2(b) exclusion because the jurisdiction does recognize the right of a lessor to seek such damages. The arbitrator(s) should dismiss the claim.

The third exclusion, subparagraph (c), eliminates the requirement for arbitrating claims made against retrospective or experience-rated policies. A retrospective or experience-rating plan is a method of computing an insured's insurance premiums based upon the actual losses incurred over a stated period, normally the policy year. The insurer establishes an initial rate and then adjusts it according to the insured's actual losses. A retrospective rating plan arbitration decision would indirectly affect the insured's interest because of the rate/loss experience relationship. For that reason, a claim under such a policy is excluded. If a case involves a retrospective or experience-based policy, the insurer must raise the affirmative defense to jurisdiction and include evidence to support it. There is no post-decision relief if a case proceeds to

hearing. The insurer issuing the policy may give its consent for the arbitration to proceed, either written or implied (i.e., filing an answer and not asserting the affirmative defense), and the arbitrator will hear the case.

Arbitration is also not compulsory if the amount sought would expose a responding member beyond its policy's dollar limit (Article Second (d)). Policy limits is the most common Affirmative Defense asserted by a Respondent. That said, the arbitrator can only rule on what is clearly asserted and presented in the file. In these cases, it is the Respondent's responsibility to clearly outline its position.

In some cases, it is enough for a Respondent to simply assert the Affirmative Defense for insufficient limits, state its policy limit amount and submit proof (i.e., dec page). If the only claimant is the Applicant company, this defense is sufficient as representation of the Respondent's position. In such a case, if the Applicant has indicated it will accept the limit as final settlement, the arbitrator(s) can deny the defense and rule on the case, awarding up to the policy limits. Of course, if the Applicant does not agree to accept the available limits, the arbitrator(s) would hear the case for liability and/or damages to determine if the limit is actually compromised. If the arbitrator(s)'s decision would result in an award above the available limit, the arbitrator(s) would uphold the defense and withdraw the case, as it would be outside of AF's jurisdiction. However, if their liability decision does not compromise the available limits, they can render an award against the Respondent for the percentage of liability found against it.

Example: Applicant's total claim is \$6,000. Applicant does not indicate if it will accept policy limits if that defense is raised. Respondent raises a proper Affirmative Defense due to a policy limit of \$5,000. Liability decision is 50 percent adverse to the Respondent. The arbitrator(s) can render a decision and deny the defense because the limits are not exceeded based on the liability placed against the Respondent. The arbitrator(s) would award the Applicant \$3,000.

This issue is much more complex when there is more than one claimant seeking recovery from the policy limit of a Respondent (i.e., applicant's insured, another vehicle, a building owner or the city/county for damage to a pole, etc.).

AF does not have jurisdiction over any out-of-pocket (OOP) damages to which the Applicant's insured may be entitled. For its OOP expenses, the Applicant Insured is considered a non-member. Therefore, unless the Applicant *specifically indicates that it will to make its insured whole from the award proceeds*, the policy limits defense would need to be upheld. To award policy limits to the Applicant would leave the Respondent and its insured open for extra-contractual claims and payments if the Applicant has not expressly agreed to handle its insured's claim.

Any time there is more than one party with claims to a policy limit, all parties must agree to accept the limits and/or their pro rata share in order for the arbitrator(s) to render an award. If any one claimant (another car, the city, the Applicant's insured, etc.) is not present in the file (as an Applicant or via clear acceptance of limits/pro rata submitted as evidence), the limits of the at-fault Respondent cannot be awarded.

If the arbitrator(s) are unclear about the intent of any Affirmative Defense, they can adjourn the case and request clarification from the party. If no response is received from that party, the case will go forward at the next hearing regardless. The best way to protect your policy is to be clear and specific from the start.

Remember, the arbitrator(s) cannot rule on speculation. Respondents, if you are unsure of the claims that may be brought against you, request a deferment to allow yourself time to complete your investigation. Stating the Applicant insured *may* have OOP expenses to claim against your policy is not enough to uphold an Affirmative Defense for insufficient limits. Your best bet if you are not sure of the situation at the time the case is filed is to communicate with the Applicant carrier to ascertain its insured's intent and then request a deferment if necessary. Remember, deferments are not automatic, so be sure to clearly explain your

situation and present any evidence you may have to support that position. If your deferment is denied, the case will be heard for liability and damages that same day, so be sure to present that portion of your case as well.

AF would like to resolve as many disputes as we can for our members. However, to do this, both the Applicants and Respondents must provide a clear explanation of the circumstances in the case at hand. By giving the arbitrator(s) what they need, you protect your company, your insured, and this process.

A frequently asked question concerns whether a member may proceed directly in litigation to pursue the full claim amount if it has decided not to accept the policy limits as final settlement. The answer is affirmative. A member does not need to file arbitration only to have the matter removed because of the policy limit exclusion.

Exclusion (e) involves coverage denial situations. A company should base its coverage denial on the fact that the company's policy does not cover the individual or entity seeking coverage for the claim or suit or that there was not a policy in effect at the time of the incident at issue. Before objecting to jurisdiction based on a coverage denial, an insurer should be aware of Rule 2-8 (Chapter 21). If a case is wrongfully removed from arbitration because of a coverage denial and coverage is admitted later, the objecting company must reimburse the other company for legal expenses and any court costs.

Exclusion (f) excludes a claim if litigation was filed before the member signed the respective Agreement. The Agreement takes effect on the date it is signed. It is not to be used as a means to avoid any previous legal obligations including pending litigation. All claim disputes not in suit on the date the company signs the Agreement must proceed in arbitration if the parties are unable to negotiate a settlement.

Exclusion (g) indicates that a party does not have to use arbitration to resolve a dispute if the terms of the insurance policy require the insured's consent to settle. The purpose of this exclusion is to avoid the possibility of the Agreement

interfering with the contractual rights between an insured and an insurer. This exclusion does not completely preclude the possibility of arbitration. A carrier faced with this situation can secure its insured's consent to proceed through arbitration. If the insured agrees, arbitration can assume jurisdiction.

Exclusion (h) exempts watercraft claims that arise from accidents in or on waters subject to federal or international jurisdiction. Watercraft claims are normally restricted to accidents happening on bodies of water that are entirely within the geographic and jurisdictional limits of one state.

Chapter 5

Article Third Decisions

The decision of the arbitrator(s):

- a) shall be based on local jurisdictional law consistent with accepted claim practices.
- b) is final and binding without the right of rehearing or appeal except when allowed under the Procedure Section of the Property and Special Forum rules. However, this does not preclude AF from correcting a clerical or jurisdictional error of an arbitrator(s) or AF staff.
- c) is neither *res judicata* nor collateral estoppel to any other claim or suit arising out of the same accident, occurrence, or event except where an applicant seeks recovery of supplemental damages as allowed under the Awards section of the rules. The decision is conclusive only of the issues in the matter submitted to the arbitrator(s) and only as to the parties to the arbitration. The admissibility of the decision in any other proceeding is not intended, nor should be inferred from this Agreement.

All matters concerning an arbitration proceeding shall be held in strict confidence.

Arbitration Forums' success and its members' confidence depend on application of the proper law. Article Third, (a) asserts Arbitration Forums' requirement that arbitrators base their decisions on the applicable local jurisdictional law.

Arbitrators must consider the AF rules, state regulations and statutes established by legislative bodies, and previous court decisions within their jurisdiction. A member can also use all of the defenses that are available in a court of law, including an affirmative defense. If the courts in a particular jurisdiction recognize the validity of a particular affirmative defense, then the arbitrator must also consider the defense. An arbitrator must place the same emphasis on evaluating defenses pled in arbitration as if they had been raised in litigation.

Article Third in the Special Arbitration Agreement also refers to the arbitrators using "equitable considerations" to make their decisions. Equitable consideration is careful deliberation by the

arbitrator that results in a fair and just decision. This relates primarily to the apportionment of the **settlement** amount paid to the claimant among the parties based on the facts pertaining to their respective liability or coverage considerations.

Several states have enacted *unfair claim settlement practices acts*. These laws and company guidelines provide the basis for establishing accepted claim practices. Since the arbitrators are experienced in claim handling and the use of accepted claim practices, they also apply this knowledge in arriving at their decisions.

Because parties enter into arbitration in dispute, there will be times when claim representatives will not want to accept an arbitrator's decision. However, Article Third, (b) addresses specifically that decisions are final and binding without the right of rehearing or appeal, except in the case of clerical or jurisdictional errors or as allowed under Rule 2-12 in the Property and Special Forums (Chapter 25).

A correction only applies if AF or an arbitrator makes the clerical or jurisdictional error. If a disputing party makes a clerical error, it has no recourse for correcting the error after the hearing. Before the hearing, a party can amend its application or answer.

The purpose of Article Third, (c) is to inform the members about the limitations associated with using an arbitration decision to determine the outcome of other proceedings related to the same event. For that reason, AF declares that its decisions are neither res judicata nor collateral estoppel to other claims or suits arising from the same accident, occurrence, or event. However, the

decision is res judicata to the sole issue of supplemental damages related directly to the original award if the applicant follows the guidelines in Rule 5-3. Otherwise, a party cannot use the decision in any other proceeding.

The last sentence in Article Third stresses the importance of confidentiality in arbitration proceedings. AF, the arbitrator, and all participants must treat all matters connected to arbitration proceedings with strict confidence. This includes sharing the decision with other parties. Since the decision is neither res judicata nor collateral estoppel, there should be no reason to disclose the decision to any other party.

Chapter 6

Article Fourth Non-compulsory Provisions

The parties may, with written consent, submit a claim:

- that exceeds this forum's monetary limit
- where a non-signatory wants to participate
- prior to settlement (Special Forum)
- not included in this or any other existing Agreement (Special Forum)

Once a company gives written consent, all Articles and Rules of the respective forum are applicable, and the company may not revoke its consent.

Article Fourth lists situations that do not meet the criteria for compulsory arbitration but which members may want to arbitrate voluntarily.

The first reason is to resolve a dispute that exceeds the specific forum's monetary limit. With all parties' consent, the panel can arbitrate claims that exceed the monetary limit.

Article Fourth also allows a non-signatory to consent to participate in a specific case with the consent of all signatory parties involved in the dispute as well as the non-signatory party. The requirement that all parties consent in writing prevents nonmembers from "picking and choosing" which cases to submit to arbitration. Because of the compulsory provisions of the Agreement, signatories do not have the opportunity to select cases.

In Special Arbitration, at least one of the disputing parties must settle with the claimant(s) to invoke the Agreement's compulsory provisions. Article Fourth, permits consenting parties to arbitrate a specific underlying issue before settling all claims related to an accident, occurrence, or event. Aside from saving legal expenses, the parties may consent to arbitrate in this situation in order to have certified

arbitrators with insurance experience resolve the dispute, as opposed to a lay jury.

Article Fourth also permits insurers to submit a claim issue not included in any existing Agreement in the Special forum. This provides the parties with an alternative to litigation, even though no specific forum is available for the claim type. If the dispute belongs in another program, participants must use the applicable program.

In either of these situations, each company must consent, and such consent should be included with the filing. This confirms to AF that the company did not file arbitration by mistake. AF prefers that the non-signatory use its company letterhead to give its consent (unless e-mail is used) and that the specific claim and desired forum be stated to avoid subsequent problems. This is particularly important when the non-signatory is a commercial insured that wants to submit its liability deductible/retention to arbitration.

It is very important to note the last sentence of Article Fourth. Once a company agrees to arbitrate the specific claim, it cannot withdraw its consent. It must participate in the arbitration process and abide by the Agreement and Rules.

Chapter 7

Article Fifth Arbitration Forums, Inc.'s Authority

AF, representing the signatory companies, is authorized to

- (a) make appropriate Rules and Regulations for the presentation and determination of controversies under this Agreement;
- (b) determine the location and the means by which arbitration cases are heard;
- (c) determine qualification criteria and provide for the selection and appointment of arbitrators;
- (d) establish fees; and
- (e) invite other insurance carriers, non-insurers, and/or self-insureds to participate in this arbitration program and compel the withdrawal of any signatory for failure to conform to the Agreement or the Rules issued thereunder.

The signatories, directors, officers, staff, agents, and AF employees, as well as the arbitrators, are not liable to and will be held harmless by any party(ies) for any negligence, act, or omission concerning the processing, administration, or hearing of any arbitration conducted under this Agreement.

Article Fifth empowers Arbitration Forums with the authority to administer the arbitration process. All of AF's arbitration agreements contain a similar article. The Board of Directors, representing AF's members, delegates this required authority and power to Arbitration Forums.

Article Fifth (a) permits AF to make the appropriate rules and regulations to perform its duties to resolve disputes among members. To that end, AF recently initiated an effort to simplify, standardize, and streamline its arbitration process wherever and whenever possible. Periodically, based on member feedback, AF updates the rules to reduce ambiguity and simplify the language.

Article Fifth (b) permits AF to select the location of its offices and places to conduct the arbitration hearings. AF's marketing and operations staffs are constantly evaluating and striving to satisfy members' needs. As part of this evaluation process, AF considers the number of filings from a particular area and the availability of certified arbitrators.

Article Fifth, subsection (c) gives AF the authority to determine the qualification criteria to serve as an arbitrator and the manner in which cases are assigned to arbitrators. A major responsibility of being a signatory is to provide qualified arbitrators to resolve the disputes submitted by the other members. To ensure all members benefit equally, AF asks that each hear as many as it files (1:1 Filed-to-Heard ratio). Currently, arbitrators must have at least three (3) years of claims experience and obtain his or her supervisor's approval. Some forums (Property and Special) have mandatory certification for arbitrators.

Article Fifth, subsection (d) provides AF with the authority to establish the arbitration filing fees. The purpose for AF's filing fee is to cover the cost of providing arbitration services from filing to resolution of the dispute. All revenues are expended in providing the best possible service to its members. AF is a not-for-profit organization. Its Board of Directors, consisting primarily of senior claim executives from AF's member companies, must approve any change in the filing fee.

Article Fifth (e) provides authority to encourage membership and participation of property and casualty insurance companies, self-insureds, and commercial insureds with large retentions or large liability deductibles. There are no initiation dues or membership fees connected with becoming a member of the Forum. This subsection also authorizes AF to force a member to withdraw from

the Forum if the member fails to follow the Arbitration Agreement or comply with the Rules.

The last paragraph of Article Fifth contains the exculpatory clause for Arbitration Forums, which protects the named parties from liability on grounds of negligence, act, or omission.

Chapter 8

Article Sixth Membership Withdrawal

Any signatory company may withdraw from this Agreement by notice in writing to AF. Such withdrawal will become effective sixty (60) days after receipt of such notice except as to cases then pending before arbitration panels. The effective date of withdrawal as to such pending cases shall be upon final compliance with the finding of the arbitration panel on those cases.

Article Sixth demonstrates how simple it is to withdraw from an arbitration program. All AF requires is notice in writing from an individual in a senior-level position who has the authority to make nationwide contract decisions on behalf of his or her company.

The withdrawal is effective 60 days after AF receives the notice of withdrawal, except for any case pending arbitration.

A withdrawing company should not file for arbitration during this 60-day waiting period unless it is willing to have the panel hear the case. All cases filed by or against the withdrawing member during the 60-day waiting period are still subject to the provisions of the program, and the member must honor all awards. Once AF closes the last

pending case and the parties comply with the decision and award, the withdrawal becomes effective.

A company cannot withdraw its membership to prevent an arbitrator from hearing a case. The member must request withdrawal in writing, and the arbitrator(s) must hear all pending cases.

Normally, withdrawal is not a result of dissatisfaction, but is due to the member company changing its policy. For example, a member company may merge with a nonmember or change its lines of coverage. Although not mandatory, AF prefers to know the reason for withdrawal. AF can use this information to take remedial actions and/or improve the program for the remaining members, if needed.

Chapter 9

Preamble and Condition Precedent

The following Rules are made and administered by Arbitration Forums, Inc. (AF) under the authority of Article Fifth (a) of the Arbitration Agreements. As a condition precedent to using these Rules, the parties should attempt to settle the subject dispute prior to filing arbitration. The filing company, at a minimum, must list the correct and current address, insured name, and claim file number (or policy number if claim file number is unknown) for the representative/company handling the claim for the adverse party. Failure to list current and correct information may cause a filing to be closed or the decision to be voided.

The Preamble emphasizes arbitration's *condition precedent*. The *condition precedent* is an act that must take place before proceeding with arbitration and using the applicable rules. It has always been the intent that the member representatives attempt to resolve their particular dispute(s) prior to filing arbitration. Arbitration is never intended to be a substitute for negotiation.

When a dispute is submitted to arbitration, AF's minimum requirement is for the filing company to use the responding company's correct and current address, insured name, and claim file number or policy number. The filing company satisfies the condition precedent by using correct and current information.

If the responding company's mailed notification is returned as being undeliverable, with no forwarding address provided, AF will administratively close the case. The filing company will need to submit a new filing using the correct/current address for the company handling the claim for the responding company. A decision may also need to be voided if it is brought to AF's attention following a case being heard that proper notice may not have been given. The responding company may need to supply validation of its correct mailing address; the filing company may need to supply documentation to support its use of the address listed in the filing.

Electronic notification eliminates some of the issues regarding lack of notice, primarily in regards to the address that is used. However, there may still be

issues that cause a decision to be voided. One example is where the filing company selects the wrong responding company. If AF's notification is sent to a completely different company, not just a different subsidiary, AF may have to void the decision. The filing company will need to re-file versus the correct member.

The condition precedent is a bilateral obligation. If AF's notification is the responding company's first notice of the claim, then it should contact the filing company representative and attempt to settle the claim. If the parties fail to settle the dispute, a response needs to be filed by the Materials Due Date posted by AF for the case (see Rule 2-2). The responding representative should also add or correct any missing or erroneous entries when filing an answer.

A frequent question arises when a claim has been assigned to a third-party administrator or some other party. In these cases, the filer should include that person's information (i.e., address, file number) on the filing since this person is handling the claim on behalf of the member.

Additionally, if the matter initiated in AF's E-Subro Hub and moves to arbitration for resolution, the parties' contact information is transferred using the representative Web profile information. As such, it is important that the parties make sure this information is always accurate.

Chapter 10

Rule 1-1 Geographical Jurisdiction

The Agreements limit jurisdiction to accidents, occurrences, or events occurring within the United States, Puerto Rico, and the U.S. Virgin Islands. For PIP Arbitration, jurisdiction conforms to the statute or endorsement giving recovery rights in the state in which the accident occurred (*the program does not apply to claims arising from out-of-state accidents*). For Medical Payments Arbitration, compulsory arbitration is applicable in states where medical payment subrogation claims are permitted by statute or judicial decision.

Rule 1-1 establishes the geographic boundaries for compulsory arbitration. AF's current jurisdiction is the entire United States, Puerto Rico, and the United States Virgin Islands. Unless a local law restricts hearing a case that falls within an Agreement's compulsory provision, AF has the power and right to apply and enforce the Agreement and Rules within these boundaries. For PIP, AF's jurisdiction is limited to those states that allow for recovery rights and is applicable only to claims arising from accidents within the applicable state. AF has the power and right to apply and enforce the Personal Injury Protection Agreement and Rules within these boundaries.

Although AF attempts to hear cases where the incident occurred, jurisdiction can change to

another state if qualified arbitrators are available to resolve the dispute. For example, Florida arbitrators hear cases from Puerto Rico and the Virgin Islands since we do not have hearing facilities outside the 50 states. Regardless of where arbitrators hear the cases, they must apply the correct local law. For claims arising from accidents in Puerto Rico and the Virgin Islands that are heard by Florida arbitrators, it is important that the parties provide applicable statutes and case law.

Further, as noted in Chapter 3, some states have statutorily mandated the use of intercompany arbitration to resolve disputes. Some states have even designated AF as the arbitration administrator. These statutes must be referred to for any questions regarding jurisdiction.

Chapter 11

Rule 1-2 Suit Dismissal and Statute of Limitations

When a matter that should have been filed in arbitration under one of the Agreements is placed in litigation, the party filing in litigation must dismiss/discontinue the suit within 60 calendar days of notification of the adverse party's signatory status. By demanding that the matter be placed in arbitration, the adverse party is affirming that arbitration has jurisdiction over the dispute and thereby waives any affirmative defense regarding jurisdiction once arbitration is filed. If the suit is not dismissed/discontinued, the party seeking removal may be entitled to statutory interests and all costs and expenses the court may deem appropriate. If the applicable statute of limitations has expired, the filing of suit will toll the statute of limitation for 60 calendar days from the suit dismissal/discontinuance. If arbitration is not filed within 60 calendar days of the dismissal/discontinuance, the expiration of the statute of limitations may be asserted as an affirmative defense.

Rule 1-2 addresses the requirement to remove a case from litigation that belongs in compulsory arbitration. The presumption here is that compulsory arbitration is applicable and there is no impediment to jurisdiction. In other words, a responding company cannot demand that litigation be dismissed only to assert an affirmative defense to jurisdiction when arbitration is filed. Any potential challenges to jurisdiction, i.e., coverage issues, need to be resolved prior to the litigation being dismissed.

A filing company must make every effort to determine if the adverse party is a signatory to the applicable Agreement with jurisdiction over the dispute. If legal proceedings have begun and it receives notice that the other party is a signatory to the applicable Agreement, it must withdraw or discontinue prosecution of the case in litigation within 60 days of notification. Discontinuance can include the imposition of a stay of proceedings in litigation, pending resolution of the arbitration, if permitted under local law.

Should litigation not be dismissed/discontinued, Rule 1-2 provides the party seeking removal of the matter from litigation the right to request statutory interests and all costs and expenses incurred. The last five words of the sentence are most important – “the court may deem appropriate.” The recovery of these interests, costs and expenses may only be

done as part of the litigation to remove the matter. They may not be submitted for recovery through an arbitration filing. If a party dismisses or discontinues a suit prior to a ruling by the Court, the party seeking removal is free to continue with its action if only for the Court to consider its request for any interests, costs and expenses.

If the applicable statute of limitations has lapsed while the case is in litigation and the suit is dismissed because arbitration has jurisdiction, the filing company has 60 days to file arbitration to protect against an affirmative defense based on the statute's expiration. The filing of litigation tolls the statute of limitations, but not for an infinite period of time.

We are frequently asked, “What obligation does the party filing litigation have when the matter is excluded from arbitration's jurisdiction per Article Second? Must it file arbitration and have the case removed prior to filing litigation?” The answer is “No.” If a filing company has a claim that exceeds a responding company's policy limits, for example, it can proceed in litigation to recover the full claim amount. As another option, it is free to file in arbitration to have an arbitrator render a decision on liability and/or damages to see if the award exceeds the policy limits. If it does not, the arbitrator will award the proven damages and the parties will reap

the benefits of intercompany arbitration. If the award exceeds the responding company's policy limits and the filing company has not agreed to accept an award up to the policy limit, the arbitrator will close the case, as jurisdiction is lacking. The filing company can then pursue recovery outside of arbitration's jurisdiction.

Another question concerns the scenario when the matter filed in litigation has been heard, i.e., a

default or verdict rendered against the insured. Must arbitration be filed once the insured notifies its carrier of the verdict or default and that carrier notifies the filing carrier that it is signatory? The answer, again, is "No." The filing carrier may file arbitration voluntarily—forgiving the default or verdict against the insured; however, arbitration would not be compulsory at that point.

Chapter 12

Rule 1-3 Monetary Limit

Compulsory arbitration is applicable to a maximum of:

- **\$100,000 Company Claim Amount in the Automobile, Medical Payment, Property, and Uninsured Motorists Forums.**
- **\$250,000 Contribution Sought Amount in Special Arbitration Forum.**
- **The limit governed by the statute or endorsement creating the subrogation or direct-action recovery right in the PIP Forum.**

- a) **AF considers claims for separate parties arising out of the same accident, occurrence, or event as separate claims.**
- b) **AF considers a claim and companion claim(s) for different lines of coverage as separate claims.**
- c) **The legal fees are not considered part of the program limit unless the policy limit includes legal fees.**
- d) **The deductible is not included as part of the Company Claim Amount.**

The purpose of Rule 1-3 is to specify and clarify the respective Forum's monetary limit for compulsory arbitration. Aside from stating the applicable monetary limit, it specifically addresses how the monetary limit relates to different types of companion or related claims; a counterclaim; legal fees arising from the same accident, occurrence, or event; and the insured's deductible interest.

Article Fourth of the various Arbitration Agreements allows the participants to waive the monetary limit should they desire to resolve a dispute in arbitration that exceeds the forum's monetary limit. It is also permissible for the filing company to reduce its claim amount so the matter remains within arbitration's jurisdiction. This might be desirable, for example, if the Company Claim Amount is \$110,000 and it will not be cost-effective to pursue recovery of the difference in litigation. In these cases, if the filing company opts to reduce its damages to resolve the dispute in arbitration, it thereby waives recovery of the balance of the claim and accepts that any negligence found against the responding party will be applied to the Company Claim Amount. So, using the above example, if the Applicant proves negligence at 50% versus the Respondent, the award would be \$50,000, not \$55,000, exclusive of the deductible amount.

The monetary limit applies on a per claim basis rather than an aggregate of all claims arising out of the same accident, occurrence, or offense. In other words, there can be a Company Claim Amount of \$100,000 or less on several claims arising from the same occurrence, and each would be subject to compulsory arbitration. The program monetary limit applies separately to each claim.

The second condition in Rule 1-3 is the claim and companion claim under different lines of coverage. A claim and companion claim are similar to the claim and counterclaim situation. As with the claim and counterclaim, AF considers a claim and companion claim as two separate claims. Therefore, any one claim arising from the same accident or incident cannot exceed the monetary limit of its forum, but the claims combined total can amount to more than the limit. For example, there could be a \$50,000 Automobile Subrogation claim in the Auto Forum and a \$150,000 Special Arbitration claim. Although the total amount sought from the responding member equals \$200,000, AF would still arbitrate the companion filings because the individual claim amounts do not exceed the monetary limit of their respective forums.

Another question often asked concerns Property Subrogation Arbitration and whether an applicant should file one or three separate applications if it has a property claim wherein it has made a payment for the building coverage, one for the contents coverage, and one for the business interruption coverage. These are considered one claim to be filed on one application and would be subject to a single forum limit of \$100,000. If the aggregate amount of these payments exceeds the \$100,000 compulsory limit, the applicant would need to be willing to limit its recovery to the \$100,000 forum limit or secure the respondent's consent to arbitrate the case at the total claim amount. If the applicant were to file them separately, the respondent could assert an affirmative defense that jurisdiction is lacking, since the aggregate amount exceeds the compulsory limit.

An arbitrator can award legal fees, if sought, and the legal fees are not included in the \$100,000 limit unless the policy limit includes legal fees. As

defined, legal fees are attorney fees, court costs, and all other expenses directly related to the prosecution or defense of a lawsuit. An example would be if an Auto applicant has a Company Claim Amount of \$85,000. The applicant also paid \$20,000 in court costs and attorney fees because the responding member raised an invalid affirmative defense against compulsory arbitration (see Rule 2-8). Even though the Company Claim Amount plus the Legal Fees Sought equal \$105,000, Auto arbitration would still be compulsory.

Rule 1-3 (d) further clarifies that the monetary limit for the amount of damages does not include the insured's deductible. For example, a Property applicant has a \$99,000 Company Claim Amount plus a deductible of \$5,000 (total damages are \$104,000). AF will hear the case because the compulsory monetary limit does not include the \$5,000 deductible, and the remaining \$99,000 is within the monetary limit.

Chapter 13

Rule 1-4 Impleading

A responding company may add other members or consenting nonmembers and/or argue the negligence of the unnamed party(ies). Upon receipt of the answer, the filing company may amend its application to add other members or consenting nonmembers or withdraw its application to pursue recovery by other means. If the filing company allows the case to be heard, it thereby agrees to accept the award, if any, against any responding company and waive its right to pursue the balance directly from any other party.

The filing company has the initial obligation, when filing its claim in arbitration, to name all potentially liable parties (members or consenting nonmembers). There may be cases, however, where the filing company either chooses to pursue recovery versus a specific member(s) or is not aware of other potentially negligent parties. Rule 1-4 provides guidance concerning cases involving additional, unnamed parties in arbitration.

The rule permits the responding company to “implead” additional members or consenting nonmembers when it submits its response/answer or argue the parties respective negligence. Impleading is the process whereby a party brings another, previously unnamed party into an action because it believes that party may be, to some degree, liable for the accident, occurrence, or event.

In these cases, the responding company may add the unnamed member or consenting nonmember or simply argue its respective negligence/liability of the unnamed party in its contentions. If another party is brought in (unnamed member or consenting nonmember), the condition precedent will apply to

the impleading party. It must provide current and correct information for the added party.

Upon its receipt of the answer, the filing company may amend its filing to add the member or consenting nonmember (if the responding company did not do so), allow the case to proceed to hearing as filed, or withdraw its filing. If the case proceeds to hearing, the arbitrator(s) will determine the percentage of liability, if any, for all alleged tort feorsors but enter awards only against each named party based on the facts. In other words, the named responding company will only pay the percentage of the award amount, if any, based upon the liability finding against its insured. (This would also apply to an uninsured party, an unknown party such as a phantom vehicle, or a party that cannot be brought into litigation.) By allowing the case to proceed to hearing, the filing company agrees to accept any award against the participating responding companies and waives its right to pursue further recovery from any other party by any means, i.e., re-filing arbitration versus another member, pursuing collections from an individual, or filing litigation versus non-signatory parties.

In the event a potential tortfeasor is not signatory and does not consent to participate in the arbitration or the allegation of another party’s negligence is a surprise, the filing company can also withdraw its filing to pursue all parties in another venue outside of arbitration, such as litigation, or it re-files arbitration at a later date, subject to the applicable statute of limitations.

Chapter 14

Rule 2-1 Filing Process

The filing company initiates arbitration by filing via AF's Web site.

All amendments, reschedule requests, and evidence submissions must be received by the Materials Due Date posted by AF.

Special Arbitration should be filed within 180 calendar days of payment to the claimant or the delay may be asserted as an affirmative defense if it can be shown to have caused prejudice to the party raising the defense.

Rule 2-1 provides guidelines and specifies what actions must be taken by the filing company and by when. Effective October 1, 2012, AF's Online Filing process is the only way that disputes can be filed with AF. The rule also clarifies that all amendments, reschedule requests, and evidence submissions must be received by the case's Materials Due Date. It needs to be noted that while evidence is electronically submitted and can be viewed online, only the submitting party, the assigned arbitrator(s) and AF staff can view it. The adverse party cannot. And, while it is not required for the parties to exchange evidence once arbitration

has been filed, they are free to do so voluntarily to foster a settlement.

The last paragraph is specific to Special Arbitration filings. It specifies a 180-day time period following payment to the claimant. The 180 days is an administrative time limit to expedite the dispute resolution process. This 180-day time limit is not a statute of limitations. If failure to file within 180 days causes a party prejudice, it may plead this as an affirmative defense on the contentions sheet. If the arbitrator determines the delay did not cause prejudice, he/she will decide the matters at issue.

Chapter 15

Rule 2-2 Responding Process

The responding company shall answer via AF's Web site.

The answer, as well as any amendments, reschedule requests, and evidence submissions, must be received by the Materials Due Date posted by AF.

If the responding company has a counterclaim, it must include it when it responds online. It must be heard with the original arbitration case or recovery is barred. The sole exception is where the responding company shows through documentary evidence that payment to its insured was made after the Materials Due Date for the original filing or anytime thereafter. Filing a counterclaim is the only way a responding company may collect its damages from the filing company.

Effective October 1, 2012, AF's Online Filing process is the only way that responses can be submitted to AF. Rule 2-2 provides the responding company with instructions and time limits for replying. AF imposes the time limit to ensure all parties are aware of the disputed issues in advance of the case being heard. Immediately upon the response being submitted, the filing representative receives an electronic notification. The filer will be able to click a link to the case that is embedded in our electronic notice to review and/or print the response, if needed.

The rule also clarifies that all amendments, reschedule requests, and evidence submissions must be received by the case's Materials Due Date. It needs to be noted that while evidence is electronically submitted and can be viewed online, only the submitting party, the assigned arbitrator(s) and AF staff can view it. The adverse party cannot. And, while it is not required for the parties to exchange evidence once arbitration has been filed,

they are free to do so voluntarily to foster a settlement.

If the responding company believes the filing company's insured is at fault or partially at fault, it may file a counterclaim to recover damages paid to its insured. The response with counterclaim must be filed by the Materials Due Date so it is heard with the original claim. The only exception to this requirement is if the responding company can prove that it paid its insured after the Materials Due Date for the original filing or any time after. In these cases, since the original decision "is neither res judicata nor collateral estoppel," the arbitrator must decide the "new" filing on its own merit.

One last note, there typically are no "counterclaims" in Special Arbitration. If Company 2 contributed to the third-party settlement for which Company 1 seeks contribution, it includes its payment information in that filing. If Company 2 seeks contribution on another third-party claim resulting from the same loss, it must submit a separate filing.

Chapter 16

Rule 2-3 Legal Fees

If seeking legal fees, a company must list these amounts or they are waived; the justification for them must be supported in the contentions; and the supports must be listed and submitted as evidence.

Rule 2-3 addresses the *Legal Fees* section of the filing and the need to enter an amount in this section, if applicable. There are only a few instances where legal fees may be sought in intercompany arbitration, and such fees must be “reasonable.”

Under Rule 1-2, if litigation is not dismissed or discontinued within 60 days of the adverse party’s (i.e., defendant’s) signatory status, the defendant is to enforce the Arbitration Agreement through the court and have the court remand the matter to intercompany arbitration. The defendant is also to request the costs and fees incurred to defend the improperly filed litigation. The court will decide if compulsory arbitration applies and if fees and costs are owed. In the rare instance where the litigation is dismissed or discontinued after the 60-day time frame but before the court rules on the issue, the party may request reimbursement of these costs as part of the arbitration dispute.

Rule 2-8 is another scenario where legal fees may be included in an arbitration filing. This is where a Respondent asserts an affirmative defense to jurisdiction causing the case to be removed, only to retract its affirmative defense once litigation is filed. For example, arbitration is filed; the respondent asserts the affirmative defense of denial of coverage; litigation is filed versus the “uninsured” party; the respondent carrier tenders coverage making intercompany arbitration compulsory. The Respondent, in this case, owes the applicant’s legal fees up to the suit dismissal as well as the fee for the re-filing.

The last instance where legal fees may be pursued applies to Special Arbitration. Special Arbitration is

different from the other forums because most times it is a liability carrier filing against liability carrier. Duty, or obligation, to defend is part of the liability policy. In Special Arbitration, a party may recover its legal fees if they are incurred or associated with resolving a dispute that falls within Special’s jurisdiction. For example, if one carrier’s coverage denial results in litigation being filed against another carrier, that carrier can settle the suit and file in Special Arbitration if there is an overlapping coverage issue. The company can include its legal fees that were incurred as a result of the other carrier’s coverage denial. If the arbitrator decides that Company 2’s policy was primary and the denial inappropriate, he/she may award the legal fees in addition to the settlement amount. The same goes for a co-defendant tortfeasor scenario. One carrier denies liability so the claimant files a suit and names an additional tortfeasor. The insurer of the additional tortfeasor can settle the suit and file in Special Arbitration for contribution and include its legal fees. If the arbitrator decides that Company 2 was 100 percent at fault and its liability denial had no merit, he/she can award the legal fees that Company 1 incurred.

In closing, legal fees will be awarded on an “all or none” basis. If the fees were incurred needlessly, they are to be awarded. An exception is when there is concurrent coverage. Here, the defense costs are usually apportioned on a pro rata basis based on the policy limits of each policy. Also, the amount of the fees may not be contested. What one carrier pays its outside counsel versus what another carrier may have paid is not an issue.

Chapter 17

Rule 2-4

Affirmative Pleadings/Defenses

The parties must raise and support affirmative pleadings or defenses in the *Affirmative Pleadings/Defenses* section or they are waived. If a denial/disclaimer of coverage is being pled (see definition of Denial of Coverage (b)), the case will be administratively closed as lacking jurisdiction so long as a copy of the denial/disclaimer of coverage letter to the party seeking coverage for the loss (i.e., alleged negligent party) is provided as part of the evidentiary material submitted. If no such letter is provided or where the issue concerns concurrent coverage (Article First (b), Special Arbitration Agreement), the case will be heard and the arbitrator(s) will consider and rule on the coverage defense.

It is critical for the parties to note if the case involves an Affirmative Pleading or Affirmative Defenses. Rule 2-4 requires the use of the specific section when a party asserts either. This ensures the parties are aware of any issues regarding jurisdiction and, equally important, alerts the arbitrator. An arbitrator may consider only affirmative pleadings or defenses included in the Affirmative Pleading/Defense section, and nowhere other than this section.

Affirmative pleadings include issues or legal doctrines that could change the allocation of damages (like bailment or joint and several liability) or reinforce the filing company's position of liability (like *res ipsa loquitur*). The filing company presents its liability theory in its contentions, but the existence of an available pleading could define the amount of the award if liability is found, or emphasize the responding company's legal duty in the case. For example, the filing company's contentions present the theory that the responding company's insured contributed to the accident that caused its damages, and bailment is asserted as an affirmative pleading specifying that if a percentage of liability is proven versus the responding company's insured (based on the applicable jurisdictional joint and several liability law), the filing company is entitled to an award of X percent of its damages. If proven, the applicable percent will be awarded.

An **affirmative defense**, on the other hand, is any issue that does not address the dispute itself (i.e., negligence or damages owed), but rather raises issues that may be impediments to the arbitrator's right to consider the dispute itself. An affirmative defense goes to jurisdiction. Regardless of who is at fault or what damages are owed, the case cannot be heard because arbitration lacks jurisdiction over the matter. Affirmative defenses include legal bars to a right of recovery (like the expiration of the statute of limitations), the exclusions listed in the Agreement's Article Second (non-signatory party, action does not exist in law or equity, policy limits), and other specific rules like 2-11.

It is incumbent upon an applicant with a novel theory of liability to establish the existence of the cause of action or liability in the jurisdiction through citation to controlling statutes or judicial decisions. Failure to establish the existence of the cause of action or liability in the jurisdiction is grounds to deny the arbitration.

Another example of a legal bar to a right of recovery that would be asserted as an Affirmative Defense is a verbal or monetary threshold for a BI settlement in a PIP state. If a claimant would not be entitled to a third-party settlement because a threshold was not met, an award could create a cause of action that does not exist in law, making the dispute subject to exclusion (b) in the Arbitration Agreements. Thus, this would be raised

as a challenge to arbitration’s jurisdiction in the Affirmative Defense section of the response.

In addition to specifying how an affirmative defense must be raised, Rule 2-4 specifies what evidence must be provided if denial/disclaimer of coverage is asserted. The evidence is a copy of the denial/disclaimer letter to the specific party seeking coverage for the loss under the responding company’s policy (i.e., alleged negligent party).

First, let’s look at **to whom the denial letter should be addressed**. The rule says the denial letter is “to the party seeking coverage for the loss,” not “to the Named Insured.” This is significant because the named insured is not the only entity who may be looking for coverage under a policy and for whom coverage is being denied. For instance, in the case of a non-permissive driver, the driver is a potential “insured” under the policy and it is coverage for his/her liability that is being denied. The named insured, in most situations, is still fully covered, so a letter to him/her is information about a denial of coverage—it is not the actual denial. It is the non-permissive driver who has personal liability in the absence of coverage, and it is he/she to whom coverage must be denied. In short, the denial of coverage letter must be addressed to the party for whom coverage is actually denied, not the named insured whose coverage is still available. The named insured may well be interested in the information, but is not directly affected because his/her coverage is usually intact.

Please note also that since the denial letter should be addressed to the individual or entity for whom coverage is denied, indication that that entity was only copied in on a letter addressed to the named insured or someone else regarding the denial is not sufficient for purposes of this rule. In limited situations, an insurance policy may not afford coverage in these theft, non-permissive use scenarios. If that is the case, the proper Affirmative Defense and supporting documentation must be submitted for the arbitrator’s review. A basic question to ask regarding this situation is, “Does your policy provide defense to the insured if taken into litigation?” Do you affirmatively deny all coverage to this insured, meaning the Applicant needs to pursue them directly? If so, your

Affirmative Defense and supporting evidence should clearly reflect that.

Further, in some situations, there could be allegations in the contentions against both a driver and the named insured, such as for leaving his/her keys in the car or elsewhere a non-permissive user had easy access to them. In that instance, coverage must still be denied to the driver for his/her negligent driving and an affirmative defense raised, but there may well be coverage for the named insured’s alleged negligent act. Therefore, the affirmative defense would not allow the case to be withdrawn, and the case would be heard, but **ONLY** for the alleged negligence of the named insured, i.e., the party for whom coverage has NOT been denied.

Lastly, we periodically see “conditional” denials that leave an opening for the insured to call and/or cooperate and get coverage for the accident. The letter may start out using denial language but ends up with an offer to reconsider if the insured cooperates. These are not accepted as denials. To be accepted as a denial of coverage letter, the letter must affirmatively deny coverage. Another way to look at it is, if the coverage defense is upheld and it is determined that arbitration lacks jurisdiction, the filing company would be free to pursue litigation versus the “uninsured” tortfeasor.

The second issue concerns **when a denial of coverage letter is needed**. The answer is basically any time it is possible to send it. Obviously, if the non-permissive user is unidentified, as in the instance of a stolen vehicle, a letter cannot be sent to him/her. Likewise, if no policy exists for the alleged insured, and the insurer has no information about him/her, a letter cannot be sent. In most other situations, as long as the entity for whom coverage is being denied is identified, a copy of the denial letter to him/her should be provided. If no denial of coverage letter has been sent to the insured, the respondent should proactively address the lack of same for the arbitrator to consider as part of the affirmative defense.

Raising an affirmative defense does not mean that such defense is necessarily valid. The party must also explain the grounds for the defense and submit evidence to prove it. A party should also complete

the entire filing even when raising an affirmative defense, as the arbitrator(s) could deny it and continue to hear the case.

Another issue that may arise in product liability cases is **spoliation of evidence**. Spoliation of evidence is a doctrine that essentially means that evidence that is crucial to proving a party's position was destroyed or made unavailable by one party to the detriment of the other. It might be raised as an Affirmative Pleading by the filing party or as a defense to the allegations or an Affirmative Defense by the responding party. Since both are important to arbitrators, we will address spoliation from the perspective of both parties.

By raising spoliation of evidence as an Affirmative Pleading, the filing company is asking the arbitrator to take into consideration its assertion that the responding party made it impossible for it to prove its case by destroying or making critical evidence unavailable to it. The filing company would have to establish through its evidence that the responding party did in fact improperly dispose of the evidence. Beyond that, there are two ways this pleading could be important. In some states, the filing company could provide proof of statutory or case law that essentially alters the burden of proof in the case of spoliation by imposing a rebuttable presumption against the party responsible for the spoliation. In other words, if spoliation is established, the burden of proof is automatically on the company that was responsible for the spoliation, though it may bring evidence to disprove the other party's position. In the absence of such clear legal support, the filing company could prove that "but for" the spoliation, it

likely would have been able to prove its case and was prevented from doing so by the actions of the responding company. It would be up to the arbitrator to decide whether it established that.

Spoliation of evidence is similar for the responding party, with the addition of Rule 2-11 that applies only to Product liability cases that provide a bar to jurisdiction if a filing company fails to provide "reasonable accommodations" for inspection of the alleged defective product to the responding company. In other kinds of cases, if there is statutory or case law as described above, spoliation might be raised by the responding company as an Affirmative Defense under exclusion b, in the basis that there is no cause of action in law for the claim. However, in the absence of this clear legal defense, spoliation that doesn't fall under Rule 2-11 is not a bar to jurisdiction and thus not an Affirmative Defense. However, it could be a defense to the allegations. The responding company would have to establish that the filing party made the critical evidence unavailable to its detriment and that but for the spoliation, it would likely have been able to prove its case. Again, it is within the arbitrator's discretion to decide whether the evidence proved that.

The important point, whether it's raised by the filing or responding company, is that in the absence of statutory or case law, spoliation doesn't automatically mean anything, and its effect on the case must be proven by the party that raises it.

Chapter 18

Rule 2-5 Disputing Damages

If a responding company disputes damages, it must present all damages arguments and disputed dollar amounts, if known, in the Dispute Damages section. Damages arguments raised in any other section will not be considered by the arbitrator. This includes, but is not limited to, issues such as repair and/or rental amounts, causation, and partial exclusions.

Like the Affirmative Defense section, the purpose of the *Dispute Damages* section is to clearly communicate to the filing company and arbitrator that damages are being disputed.

The filing company itemizes the various payments it has made. The AF online filing process handles this easily by asking for the dollar amount for each damages type selected, i.e., auto collision, rental, towing/storage, as well as any prior partial payments received from the responding company. The damages information is then properly listed in the Damages section. When determining if damages were proven, the arbitrator can compare the Company Claim Amount to the itemized amounts and the damages evidence. For example, if the filing company lists a Company Claim Amount of \$2,700, the arbitrator can verify that this is comprised of a collision payment of \$2,300 and a rental payment of \$400, and that these damages items are supported by evidence, i.e., estimate, rental invoice.

If the responding company disputes the damages claimed, it must clearly outline its position in the Dispute Damages section. It should also provide its itemization of damages to show the amount that it feels the settlement should be. Using the example above, if the responding company feels that \$400 of the collision damages were prior damages and that rental should only be \$300, it would present its damages argument and provide its itemization. For example, “Based on the prior damage and excessive

rental, we believe we only owe \$1,900 collision plus \$300 rental for a total of \$2,200.”

It must also be stressed that if the Dispute Damages section is blank, damages are not at issue; the arbitrator will only verify that the filing company’s itemized amounts are supported by the evidence submitted by the Applicant. The arbitrator will not review whether the payments were appropriate, reasonable, excessive, etc.

In Property, a Respondent may need to raise the issue that part of the claimed damages (for instance work product or costs related to mold) are not covered under its policy. These issues can be raised as a challenge to damages in the Dispute Damages section or as an Affirmative Defense, since it could be a partial bar to jurisdiction for these damages. For example, claimed damages for a water loss include \$3,500 for repairs to the building; \$700 for personal property; and \$1,200 for mold remediation. The Respondent would raise the issue of its mold exclusion, and when possible, itemize the amount of the excluded damages in the Dispute Damages section. The arbitrator can then consider the payment supports from the Applicant and if liability is established, adjust the award for those excluded damages.

In these cases, the Respondent could also implead/add the other carrier or the Applicant can withdraw the arbitration and pursue recovery of the full claim outside of arbitration.

Chapter 19

Rule 2-6 Companion Claims

All companion claims will be heard together if

- (a) they are related by the parties online or**
- (b) the parties notify AF of the relationship prior to one of them being heard.**

It is AF's intent to hear all related, or companion, claims that arise from the same accident, occurrence, or event at one hearing. This ensures consistent decisions and eliminates the time and cost of having multiple hearings to resolve multiple claims arising from one loss or accident. That said, it is not required that companion claims be heard together, nor is a companion claim barred from being filed if it is not heard with an initial filing, like a counterclaim is.

Per the AF Definitions, a companion claim is any additional claim(s) by or against a participating party arising out of the same accident, occurrence, or event, which falls under the same or another AF compulsory forum. Examples include:

- An applicant files an Automobile and PIP application seeking recovery of its automobile physical damage claim and injury claim.
- An applicant files an Automobile application versus two respondents and one

of the respondents files an Automobile application versus the other respondent only. (If the applicant is included, this would constitute a counterclaim, not a companion claim.)

In order for companion claims to be heard together, they must be related online by the parties, or, if the relationship becomes known after they are filed, the parties may contact AF to have them related and heard together. It is not acceptable to note a relationship using the "Administrative Request" area or Contentions, as these fields are not viewed until the hearing.

If neither step is taken and the companion, or related, filings proceed to hearing separately, the decisions will be binding even if they are inconsistent. Only with the consent of all parties can the decisions be voided and the matters scheduled to be reheard together.

Chapter 20

Rule 2-7

Pre-hearing Settlement

The filing company must immediately withdraw its application online if the dispute is resolved or immediately notify AF. Upon notification, AF will withdraw the case from arbitration.

Rule 2-7 is straightforward and advises the filing company to immediately withdraw its filing if settlement is reached with the responding company prior to the case being heard. This prevents the needless hearing of a case when the parties have amicably resolved the dispute and helps reduce case cycle time by ensuring arbitrators are hearing only disputed claims.

The filing company can easily withdraw its filing online by selecting “Withdraw Docket” under Docket Actions.

It should be noted that AF *cannot* withdraw/close a filing based upon the responding company’s request. Only the filing company can withdraw its filing. If payment has been made in full to the filing company and the case is not withdrawn by the filing company, the responding company should submit a response and include proof of payment to the filing company to support its case.

Chapter 21

Rule 2-8

Case Restoration after Improper Objection to Jurisdiction

If the responding company pleads an affirmative defense and AF or the arbitrator(s) closes the case based on no jurisdiction and it is subsequently discovered that arbitration was properly filed, the filing company may re-file the case in arbitration. The responding company will reimburse the filing company for all reasonable legal expenses and court costs resulting from the improper objection to jurisdiction, as well as the additional arbitration filing fee.

Rule 2-8 cautions the responding company about the penalties associated with raising an improper affirmative defense that removes a case from arbitration's jurisdiction when jurisdiction existed. It also gives the filing company the right to recover any reasonable legal fees and court costs it incurs because of the improper assertion of an affirmative defense.

For example, when a respondent asserts "no coverage," AF accepts this in good faith and closes the case. The applicant is free to pursue the "uninsured" party or another liability carrier, if applicable.

If, through litigation, it is determined that the original filing was proper and that the case was closed in error (i.e., there is coverage), the filing company will re-file arbitration. If it incurred legal expenses due to the initial removal of the case, it is entitled to recover these expenses. If not reimbursed by the responding company, the filing company may list these expenses in the *Legal Fees* section of the application, outline why they are being sought in its contentions, and provide evidence/proof to support the amount.

Chapter 22

Rule 2-9 Reschedule

Each party is permitted one reschedule of the Materials Due Date if selected

(a) by the Materials Due Date or

(b) within three business days after the Materials Due Date, so long as the party has already submitted its documentation pursuant to Rule 2-1 or Rule 2-2.

AF will notify all parties of the new Materials Due Date. Additional reschedules may be granted with consent of all parties; AF will charge the requesting party a fee for any additional reschedule requests.

Companion cases that are related to be heard together will be treated as one claim (i.e., one reschedule per party for all cases).

While AF strives to provide the most efficient process possible, we understand there will be times when a party needs additional time to prepare and/or submit documents. There are also times when a responder introduces new information in its answer and the filing party wishes to amend its submission. Rule 2-9 was implemented to address these membership needs.

Each party is allowed to reschedule a case once, so long as requested by the Materials Due Date, or within three business days after the Materials Due Date so long as the party has already complied with Rule 2-1 or 2-2.

The reference to Rules 2-1 and 2-2 is important because it describes the proper process and timeframes to provide supporting documents or respond to a case. If a party has not provided all of its documents by the Materials Due Date, it may not use Rule 2-9 to overcome the failure to meet that deadline. However, any time up to the Materials Due Date, a party may the case.

If an additional reschedule is needed, AF will allow it only if all parties consent. In this situation, the requesting party will be assessed a fee that is double the applicable forum's filing fee.

Chapter 23

Rule 2-10

Deferment

Each party may request a one-year deferment and must provide the basis for the request in the Deferment Justification section. There will be no fee for an initial deferment request.

Deferment requests by the filing company will be automatically granted. A responding company may challenge the request if it believes the delay is not warranted. If challenged, the case will be heard and the arbitrator(s) will consider the validity of the request. If the request is upheld, the case will be deferred for one year from the date of filing. If the request is denied, the arbitrator will continue to hear the disputed issues.

Deferment requests by a responding company will be automatically challenged and the same process as outlined above will be followed.

Companion cases that are related to be heard together will be treated as one claim (i.e., a deferment request applies to all related cases).

Any subsequent deferment requests will follow the above procedure. AF will charge the requesting party a fee for subsequent request(s).

An affirmative defense is waived if it is available when the deferment request is made but is not asserted. This does not prohibit the responding company from subsequently asserting an affirmative defense at the time it becomes available.

Rule 2-10 accelerates the dispute resolution process by expediting a case to hearing and precludes any unnecessary delay. A deferment is a postponement of a hearing for a one-year period from the date of filing.

The requesting party should base its Deferment Justification on a situation that will, ultimately, have an impact on the arbitration process as it relates to the specific case. For example, the party has a companion claim or suit in litigation and does not know if the verdict will exhaust the policy limits. In another example, there is a companion claim in litigation and the litigants are involved in the discovery of evidence. The party requesting the deferment wants to use information from the discovery process to support its arbitration claim.

The requesting party must **prove** the deferment is necessary, showing that the companion claim or suit exists and will have an impact on the arbitration case. This can sometimes be difficult to prove. The presence of a suit does not immediately infer that the parties will gain additional information when the suit is resolved that will be helpful in the arbitration proceeding. Conversely, the arbitration decision will not affect the court decision because the Arbitration Agreements (Article Third) specifically state that arbitration decisions are neither *res judicata* nor *collateral estoppel*.

A party requests a deferment by checking “*Yes*” to “*I request One-Year Deferment*” **and** providing the rationale for the deferment in the Deferment

Justification field.

A deferment request by the filing company is automatically granted. It is presumed the filing company has a valid reason to delay the arbitration. Most often, it has filed arbitration simply to toll the statute of limitations and protect its interest on its claim until other issues are resolved. The responding company may, however, challenge the deferment request if it believes the delay is not warranted or needed.

A deferment request by the responding company is automatically challenged. The case will proceed to hearing as originally scheduled.

When a deferment is challenged – either by request or automatically – the arbitrator will consider the Deferment Justification and any arguments against it, as well as any evidence in support of the respective position, and determine whether the deferment is valid. If valid, the case will be restored to deferred status for one year from the date of filing. AF will notify the parties when the case is returned to “Ready to Hear” status. Another deferment may be requested at that time, if needed, and the same process as outlined above will follow. If the deferment request is deemed not valid, the arbitrator will continue to hear the case in its entirety, resolving any disputed issues (i.e., liability and/or damages). Therefore, the parties should provide all arguments (liability and/or damages) and evidence, as the case could immediately be heard to a conclusion.

If during the one-year deferment period it is determined the deferment is no longer needed, the party requesting it is to notify AF so the case can be scheduled to be heard. It is also strongly

recommended that the party amend its response, if necessary, to address an affirmative defense or other issue that the deferment resolved. For example, a responding company requests a deferment to postpone the arbitration hearing because of a policy limit issue; the filing company’s claim is for a portion of the policy limit, but other potential claimants exist (i.e., multi-vehicle accident). Hopefully, all claims are settled on a pro-rated basis during the deferment period. If not, the responding company would amend its response to remove the deferment request (this would schedule the case for hearing). In addition, it should amend its response to assert the affirmative defense of policy limits, if the amount sought by the filing company exceeds the amount remaining.

A responding company also has an obligation to raise any objection to jurisdiction as an affirmative defense in its answer even if it or another company has requested a deferment. This allows the filing company to seek other means for recovery if a valid objection to jurisdiction exists. There is no need to delay the arbitration proceeding. When a company raises a jurisdictional issue, the arbitrator will consider the jurisdictional question first. If the arbitrator determines AF has jurisdiction, he/she will then consider the deferment request. If the arbitrator upholds the affirmative defense and decides AF does not have jurisdiction, it will withdraw the case. AF cannot defer a case over which it has no jurisdiction.

No fee is charged the requesting party for the initial deferment request. However, a fee equal to double the applicable forum’s filing fee is charged for subsequent deferment requests.

Chapter 24

Rule 2-11

Product Liability Evidence

For Product Liability cases, reasonable accommodations should be made for the inspection of the alleged defective product(s). Failure to do so may result in case withdrawal if raised as an affirmative defense and proven to be critical to the defense of the claim.

Intercompany arbitration is designed to provide a fair and neutral means for resolution of disputes between/among signatory companies. For product liability cases, Rule 2-11 assures that the responding company has been given a reasonable opportunity to inspect the allegedly defective product in order to prepare its defense.

Reasonable accommodations must be made by both the filing and responding company. It is not always the requirement that the responding company go to the alleged defective product. In certain situations, it may be more reasonable for the filing company to send the product to the responding company.

If the responding company has requested but has not been given a reasonable opportunity when such inspection is critical to its defense of the allegations made against its insured, it would be unfair for the arbitrator(s) to proceed with only the filing company's description of the defective product to consider. However, if "reasonable accommodations" have been made for the responding company to inspect the product and it chose not to do so, the rule will not protect the responding company and will not prevent the case from being arbitrated.

A question that may arise is, "If the Arbitrator grants an affirmative defense based on Rule 2-11 (reasonable accommodations for the inspection of a defective part were not made), would the filing company be able to file the case in litigation?"

In these cases, the filing company would have two options. First, it could re-file arbitration if/once reasonable accommodations for the inspection of the defective part were made as a result of the arbitrator's decision (since the objection to jurisdiction would then be removed). If reasonable accommodations could not be made, i.e., the defective part is not available for inspection, then the filing company would be free to pursue the matter outside of arbitration. The rationale for this is that the courts have more formal rules of evidence for these types of situations.

Please see Chapter 17, page 33, for discussion on spoliation of evidence.

Chapter 25

Rule 2-12

Appeal Process (Property and Special Forums)

Any party that participated in the original hearing may appeal a decision in the Property and Special Forums so long as the *Company Claim Amount* is \$25,000 and above (Property); the *Total Settlement Amount* is \$100,000 and above (Special).

(a) The appeal indicating the basis for the appeal and a brief statement regarding the alleged error by the original panel must be submitted via AF's Web site within thirty (30) calendar days of the decision publication date.

(b) AF will notify the adverse party which will have thirty (30) calendar days from AF's notification to submit its response to the appeal. A party waives its right to respond if its response is not timely received.

(c) AF will have the original file, decision, and appeal positions reviewed by a new three-person appeal panel. No arbitrator from the original panel will sit on the appeal panel. No additional documentation or evidence is allowed. No personal appearances (i.e., company representative, witness, expert) of any type (i.e., telephone, videoconferencing, etc.) are allowed, even if such appearance was made when the case was originally heard. The appeal panel will review only the original file, decision, and the appeal positions.

(d) The appeal panel's decision will be final and binding with no right to further review, appeal, or inquiry.

AF will charge a substantial, non-refundable fee to the party filing the appeal.

AF's member companies desire and appreciate an arbitration process that is expeditious and provides a binding resolution of their claim disputes. This is especially true for disputes involving low claim dollars and/or minimal complexity. In 2004, a concern was raised about the final and binding nature of decisions when they reveal an error of fact or law was made by an arbitrator. This concern was specific to claims involving higher dollar amounts and/or complexity filed in the Property and Special Arbitration forums. In response, AF drafted the criteria and procedure to appeal a decision in the Property and Special forums. It must be emphasized that the appeal process is not intended to simply facilitate another chance to prevail. The basis for an appeal under Rule 2-12 must be an actual error of

fact or law by the original panel. Examples include, but are not limited to, the erroneous interpretation of submitted case law or evidence, determination of coverage, or damages awarded.

The right to appeal a decision is limited to those parties that "participated" in the original hearing. In other words, if a Respondent (or Company 2 in Special) did not respond, it may not appeal the decision afterwards.

To appeal a Property decision, the Company Claim Amount must be \$25,000 or above. To appeal a Special decision, the Total Settlement Amount must be \$100,000 or above. In addition, the appealing company must submit the appeal via AF's Web site

within 30 days of the decision publication date and must pay a non-refundable fee for the appeal. (AF's current fee schedule is available at www.arbfile.org.)

In situations where there are related cases (i.e., companions and/or counterclaims), only those cases that meet the monetary limit will be subject to appeal, and the appeal fee will be applied to each case for which an appeal is requested.

The appealing party must file the appeal via AF's Web site providing its contact information, as well as the docket number of the decision being appealed. The appealing company will select the basis for the appeal (Request Type) and provide a brief description of the alleged error by the arbitrator(s). The intent of the appeal submission is to concisely capture the basis for the appeal without allowing for further arguments and/or discussion of the party's position.

Upon receipt of the appeal, AF will notify the other participating parties. Each will have 30 days from AF's notification to submit its position on the appeal. AF will not reschedule an appeal hearing; an adverse party waives its right to respond after the 30-day time limit expires.

After the time limit expires, AF selects a new panel, not including any arbitrator from the original panel, to sit on the appeal panel. The appeal panel will consider the original file, decision, and appeal positions to determine if an error was made. A party cannot submit new evidence, present new witnesses, or appear before the appeal panel. The appeal panel will either affirm the original decision or render a new decision if it believes an error of fact or law was made by the original arbitrator/panel. The appeal panel's decision will be final and binding without the right of rehearing or further appeal.

Chapter 26

Rule 3-1

Notice of Hearing

AF will notify the parties at least 30 calendar days prior to the initial Materials Due Date and of any subsequent changes. For Special Arbitration cases, AF will give notice at least 50 calendar days prior to the initial Materials Due Date.

Rule 3-1 establishes the time frame for notifying all disputing parties of the filing and Materials Due Date.

AF notifies the parties at least 30 calendar days prior to the Materials Due Date. AF relies completely on the accuracy of the Respondent information provided by the filing company in compliance with the condition precedent, especially the address. For this reason, if AF's mailed notification is returned as being undeliverable, with no forwarding address provided, AF will administratively close the case. The filing company will need to submit a new filing using the correct/current address information for the representative/company handling the claim for the responding company.

Likewise, if the filing company selects the wrong responding company and AF's electronic notification is sent to the wrong party, AF will close the filing or void the decision. The filing company will need to re-file versus the correct responding company.

The notification provides a level of protection for the responding company. It provides notification that arbitration has been filed against it and the date that its answer and evidence items must be submitted/received. If the notice is the responding company's first notice of arbitration, it should immediately review the case online. If additional time is needed to prepare and submit its response, it should reschedule the case online contact AF about securing a reschedule of the hearing per Rule 2-9.

Chapter 27

Rule 3-2 Failure to Answer

A case will be heard even if a responding company fails to answer.

Rule 3-2 clarifies and strengthens the time restrictions imposed on the responding company to answer by specifying that its failure to respond in a timely manner will not delay the hearing.

Rule 2-2 establishes that the response must be received no later than the specific Materials Due

Date posted by AF for the case, and that documents not received by this deadline will not be made available at the hearing. Per Rule 3-2, the failure to comply will not postpone the hearing of the case either. The arbitrator(s) will decide the case based only on the documentation submitted in time, even if only the filing company's.

Chapter 28

Rule 3-3

Arbitration Panel Size

One arbitrator will hear a case unless a three-person panel is requested based on the following limits:

Automobile, Medical Payment, or PIP Forum – Company Claim Amount of \$7,500 and above.

Property or Special Forum – Company Claim Amount, or Contribution Sought, or Legal Fees Sought of \$15,000 and above.

A party requesting a three-person panel will be charged a three-person panel fee.

When companion cases are filed in multiple forums and a three-person panel is requested, the following forum order will be used to determine which monetary limit applies: Special, Property, PIP, Med Pay, Auto.

One arbitrator typically hears a case; however, the parties have the right to request a three-person panel, if desired. To ensure three-person panels are not requested on low-dollar claim disputes, Rule 3-3 establishes monetary limits to request a three-person panel.

To request a three-person panel, a party **must** select the “Request three-member panel” prompt online or on the application, depending on filing method used. (This prompt does not appear online if the above monetary limit is not met.) AF will charge the requesting party a fee, which varies by forum. For example, in the Auto Forum a single fee is charged, while in the Special Forum a per-arbitrator fee is charged. Refer to the Fee Schedule on AF’s Web site for more information: <http://www.arbfile.org/webapp/pgStatic/content/pgFeeSchedule.jsp>

In addition, AF recognizes, in most instances, the disputing parties will want companion claims heard

together. This ensures consistent decisions because the same arbitrator(s) views the same facts and evidence from a perspective of all issues. In order for that to occur, the last paragraph was included in Rule 3-3. When a party files a companion case from Automobile or another AF program with a Special or PIP Arbitration case, the rules governing the Special or PIP case will have jurisdiction over all of the cases, including the number of arbitrators who will hear the case.

For example, if a party requests a three-person panel hear a \$10,000 Special case and a \$10,000 Auto companion case, AF will not be allowed to comply with the request. This is because the Special forum’s rules control the cases and the Special case does not meet the \$15,000 monetary limit for a three-person panel. In these situations, the parties are free to separate the cases or have them heard separately if they want one case heard by a three-person panel. As noted above, this may result in inconsistent decisions.

Chapter 29

Rule 3-4 Adjournments

The arbitrator(s) may grant an adjournment for cause or to request briefs of law or clarification of submitted materials (including policy limits issues). AF will notify the parties of the new Materials Due Date for the requested item(s). If the requested item(s) is not received by the Materials Due Date, the case will be heard without them.

An adjournment is an interruption of a hearing at the arbitrator's(s') discretion for a maximum of 30 days. The determination of "cause" is at the arbitrator's discretion. Clarification concerning a policy limits defense would be one reason to adjourn the hearing. For example, the responding company asserts the affirmative defense that it has policy limits and that additional claimants exist. The arbitrator could adjourn the hearing to get more information regarding the additional claimants (i.e., number and claim amounts) to better determine if the affirmative defense of policy limits is applicable.

To avoid any unnecessary delay, it is highly recommended that a company submit evidence to support all references to local statutes and case law. This will allow the panel to properly review this material and review the actual statute or case law.

If a particular statute is cited in the contentions and the arbitrator(s) needs clarification of the statute, the arbitrator may request an adjournment, and AF will reschedule the case. This also applies to the clarification of any information included in the case file. For example, an arbitrator is not sure if he understands a critical graph included in an expert witness statement. The arbitrator can adjourn the case and request a more complete explanation of the graph.

If an arbitrator adjourns a hearing, AF will notify all parties of the new Materials Due Date and the information/documentation that the arbitrator requests. If AF does not receive the requested documents by the due date, the case will proceed to hearing, and the arbitrator will render a decision based on the available file material.

Chapter 30

Rule 3-5

Requirements for Arbitrator Consideration

The arbitrator(s) may only consider:

- a) **Affirmative pleadings or affirmative defenses included in the *Affirmative Pleading/Defense* section.**
- b) **Deferment requests that are supported in the *Deferment Justification* section.**
- c) **Evidence listed.**
- d) **Amount entered as the *company claim amount, contribution sought amount, and/or legal fees*.**
- e) **Disputed damages if specifically pled in the *Dispute Damages* section.**

Rule 3-5 outlines specifically what an arbitrator may and may not consider, such as affirmative defenses, deferments, evidence, dollar amounts, and damages contested. It is the party's responsibility to bring these items to the arbitrator's attention if they apply to the case.

Rule 3-5, subparagraph (a) pertains to presenting an affirmative defense. An arbitrator *cannot* raise an affirmative defense for a company. A company must assert the defense in the *Affirmative Defense/Pleading* section and list and submit evidence to support it (Rule 2-4). The arbitrator must decide if an affirmative defense or pleading is valid before beginning to decide the liability and/or damages issue(s). It is a good idea for a company to complete the entire filing, including its *contentions* and *evidence* as though the defense or pleading does not exist. If the arbitrator denies the affirmative defense, the hearing will continue, and the arbitrator will decide the liability and/or damages issue(s).

The second item for consideration in Rule 3-5 regards presenting a deferment request or challenge to ensure the arbitrator's(s') consideration. If a company requests a deferment, it must provide rationale for the request in the *Deferment Justification* section (Rule 2-10). The same applies to any involved company that wants to challenge a deferment request. The company with the objection

must also include its rationale in the *Deferment Justification* section.

Rule 3-5, subparagraph (c) advises each disputing party that it must list its evidence in the *Evidence* section for an arbitrator to consider it. Even if a case is to be represented in person, the party must still list and submit its evidence. The Arbitration Agreements and Rules do not mandate a discovery process for evidence. The evidence listed on the contentions sheet is the only way for each company to know what another company is presenting to the arbitrator. The arbitrator(s) matches the evidence list with the attachments and verifies that the evidence supports the allegations and/or defenses. The arbitrator(s) will not consider unrelated evidence that does not support the contentions or new evidence a company does not list on the contentions sheet. The arbitrator will not consider evidence if it is not listed. This helps to guard against "surprise" evidence influencing the arbitrator(s).

Subparagraph (d) warns that the arbitrator will only consider the amounts listed in the *Company Claim Amount, Contribution Sought Amount, and Legal Fees* sections of the application. These entries are critical for the arbitrator to render an accurate award. There will not be an award if these entries are left blank. These amounts are the basis for the

arbitrator's(s') award computation. The *company claim amount*, *contribution sought amount*, and *legal fees amount* take precedence over the *damages amount* if there is a conflict between the entries. For example, if the filing company lists its company claim amount as \$2,000 but its itemization in the Damages section suggests its damages equal \$20,000, the arbitrator's award will be controlled by the company claim amount. So, if 100 percent liability is proven and all damages proven, only \$2,000 will be awarded.

Rule 3-5, subparagraph (e) provides the requirements for having an arbitrator consider contested damages. For example, a responding

company may disagree with the filing company's appraisal as to the amount of damages used to determine the *Company Claim Amount* in the Auto Forum and can make the amount of damages an issue. To do so, the responding company must clearly outline the specific damages and amounts it is disputing in the Dispute Damages section (Rule 2-5). It is strongly recommended that the responding company provide an itemization of its damages position, if possible, to ensure the most accurate award. If the responding company disputes a portion of the repair work done and/or the number of rental days, for example, it should argue this point and provide the dollar amount that it believes is warranted.

Chapter 31

Rule 3-6 Hearing Informality

Procedure at arbitration hearings is informal and confidential. Formal rules of evidence do not apply. No recording of the proceedings, in any manner, is allowed.

Rule 3-6 establishes that arbitration hearings are informal. The arbitrators do not adhere to strict rules of evidence, and there is no discovery process. The arbitrators accept any and all listed and submitted evidence, evaluate its applicability and credibility, and render a decision based on their assessment.

AF members have agreed to forego the rigid atmosphere of propriety and the time-consuming rules that govern a court proceeding, including rules of evidence, to achieve the advantages of

expediency and cost-effectiveness. Rules of evidence are a series of rules created by the courts to ensure that any evidence presented in court is fair and reliable. These rules determine whether the court will admit and consider evidence. Since these rules are not applied in the arbitration hearing, companies may present their positions without concern about whether their evidence would be admissible in a formal court proceeding.

Further, the hearings are confidential. Recordings of any type, in any manner, are not allowed.

Chapter 32

Rule 3-7

Hearing Attendance

A party may be present when a case is heard and present witnesses. The intent to do so must be noted on the filing.

- (a) the representative may only clarify, at the arbitrator’s request, its contentions and submitted evidence.**
- (b) Insureds or witnesses may not appear without the presence of a company representative.**
- (c) Insureds or witnesses may appear only if their written or transcribed recorded statement or report is listed as evidence and AF and all parties know of their appearance. They may only clarify, at the arbitrator’s request, such statement or report for the arbitrator and may not present testimony or additional evidence. Specifically, witness testimony is not evidential.**
- (d) All parties will be dismissed after their appearance and will be subsequently notified of the decision.**

Intercompany arbitration is designed to be an expeditious, easy, and cost-effective claims resolution process. In addition, the “file is to speak for itself.” For this reason, most arbitration cases are heard by file submission only. Rule 3-7, however, allows a party to appear before the arbitrator at the hearing and, if necessary, present witnesses.

If a representative (i.e., adjuster, attorney) wishes to attend a hearing, he/she must check the box that indicates “*Appearance will be made by*” and then select “Member Representative.” AF and all other parties must be notified that an appearance will be made (see Rule 2-1 and 2-2). Checking the appropriate box informs the other party(ies) and AF of the intention to appear. This gives the opposing party an opportunity to appropriately adjust its strategy and minimize any element of surprise.

A representative should not attend a hearing with the understanding that he/she will verbally present his/her case. Rather, the arbitrator will review the submitted contentions and evidence prior to meeting with the representative. Once the arbitrator is familiar with the case and the issues in dispute, he/she will meet with the representative and ask any questions he/she may have in regard to the case. The representative will be dismissed once the

arbitrator has all the information and/or clarification needed.

The same applies should an insured or a witness or expert also appear. His/her appearance should be noted on the application and, of extreme importance, his/her statement or report must be listed (under the Evidence section) and submitted. He/she may not attend to present verbal testimony. For this reason (and since a statement or report is as effective as a personal appearance), these types of appearances are very rare. To control claim costs, participants confine personal representation and witnesses to very complex cases where the arbitrator(s) benefits from their presence.

Rule 3-7 also provides that an insured or a witness or expert may not appear without the presence of a company representative. The purpose of this restriction is to minimize the potential for disruption at hearing.

A question that arises is, “What constitutes a member representative?” For the purposes of intercompany arbitration, the “member representative” is the person handling the claim on

behalf of the member, i.e., an employee (adjuster, staff attorney) or an individual retained (third-party administrator, outside attorney). Typically, this is the individual who submits the filing or responds to

it and appears at the hearing to answer any questions the arbitrator(s) may have.

Chapter 33

Rule 3-8 Arbitrator Neutrality

No arbitrator will hear a case in which he/she personally or his/her company has any direct or indirect material interest.

Arbitrator neutrality is critical to the success of any arbitration process. AF makes great strides to prevent an arbitrator from hearing a case that involves his/her company. If a case is inadvertently assigned to an arbitrator that involves the arbitrator's company or represents any other potential personal interest, the arbitrator must immediately notify AF so the case can be reassigned.

In addition, AF emphasizes that an arbitrator excuse himself/herself from hearing any case if he/she has

a direct or indirect interest in the outcome (financial, business, personal, or professional). We also recommend that he/she excuse himself/herself from hearing a case that involves a prior employer, coworker, or claim adversary if his/her decision could create an **appearance** of impropriety. The mere appearance of impropriety is reason enough for the arbitrator to return a file to the AF hearing officer for reassignment to another arbitrator.

AF supports and reinforces the importance of arbitrator neutrality and objectivity at the hearings and in training workshops.

Chapter 34

Rule 3-9

Post-Decision Coverage Allowances

A responding company may assert no coverage, a denial of coverage, or a policy limits defense via AF's Web site up to 60 calendar days from the publication of the decision if the

- a) filing company made its filing at least 120 calendar days before the statute of limitations expires; and**
- b) responding company pleads its defense at least 60 calendar days before the statute of limitations expires.**

A copy of the denial of coverage letter to the party seeking coverage for the loss or proof of policy limits must accompany the inquiry or no action can be taken.

When an award exceeds policy limits, the filing company will have the option to accept the policy limits as final settlement and forego recovery of the claim against the insured directly or have the decision voided to pursue alternative means of full recovery.

The Agreements (Article Second) provides that arbitration lacks jurisdiction when an award will exceed a member's policy limits or if there is no liability policy or coverage has been denied. Issues regarding coverage need to be properly asserted and supported in response to a filing (see Rule 2-4, Chapter 17). This ensures appropriate action can be taken and/or an arbitrator takes it in to consideration when resolving the dispute. That said, Rule 3-9 was established to protect all members and offer post-decision relief when an award was entered against them and there is no liability policy, or coverage has been completely denied, or, the award exceeds the policy limits. Defenses regarding retrospective or experienced rated policies, high liability deductibles, or partial exclusions, however, are not included for post-decision review. These defenses may only be asserted prior to hearing for consideration by an arbitrator.

Rule 3-9 allows a responding party to assert no coverage, denial of coverage, or policy limits, following the hearing via [AF's Web Site](#) whether it submitted a response or not. However, certain time frames must be met to give the filing company

enough time to take other actions before the statute of limitations expires.

The first time limit restricts the opportunity to raise a post-hearing coverage issue to 60 days following the decision publication date. Where applicable, a copy of the denial of coverage letter or proof of policy limits **must** accompany the notification to AF and be received within the 60-day time limit. Further, when policy limits is at issue, the filing company will have 30 days to decide whether or not to accept the policy limits as final settlement of the claim. During this time, payment of the award should be held until the issue is resolved.

The second time limit is the filing company's requirement to file at least 120 days before the statute of limitations expires. The 120-day period provides ample time for the responding company to raise any objections to jurisdiction. It also provides ample time for the filing company to take other action if the responding company's answer has a valid objection.

The third time limit referred to in Rule 3-9 is a requirement for the responding company to answer with its defense at least 60 days before the statute

expires. This gives the filing company time to take other action to recover the damages. If the defense is not raised at least 60 days before the statute's expiration and the filing company has filed 120 days before the statute expires, it forever surrenders its right to the defense.

In closing, the applicability of Rule 3-9 in Special Arbitration must be discussed, specifically when the disputed issue concerns concurrent coverage. For most cases, when the responding company raises an Affirmative Defense for denial of coverage and provides a copy of their denial of coverage letter addressed to the entity that needs coverage, AF will administratively withdraw the case without it going to an arbitrator. Rule 2-4, however, provides a specific exception to this process for cases filed in Special Arbitration as concurrent coverage disputes. For such a case, AF may not administratively withdraw and the case must go to an arbitrator for consideration of all the evidence.

The reason for this exception is that the dispute being arbitrated is whether or how the coverage for the responding company applies to the given claim paid by the filling company. This kind of dispute is compulsory in Special Arbitration under Article First (b). It would therefore be improper to administratively refuse jurisdiction for the case for

denial of coverage without an arbitrator considering the arguments and evidence of all parties.

Likewise, Rule 3-9 allows a responding company to raise their denial of coverage or policy limit issue after the hearing. Again if the company provides a copy of their denial of coverage letter addressed to the entity that needs coverage within the designated time frame, AF will administratively void the decision because AF did not have jurisdiction to decide the case.

However, the exception in Rule 2-4 must again be considered in a Rule 3-9 situation because AF does have jurisdiction to decide concurrent coverage disputes. If the post-decision inquiry essentially reargues the position stated in the parties response that the arbitrator has already found lacking, the decision cannot be voided and it is final and binding. However, if the post-decision inquiry provides the required denial of coverage letter or evidence that no policy was in effect or that other conclusive evidence of no coverage which was not available to the arbitrator, the decision might be voided. The latter situation will be considered on a case by case basis.

Chapter 35

Rule 4-1

No Default Judgments

Arbitration panels may not render default judgments. Decisions must be based on the evidence submitted. In the Uninsured Motorists Forum, the filing company must establish its basis for challenging the adverse company's denial of coverage and/or why the adverse company should reimburse the UM settlement. Liability and damages will not be disputed.

There are no default judgments in intercompany arbitration. The filing company does not prevail simply because no answer is submitted. In the Automobile, Property, PIP, and Medical Payments forums, the filing company always has the burden of proof. It must establish its position, through its evidence, regarding negligence **and** damages to the satisfaction of the arbitration panel, even when there is no response.

In intercompany arbitration, the standard of proof used is “preponderance of evidence” (contrasted with “beyond a reasonable doubt,” which is required in criminal proceedings). The preponderance is based on the more convincing evidence in regard to its probable truth or accuracy, and not simply the amount of evidence.

The purpose of Special Arbitration is to facilitate prompt and fair resolution of first- and third-party claims where there is a dispute over contribution of another signatory party on the basis of shared liability or concurrent coverage. To put the burden of proof on the party that stepped up and resolved the claim for which all participants share responsibility and then filed in arbitration for a ruling on proper apportionment would be in conflict with that purpose. It would likely result in delayed settlements and possible unnecessary litigation. For that reason, the burden of proof in Special Arbitration is equal among all participating parties and not only on the filing party.

In the Uninsured Motorists Forum, since the sole issue is the validity of the responding company's denial of coverage, the filing company must support

its position that the denial was improper and/or why the member who issued the denial of coverage should reimburse the filing company's UM settlement.

A frequently asked question is whether proof of payment is required. The distinction between proof of payment and proof of damages is important. Proof of payment is a must **only** when a respondent, through its answer, affirmatively challenges the existence of a subrogation claim. If not challenged, the presumption is the applicant has made payment to its insured and a subrogation claim exists. Such challenges should be rare, and the challenge should be substantiated. A challenge should not simply be raised because the applicant did not list proof of payment in its evidence listing. We don't want to require the submission of unnecessary documentation. If the applicant's claim for subrogation is challenged, as part of its evidence, the applicant must provide some form of proof that payment was made to its insured. For example, this could take the form of a copy of the check or draft issued to an insured in payment of the loss or a copy of the proof of loss executed by the insured on the claim.

While it is not a requirement to submit proof of payment to prove damages, we do recommend it be included in the evidence packet. Many arbitrators find it useful to verify if the filing company has listed its damage claim correctly (not including its deductible twice, deducted its salvage return). It is also of particular benefit when there are prior partial payments.

Chapter 36

Rule 4-2

Notice of Clerical or Jurisdictional Error

Pursuant to Article Third, the arbitrating companies must notify AF of a clerical or jurisdictional error via AF's Web site within 30 calendar days after the decision's publication date. The determination as to whether an actual error was made is at AF's sole discretion and is not subject to further review, appeal, or inquiry. AF may also find and correct clerical or jurisdictional errors without notice from the arbitrating companies within 30 calendar days after publication of the decision.

While the members have agreed to accept all decisions as final and binding regarding issues of fact or law, Rule 4-2 provides guidelines for correcting a clerical or jurisdictional error made by AF staff or an arbitrator(s) following a decision. AF will void or amend an arbitration decision under very limited circumstances. The involved parties may bring these errors to AF's attention via [AF's Web site](#) or AF can take corrective action on its own without notice from the parties if it recognizes an error has been made. Upon confirmation of the error, AF will provide notification to all parties and inform them of the action that will be taken. During this time frame, payment of the award should be held until the issue is resolved.

Clerical errors are unintentional mistakes made by the AF staff or an arbitrator(s). For example, an arbitrator makes a mathematical error in calculating or entering an award or AF fails to provide proper notice or comply with a three-person panel request. AF can correct a clerical error if notified within 30 days of the decision's publication date. The decision's publication date is the date when AF transmits or mails the decision to all interested parties.

Jurisdictional errors occur when an arbitrator fails to rule on an affirmative defense, asserts an affirmative defense not pled by a party, renders a decision on an issue not in dispute or over which arbitration lacks jurisdiction, or improperly

dismisses a case for lack of jurisdiction where jurisdiction exists. For example:

- A party raises the affirmative defense that the statute of limitations expired and supports this defense with the appropriate evidence. The arbitrator does not recognize or acknowledge this defense in the decision and rules solely on the issues of liability and/or damages. The party that raised the defense can assert that the arbitrator committed a jurisdictional error by not addressing the affirmative defense, or objection to jurisdiction, in his/her decision.
- A responding company does **not** raise the affirmative defense that the statute of limitations expired even though the filing was filed "late." The arbitrator notices the late filing date and closes the filing on his/her own. Since the affirmative defense was not asserted by a party, it is considered waived and the arbitrator's decision would be considered a jurisdictional error. AF would void the decision and return the file to the arbitrator for a decision on the disputed issues.
- A responding company contests liability only; damages are not contested. The arbitrator, upon his/her review of the evidence, feels that the damages paid by the filing company were excessive or not related to the accident/loss and reduces the award. This would be a correctable error since the arbitrator did not have jurisdiction over damages since they were not contested.
- A responding company asserts and supports a denial of coverage (per Rule 2-4), but the arbitrator denies the affirmative defense. This would be a

jurisdictional error (Article Second (d) of the Agreement) and AF would void the decision.

- A responding company asserts that it is not signatory to the forum in which a dispute is filed or that the matter was filed in the wrong forum, and the arbitrator upholds the affirmative defense/objection to jurisdiction. If it is determined that the responding company was, in fact, signatory to the applicable forum or that the matter was filed in the correct forum, AF will void the decision and reschedule the case for a new hearing.

Clerical or jurisdictional errors are the only issues that can be brought to AF's attention following a

decision's publication. AF recognizes that a member might be dissatisfied with a decision or award as it is a strong advocate for its position; however, the member has agreed to accept all decisions as being final and binding with no right to rehearing or appeal (except where allowed in Property and Special Forum). This includes perceived errors of fact or law.

AF continuously surveys the membership to get their feedback on decision quality and uses this information to address any procedure or training issues. Any dissatisfaction with arbitration results should be communicated through this method.

Chapter 37

Rule 4-3

Decision Publication

Decisions will be posted on the AF Web site after the case is heard. Electronic signature(s) of the arbitrator(s) will be used.

AF posts the decisions on its Web site promptly following the hearing by an arbitrator. A member who has filed or responded online via AF's Web site receives an immediate e-mail notification once a decision is posted. The representative can click on the link to the case that is embedded in the notice to see the decision and/or print a copy.

A member who has not filed or responded online (i.e., filed/responded via regular mail) may also view the decision online once it is posted.

Since the decisions are entered by the arbitrators online and posted to AF's Web site, electronic signatures are used. Every arbitrator has specific login criteria (user ID and password) that he/she uses to access AF's Decision Management page. He/she enters his/her credentials on every case he/she hears to authenticate himself/herself as the arbitrator for the case. This prompts his/her name to appear on the decision notification.

Chapter 38

Rule 5-1 Award Payment

The parties shall honor all awards within thirty (30) calendar days of decision publication date. Payments made as a result of the award are to be made only to the filing company. Payments must include any deductible interest, if applicable, in the interest of good will between the companies.

The benefits of intercompany arbitration are not truly realized until the award has been paid and a claim file closed. To ensure the arbitration process remains expedited, a time limit was established for a party to pay an award.

A member with an award rendered against it should promptly process the payment of it. The only exception is where a party questions the timely filing of documentation (Rule 2-2), raises a post-hearing coverage defense (Rule 3-9), will assert that a clerical or jurisdictional error was made (Rule 4-2), or file an appeal (Rule 2-12). Otherwise, the responding member must comply with the arbitrator's decision and award within 30 days of the publication date.

Rule 5-1 also provides direction on the payment of an arbitration award. Simply, the responding company must send award payments directly to the

filing company. Intercompany arbitration resolves disputes between the member companies. These are the only parties at interest. As such, the award must be paid directly to the filing company and no other party (i.e., insured). When a third-party administrator files arbitration on behalf of a member company, it should use the Remittance Information section of the online filing process to note whether the award payment should be payable to the third-party administrator or the member company, depending on their business arrangement, and the responding company should comply.

In the interest of good will between the members, any payment that is made as a result of an arbitration decision must include any applicable deductible interest. The award will include the deductible interest in proportion to the liability assessment as a courtesy calculation for the members.

Chapter 39

Rule 5-2

Unpaid Award Follow-up Process

When a party does not honor the award within thirty (30) calendar days after publication:

- (a) The prevailing company's local representative must immediately send a written request for payment to the adverse company's local senior representative, addressing him/her by name.**
- (b) If the award remains unpaid thirty (30) calendar days after written request for payment, the company should send a copy of the letter to AF requesting assistance with award payment.**
- (c) AF will notify the non-paying company.**
- (d) If the award remains unpaid for an additional thirty (30) calendar days, the company may seek legal recourse in pursuit of collection and is entitled to statutory interest and all legal fees and costs incurred in pursuing collection until the award is paid.**

Rule 5-1 establishes that an award must be paid with 30 days of the decision publication. Rule 5-2 outlines the process a member can take when an award is not paid.

If the prevailing party does not receive payment within 30 days after publication of the award, it must take the first step, which is to send a written request for payment to the delinquent company's local senior claim representative. The prevailing party should use the claim manager's name if possible or, at a minimum, address the request to the correct position. A party should also be able to prove delivery in the event a negative response or no response elevates the problem.

The prevailing party should take the next step if the award remains unpaid 30 days after the written request for payment, which is soliciting the help of AF to obtain the award. AF will contact the highest-level individual available at the delinquent company and inform the prevailing party of the action.

Thirty days after AF acts, the prevailing party is free to take the final step. The prevailing party may then sue the delinquent party to enforce the award or agreement. The rule provides that the prevailing party may request the court also award statutory interest as well as any legal fees and costs incurred in pursuing collection of the award (i.e., attorney fees, court costs, etc.).

Chapter 40

Rule 5-3

Supplemental Damages

In the Automobile, Property, and Special (for workers' compensation subrogation claims) programs, a filing company can file for supplemental damages paid after the Materials Due Date of the original hearing or anytime thereafter. In the PIP and Medical Payments programs, a filing company can file for supplemental damages paid after the initial filing, if these damages are contested by the responding company. In all programs, the original liability decision is *res judicata*. The sole issue in these filings is the supplemental damages.

In Special Arbitration, if the original settlement of the claim is legally voided, the arbitration finding is nullified and the award payments must be returned.

Rule 5-3 addresses supplemental damages. While it is strongly recommended that arbitration not be filed until a claim is concluded, AF realizes this may not always be possible. Therefore, in the Automobile and Property Forums, the applicant can file to recover supplemental damages paid after the Materials Due Date of the original hearing date or anytime thereafter. The same applies in the Special programs for workers' compensation subrogation claims. If the supplemental payment is made prior to the Materials Due Date, the filing company needs to amend its filing to include these damages.

In the PIP and Medical Payments Forums, the members may desire an expedited resolution of a liability dispute. Because continuing, or ongoing, payments may be more common in these forums, Rule 5-3 allows an applicant to file arbitration to recover supplemental damages paid after the initial filing if the respondent contests these damages.

In all forums, the original liability decision is binding unto the parties. The sole issue for the arbitrator to consider in the new filing is the supplemental damages.

Chapter 41

Rule 6-1 Filing Fees

The filing company incurs a filing fee payable to AF. A responding company that files a counterclaim shall also pay the prescribed filing fee. In Special Arbitration and Uninsured Motorists Arbitration, all parties incur the prescribed filing fee.

Rule 6-1 specifies that the filing company must pay the filing fee as well as a responding company that files a counterclaim. In the Special and Uninsured Motorists Forum, all parties must pay the respective filing fee, which varies depending on the contribution sought amount and whether a three-person panel is requested. There are no exceptions to a party's obligation to pay the filing fee, even if a party files a case in error or withdraws its filing prior to hearing due to settlement of the claim.

The Agreement's Article Fifth (d) grants AF the authority to establish fees on behalf of signatory companies. For most signatory companies, all filing fees are included in an invoice sent to each company (on a monthly billing cycle) for the total cases filed and/or deferred during the billing month.

The current fee schedule is available on AF's Web site (www.arbfile.org).

Chapter 42

Rule 6-2

Physical Evidence Return

AF will return physical evidence (i.e., defective parts, components, DVDs) if requested as an administrative request and a self-addressed, stamped envelope of sufficient size and postage is provided. All other material will be destroyed after the case is heard.

Rule 6-2 notifies each party that AF destroys all file materials after a case is heard, unless a party notifies AF that it wants physical evidence to be returned.

If a party wants AF to return physical evidence, it must be noted as an administrative request, and the party must provide a self-addressed, stamped envelope of sufficient size with the correct postage.