



# **Guide for Arbitrators**

A Resource and Reference Manual  
for Member Arbitrators

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Arbitration Forums, Inc. (AF) is pleased to welcome you into a distinguished group of professionals who skillfully and objectively resolve intercompany claim disputes for over 4,700 member companies. Your appointment as a Member Arbitrator qualifies you to join a long line of claim professionals who have served the insurance industry for over 70 years.

AF and the member companies greatly appreciate your service as an arbitrator, as your active participation is critical to the success of the arbitration process. The time you dedicate is important—not only to AF, but to the insurance industry. Your service to the insurance community is highly valued, and we appreciate your support.

Intercompany arbitration greatly affects our members' recovery potential. Each year, close to 700,000 disputes worth \$3 billion in claims are arbitrated through AF.

As such, experience, expertise, and objectivity are essential qualifications of an effective arbitrator. However, **objectivity** is indisputably the most important qualification. It is the foundation of the arbitration system. It is AF's responsibility to preserve complete objectivity in the arbitration process. AF reserves the right not only to appoint, but also to remove or restrict the service of any arbitrator where the objectivity of the process or the decision is in question.

We hope this guide will help you contribute to the maintenance of high standards and continued confidence in the arbitration process.

Again, thank you and welcome.

# Ethical Obligations

Arbitrators appointed to AF's arbitration panels accept serious responsibilities that include important ethical obligations. Although there have been few situations wherein an arbitrator's objectivity has been questioned, AF believes it is in the best interest of the arbitrators for AF to set forth generally accepted standards of ethical conduct.

## **1. An arbitrator must abide by high standards of conduct so that the arbitration process preserves its integrity and fairness.**

Objectivity and neutrality are the foundations of a credible arbitration system. All decisions must be based solely on the arguments made in the contentions and the evidence submitted by the parties to avoid any perception of bias. You may use your claims knowledge and experience when rendering a decision, but you may not use any other outside resources to research an issue.

In addition, you must excuse yourself from hearing the case if you have a direct or indirect interest in the outcome (financial, business, personal, or professional). We also recommend that you excuse yourself from hearing a case that involves a prior co-worker or claim adversary if your decision could create an **appearance** of impropriety. The mere appearance of impropriety is enough for you to return a file to AF for reassignment to another arbitrator.

## **2. AF's rules mandate that only qualified arbitrators will hear cases.**

AF offers six arbitration programs:

1. Automobile Subrogation
2. PIP Subrogation
3. Med Pay Subrogation
4. Property Subrogation
5. Special Arbitration
6. Uninsured Motorists

Each program is designed to resolve specific types of claims disputes and has its own qualification criteria. Your appointment as an arbitrator for one program does not automatically allow you to hear cases in other programs. You may only hear cases filed in the program to which you are qualified (i.e., have the appropriate claims experience and knowledge to decide the disputed issues); certified, where applicable; and have your supervisor's approval to be appointed and participate. You must return any case to AF that you believe you are unqualified to hear. AF will be unable to process your decision if you hear a case in a forum that you are not appointed to hear.

## **3. An arbitrator's authority is derived from the respective arbitration agreement.**

The arbitrator should neither exceed that authority nor do less than is required to exercise such authority. The agreement establishes procedures and rules to follow when conducting the arbitration hearing. As an arbitrator, you must have a complete understanding of these procedures and the rules of the program(s) for which you have been appointed.

**4. An arbitrator is not to delegate the duty to decide a case to any other person.**

This is particularly important with three-person panels. It is improper for only one or two members of a three-person panel to read and decide a case. Each member must review the submitted files and discuss the merits of the case. Remember, the reason a party requests a three-person panel is to obtain this interactive discussion of the merits of the case.

**5. An arbitrator must base his or her decision solely on the evidence presented and the applicable law.**

Intercompany Arbitration is an informal process. Formal rules of evidence do not apply and serve only as a guide. All evidence that the parties submit to support their case is to be considered. As the arbitrator, you examine the evidence and decide what it “is worth” in regard to the position presented by the party. Evidence should be both relevant and credible to the dispute. Remember, as an arbitrator, your role is to be a neutral, objective, third party and not an advocate for either party. The Applicant must prove its case; the Respondent must disprove the Applicant’s case. Do not decide a case based on how you would have investigated, adjusted, or presented it.

**6. An arbitrator must conduct himself or herself in a manner that is fair to all parties.**

You must hear cases in an impartial manner with equal treatment shown to each party. You must not be swayed by outside pressure, concern for criticism, or self-interest. As the arbitrator, you are in charge. If you are assigned to hear a personally represented case, remember that the representative is present only to offer clarification of written evidence. The representative is not permitted to present oral testimony or introduce evidence that is not listed in the filing; other considerations may apply to Property Product Liability cases. Do not be swayed by “what is said.” Rather, base your decision on the “facts” as presented in the contentions and evidence.

**7. An arbitrator must maintain confidentiality concerning each party and the contents of a case.**

You must not make negative or sarcastic remarks to anyone about another member’s judgment or ability in presenting his or her case. Derisive comments create an appearance of impropriety and could possibly foster a bias against a particular member or representative. AF will not allow such discussions.

[Click Here](#) to view AF’s tutorial on Ethical Obligations.

## Process Overview

The following section reviews the Intercompany Arbitration process. Additional orientation and training will be provided by AF. In addition, AF publishes an “[E-Bulletin for Arbitrators](#)” on a regular basis and provides in-depth training tutorials on various hearing-related topics on the Arbitrator’s Resources page of AF’s Web site. [Click Here](#) to view our tutorials.

### Eliminate Conflict of Interest

AF will identify and assign files for you to hear based on your claims experience and qualifications and excluding any case that involves your company. Since subsidiaries are likely to change, or all may not be known, you should still look at the involved members when you first review a file to ensure there is no conflict of interest. You cannot hear a case that involves your company.

As stated in the Ethical Obligations section, you must also refrain from hearing a case involving a prior employer if your objectivity could be questioned. You must avoid the *appearance* of bias or impartiality.

Arbitrators who are employed by third-party administrators (TPAs) must refrain from hearing a case that involves a client, whether or not the TPA handled the claim being heard.

If a potential conflict of interest exists, request the case be reassigned to another arbitrator via email to [arbitratorsupport@arbfile.org](mailto:arbitratorsupport@arbfile.org) or by calling the Arbitrator Help Desk at 1-866-977-3434.

### Case Contents

A typical case will include the following:

- Case Information
- Damages
- Contentions
- Evidence

The **Case Information** section identifies the parties to the dispute and the amount of damages being sought. If policy limits are at issue, this section will also include whether the filing company has agreed to accept the policy limits as its final award/recovery.

The **Damages** section is where the filing company itemizes the payments it made to support its Total Company Claim Amount (i.e., collision payment, rental, towing in the Auto Forum). It might also include a prior payment received from the responding company. The filing company must also support its damages (i.e., estimates, total loss documentation, rental invoices). Proof of payment on its own does not prove damages nor is it required.

If a responding company disputes damages, it must present its damage arguments in the Disputed Damages section, including the exact amount of the damages in dispute, if possible (See Rule 2-5). This includes, but is not limited to, issues such as repair and/or rental amounts, causation, and partial exclusions. As an arbitrator, you may not consider damage arguments raised in any other section, i.e., the Contentions (see Rule 3-5e).

The **Contentions** section is where a party presents its position regarding negligence or coverage (if disputed issue concerns concurrent coverage). This is the essential information to the merits of its case: the who, what, when, where, why, and how concerning the accident/loss.

It is important to emphasize that a case is not won or lost on the contentions alone. *Contentions are neither true nor false without supporting evidence.* For example, an allegation of speeding by one of the parties must not be accepted unless it is supported by some form of evidence.

Always remember: **Contentions + Evidence = Fact.**

The **Evidence** section lists the evidence that a party submits to support its case. An arbitrator may not consider unlisted evidence. Each party must know what evidence is being submitted by the adverse party(ies). There is to be no “arbitration by ambush” or surprises when a case is heard.

Typical evidentiary items that you will find include, but are not limited to, written and/or recorded statements (insured, witness, expert), scene photos, vehicle photos, police reports, diagrams, adjuster notes, estimates, cause and origin reports, and medical records.

Submission of evidence is not required. There may be a case where, for whatever reason, a Respondent has chosen not to submit any evidence. It simply denies the Applicant’s allegations via its contentions with no evidence listed or submitted.

### **Electronic Proofs of Damages**

In a society where commerce is less dependent on paper transactions, the arbitration process needs to recognize and reflect this evolution. AF's members are looking to eliminate unnecessary expenses and have identified the cost of mailing checks or drafts as falling into this category. Two of the payment types that we have seen change from paper to electronic payment are towing and rental. It is common for the Applicant to provide electronic proof of payment without the corresponding bill. Knowing that the Applicant does not possess a traditional bill due to its electronic connection with certain vendors, these proofs of payment will have to be accepted also as proof of damages.

[Click Here](#) to view AF’s training tutorial on Evidence Consideration and/or Hearing Paperless Cases.

## Affirmative Pleadings/Defenses

Affirmative Pleadings are typically asserted by the filing company; Affirmative Defenses are asserted by the responding company. Each typically addresses an issue that is apart from the issues of negligence or damages.

**Affirmative Pleadings** must be asserted in the Affirmative Pleading section to be considered. One cannot be applied by an arbitrator if it is not asserted, even if it is applicable.

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 existence of an available Affirmative Pleading could define the amount of the award if liability is found or emphasize the responding company’s legal duty in the case. (*See table for available Affirmative Pleadings.*)

The filing member must present its liability argument in the Contentions, i.e., “the Respondent’s negligence caused our damages or a percentage of them.” The existence and applicability of joint and several liability would change the allocation of damages if, for example, it would allow the filing member to recover 100% of its damages, regardless of the amount of negligence proven versus the named responding member. An example of an Affirmative Pleading is “Joint and Several Liability”—that regardless of the percentage of negligence found against the Respondent, the Applicant is entitled to a full recovery (or whatever the specific state allows).

An Affirmative Pleading might also be asserted to proactively refute an Affirmative Defense. For example, the filing is being made after the Statute of Limitations has expired; however, a suit had previously been filed. Per Rule 1-2, the filing company has dismissed the suit to file arbitration. To prevent the successful assertion of an Affirmative Defense regarding the expiration of the Statute of Limitations, the filing company might assert an Affirmative Pleading that the Statute of Limitations has been tolled per Rule 1-2 and provide a copy of the suit dismissal to support this pleading.

An Affirmative Pleading could also be asserted to inform the arbitrator that the Applicant is willing to accept policy limits, a pro-rata share of the Respondent’s limits in the event there are multiple parties, and make its insured whole for any out-of-pocket expenses from its award proceeds.

The following table lists the available Affirmative Pleadings and what an arbitrator should consider when ruling on it.

Affirmative Pleadings	
(a) Bailment	Did Applicant submit evidence to support bailment applied? Did Applicant support that bailment affects the recovery?
(b) Joint and Several	Did Applicant support that joint and several applies to this jurisdiction? If joint and several is applicable, was it proven how it applies?

(c) Other	This may be used if the Statute of Limitations has run, but litigation was dismissed and the arbitration filing is within the required 60 calendar days (Rule 1-2), as an example. Did the Applicant prove the date of dismissal of the litigation?
(d) Phantom Vehicle (no longer applicable)	While listed in our Online Filing system as an Affirmative Pleading, Phantom Vehicle is no longer applicable.
(e) Policy Limit Acceptance	If the Applicant indicates acceptance of the Respondent’s policy limits, does it also agree to make its insured whole for any out-of-pocket expenses if the Respondent requires it?
(f) Pro-rata Share Acceptance	If the Applicant indicates acceptance of its pro-rata share of the Respondent’s policy limits, does it also agree to make its insured whole for any out-of-pocket expenses if the Respondent requires it?
(g) Spoliation of Evidence	Has the Applicant proven the Respondent either disposed of critical evidence or did not make it available for the Applicant to inspect/test? Did the Applicant prove that the piece of evidence would have been crucial to proving its case against the Respondent?

**Affirmative Defense** is defined for inter-company arbitration purposes as “a defense that does not address the allegations (i.e., liability and/or damages), but instead asserts a reason that precludes the arbitrator(s) from accepting jurisdiction.” Affirmative Defenses come from Article Second, Exclusions, of the various Arbitration Agreements as well as the Rules.

Rule 2-4 requires that an Affirmative Defense be asserted in the Affirmative Defense section to be considered. A party cannot “hide” an Affirmative Defense in its contentions. If the Affirmative Defense is applicable and the Applicant’s claim is barred, this needs to be the first issue addressed/resolved by the arbitrator. If, for example, the Statute of Limitations expired prior to the date the Applicant filed its claim in arbitration, there is no need for you to take time assessing liability or damages issues. If a party fails to raise an Affirmative Defense in the appropriate section, you may not consider it. Further, you may not raise an Affirmative Defense for a party. If, for example, the Applicant has filed its claim after the Statute of Limitations expired, but the Respondent has not asserted this defense, it is waived. You may not raise it for the Respondent.

The following table lists the available Affirmative Defenses and what an arbitrator should consider when reviewing it.

<p><b>Affirmative Defenses</b>  <b>Article Second – Exclusions</b>                      No company shall be required, without its written consent, to arbitrate any claim or suit if:</p>	<p>If exclusion is asserted as an Affirmative Defense:</p>
<p>(a) It is not signatory nor has given written consent</p>	<p>Did the Applicant submit as evidence written consent from the Respondent agreeing to arbitrate the claim in the chosen forum?                      Is arbitration mandatory by statute in the loss state?</p>
<p>(b) Such claim or suit creates any cause of action or liabilities that do not currently exist in law or equity</p>	<p>The members have the same causes of action in arbitration as they do in litigation. Likewise, they have the same defenses available to them. For example, arbitration must be filed prior to the running of the statute of limitations, except if litigation was previously filed (see Rule 1-2). Also, the Applicant has not crossed the monetary PIP threshold to pursue a tort action or medical payment, so subrogation is not allowed in the loss state.</p>
<p>(c) Its policy is written on a retrospective or experience-rated basis</p>	<p>Has the Respondent submitted evidence to prove the exclusion? Typically the policy or its dec page is submitted to prove that it is a retro or experience-rated basis.</p>
<p>(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, an Applicant may agree to accept an award not to exceed policy limits and waive their right to pursue the balance directly against the Respondent’s insured</p>	<p>Has the Respondent submitted a declarations page or screenshot of the coverages to prove limits? In multiple exposure situations, has the Respondent provided evidence that supports the value of the other outstanding cases, in addition to the one in question, exceeds the policy limits?</p>
<p>(e) It has asserted a denial of coverage</p>	<p>If the Respondent has an active policy but asserts that coverage has been denied for some reason, has a denial of coverage letter to the person seeking coverage and/or the named insured been submitted as proof? (A denial of liability or a denial of coverage letter to the adverse party does not qualify.) If there is no denial of coverage letter, has the Respondent submitted evidence to prove an allegation of theft or non-permissive use?</p>
<p>(f) Any claim for the enforcement of which a lawsuit was instituted prior to,</p>	<p>Any qualifying case in litigation at the time the member signs the agreement is not subject</p>

and is pending, at the time this Agreement is signed	to AF’s jurisdiction. Has the Respondent shown that the case was already in litigation at the time the agreement was signed? Copies of the petition and the agreement would prove this point.
(g) Under the insurance policy, settlement can be made only with the insured’s consent	AF has no jurisdiction over our member’s insureds, so their involvement, via policy provisions, removes the case from arbitration. Has the Respondent provided policy language to prove the insured’s consent is required?
<b>Forum-Specific Exclusions</b>	
<b>Property</b>	
(a) Product liability claim arising from an alleged defective product.	Did the Applicant submit as evidence written consent from the Respondent agreeing to arbitrate the claim in the Property forum?
(b) Watercraft claim arising from accidents on waters under federal or international jurisdiction.	Did the Applicant submit as evidence proof that the waters upon which the accident occurred were not under federal or international jurisdiction? Did the Respondent provide proof that the waters were under federal or international jurisdiction?
<b>Med Pay</b>	
(a) Jurisdiction is limited to those states that allow for medical payments subrogation recovery.	Did the Applicant submit evidence proving medical payments are recoverable in the jurisdiction? Did Respondent submit evidence proving they’re not?

Additional Affirmative Defenses include:

- The claim does not fall under the jurisdiction of the applicable agreement. For example, the filer has submitted a dispute concerning damages to a building in the Automobile Subrogation Arbitration forum or has filed a coverage dispute that is not a concurrent coverage dispute under Article First (b) of the Special Arbitration Agreement.
- A counterclaim is being filed that needed to have been filed at the time an earlier, original filing was submitted and heard (Rule 2-2). The Arbitrator will need to confirm the same parties are involved and determine if the damages claimed on the counterclaim were paid prior to or after the Materials Due Date for the original filing.
- The amount sought is within a liability deductible or the insured’s self-insured retention, and since the insured is not signatory, arbitration lacks jurisdiction over the matter.
- Applicant does not have a cause of action or right of recovery. This may pertain to diminished value damages, PIP, or splitting a cause of action (Mahler case law in WA).

## Denial/Disclaimer of Coverage – Article Second (e)

Rule 2-4 elaborates further on coverage denials/disclaimers. Like any Affirmative Defense, denial/disclaimer of coverage must be raised as an Affirmative Defense in the Affirmative Defense section. If it is not, it cannot be considered. Rule 2-4, particularly the last sentence, has caused some confusion, so we would like to clarify what it means.

To start this analysis, the definition of denial of coverage from the rules is: *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.*

First, let's look at to whom the denial letter should be addressed. The rule says the denial letter is "to the party seeking (liability) coverage." This is significant because the named insured is not the only entity who may be looking for liability coverage under a policy and for whom liability coverage is being denied. In instances where the named insured or a permissive driver was operating the Respondent's vehicle, the Respondent's denial of coverage letter should be directed to the named insured, driver, or both, depending on the nature of the denial, since both are seeking liability coverage from the Respondent's policy. The same is true in the scenario where a non-permissive driver was operating the Respondent's vehicle. The Respondent's denial of coverage letter should be directed to the driver if he/she is known (and there is no argument regarding theft) and/or the named insured, since it is liability coverage from his/her policy that is being denied.

In short, the denial of coverage letter must be addressed to the person 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 or her coverage is usually intact. Also, since the denial letter must be addressed to the individual or entity for which coverage is denied, a copy of a letter addressed to the named insured or someone else regarding the denial, even with the individual or entity courtesy-copied, is not sufficient for the purpose of this rule.

In some situations, there could be allegations in the contentions against both a driver and the named insured, e.g., leaving his or her keys in the car or elsewhere a non-permissive user had easy access to them. In that instance, even if coverage is denied for the driver's negligent driving, there may well be coverage for the named insured's alleged negligent act, and the Affirmative Defense would not be granted to withdraw the case. The case would be heard but ONLY for the alleged negligence of the named insured, i.e., the party for which coverage has NOT been denied.

The second issue concerns when a denial of coverage letter is needed. The answer is 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 or her. Likewise, if no policy exists for the alleged insured and the insurer has no information about him or her, a letter cannot be sent. In most other situations, as long as the entity for which coverage is being denied is identified, a copy of the denial letter to him or her must be provided. If no denial of coverage letter has been sent to the

insured, a Respondent should proactively address the lack of same for the arbitrator to consider as part of the Affirmative Defense.

In addition, 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. Since some states and companies require this type of language in these letters, consideration must be given by the arbitrator when deciding whether the content of the letter is sufficient to support the denial of coverage defense. If the coverage defense is granted and it is determined that arbitration lacks jurisdiction, the filing company would be free to pursue litigation versus the “uninsured” tortfeasor.

It is important to note that the failure to submit a copy of a denial of coverage letter for the simple reason that such letters are not sent as a company practice does not overcome the requirement of the rule. Arbitration replaces litigation, so unless the company intends to allow the alleged insured to provide his or her own defense in case of a suit, the company should expect to participate in arbitration or deny coverage to him or her in writing.

After reviewing the arguments and evidence presented regarding an Affirmative Defense, you will either grant it (it applies) or not (it does not apply). If you grant the defense, you will select “Yes” at the “Affirmative Defense Granted?” prompt on the Online Decision Entry screen and explain your finding in the Explanation section (see graphic below). Since the defense was granted, arbitration lacks jurisdiction over the claim (e.g., Statute of Limitations expired, no coverage). As such, the case is closed following your decision on the Affirmative Defense, except on cases with multiple Respondents. If the defense is not granted, you will select “No” at the “Affirmative Defense Granted?” prompt on the Online Decision Entry screen and explain your decision in the Explanation section. Since the defense was not granted, arbitration retains jurisdiction over the claim (e.g., filing was timely, coverage exists). As such, you will proceed to make a decision on the issue of liability and/or damages depending on what is disputed or conceded.

**Attention: The scheduled hearing date is more than 5 days in the future. If you want to hear the case now, you may proceed. If you do not wish to hear the case now, please click Cancel to exit the case.**

General Information		Case Information	
Date Heard: 03/07/2014	Arbitrator 1: DOUG NIKOW (ARBITRATION FORUMS, INC.)	Case Status: OPEN	Total Company Claim Amount: \$12,500.00 <small>(Does not include deductible)</small>
Arbitrator 2:	Arbitrator 3:	Hearing Type: SCHEDULED HEARING	Deductible Paid By Insured: \$250.00
		Ready To Hear Date: Jun 4, 2014	Legal Fees Sought: \$0.00
		Estimated Heard By Date: Jul 19, 2014	
		Staff Hearing: No	

Related Cases	Deferment	Def Challenge	Hear Challenge	Affirm. Defense	PO3
Docket No AD25002281400	No	No	No	Yes	No

Disputed Damages	
Respondent	Damage Dispute Description
Respondent 1	Party has indicated that they are not disputing damages

**Findings (for ADs and Defer Challenges)**

Affirmative Defense Findings	
Respondent 1	Affirm. Defense Requested: Respondent 1 raised an affirmative defense of type <b>Policy Limits - Multiple Exposures</b> with the following justification: <i>"Multiple exposures exceed our policy limit of \$10k. Alpha damages: \$9581.00 Delta damages: \$6148.00 Proposed pro-rata if liability assessed: Alpha: \$6100.00 Delta: \$3900.00"</i> <small>Policy Limits: \$10,000.00</small>
Affirm. Defense Granted?	No
Explanation	Affirmative defense denied. Both Alpha and Delta agree to accept their pro-rata share and make their respective insureds whole, for any out of pocket expense.

Arbitrator(s) considered the following when rendering the decision (Hearing Representation Information)

Applicant - ALPHA INSURANCE OF GEORGIA
Hearing Representation <input type="checkbox"/> Application <input type="checkbox"/> Contentions <input type="checkbox"/> All Listed Evidence Received <input type="checkbox"/> Personal Appearance

Respondent 1 - BETA INSURANCE OF COLORADO
Hearing Representation <input type="checkbox"/> Response <input type="checkbox"/> Contentions <input type="checkbox"/> All Listed Evidence Received <input type="checkbox"/> Personal Appearance <input type="checkbox"/> No Answer

[Click Here](#) to view AF's training tutorials on Affirmative Defenses and/or Coverage Issues.

## Deferments

As noted on Page 8, a deferment is a one-year postponement, from the date of filing, of an arbitration filing. Any party may request the one-year deferment when a companion claim or suit is pending and issues must be resolved prior to the arbitration case being heard. The request is made and the justification for it is provided in the Deferment Justification section.

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, i.e., the arbitration decision will not affect the companion claim or suit or vice versa. Deferment requests by a responding company will be automatically challenged, and the same process as outlined above will be followed.

When a deferment is challenged, your job is to determine if the one-year postponement is valid or necessary. The party requesting the deferment should be telling you why the case needs to be deferred for one year, what impact the companion claim or suit has on the arbitration case. Some examples include the Applicant has filed simply to toll the statute of limitations with the understanding that the underlying claim or suit must be resolved first; the Respondent has a policy limit issue with a BI pending; or a coverage or fraud investigation is pending.

Deferment requests must be supported with evidence. If, as in the example above, the reason for the deferment request is that a companion claim is in litigation, the party should submit a copy of the first page of the lawsuit to prove who the plaintiff/defendant is and to provide the case number and the court the case is filed with.

If the request is upheld, the case will remain in deferred status for one year from the date of filing. If the request is denied, the arbitrator will continue to hear the disputed issues (i.e., liability, damages, coverage).

There are times when a party may raise an affirmative defense and request a deferment. Both must be properly asserted in order for them to be addressed. If a member asserts an affirmative defense citing policy limits and additional claims pending that may exceed its limits, you should check to see if it has also requested a deferment (in compliance with Rule 2-10) to allow time for the limits issue to be resolved. If it has also properly requested its deferment, the affirmative defense should be denied and the deferment granted.

NOTE: If you uphold the affirmative defense in these situations, the upholding of the affirmative defense closes the filing and will not allow you to grant the deferment.

[Click Here](#) to view AF's training tutorial on Deferments.

## Liability

The responding company sets forth the issue(s) to be decided. Does the responding company concede or dispute liability? Damages? When liability is disputed, you must review the respective liability positions and **decide the case based on the contentions and evidence presented.**

The entry in the "I admit \_\_\_\_% liability" field takes precedence over any liability arguments made in the responding company's contentions in most cases. For example, in cases involving a single impact, if the responding company enters "100%" in this field but also makes liability arguments in its contentions, your liability decision will be controlled by the 100% liability admission. (If "0%" is entered in this field but no liability arguments are made, you are free to deem that liability is not disputed or at issue and resolve any damages dispute.) In cases involving multiple impacts where the Respondent may be admitting 100% liability for the Applicant's rear damages only, the arbitrator will have the discretion to rule on the disputed front damages.

If the responding company is conceding full liability (100%), you can simply enter "Liability admitted" in the Liability Decision section. The sole issue for you to resolve will be damages (assuming the Respondent has properly disputed damages – see Page 6 on Damages).

If the responding company admits **partial** liability, you cannot find it less responsible than the amount admitted. For example, if the Respondent in an Auto case admits "75%" liability, but you feel it is less responsible, your Liability Decision must note: "based on: Respondent has accepted 75% liability and Applicant did not prove any additional liability against Respondent." Needless to say, this does not prohibit you from attributing **more** liability against the Respondent, if proven.

On occasion, the parties may present conflicting arguments regarding liability being in dispute. The Applicant argues that liability has been accepted and only damages are in dispute. A partial prior payment may have also been made. The Respondent, however, does not specifically enter a percent of liability admitted. In these cases, pre-arbitration correspondence or communication between the parties reflecting a settlement **offer** has been made, should not be construed as an admission of liability. An offer is not a concession of liability. Prior correspondence or communication that reflects a settlement offer or liability has been accepted (e.g., E-Subro Hub negotiation messages or prior partial payments) can, however, be used to support that liability has been conceded.

## Damages

If a responding company disputes damages, it must present its damage arguments and disputed dollar amounts, if known, in the Dispute Damages section (see Rule 2-5). Damage arguments raised in any other section may not be considered by the arbitrator (see Rule 3-5e). This includes, but is not limited to, issues such as repair and/or rental amounts, causation, and partial exclusions.

Needless to say, the more detailed the information is regarding what damages are disputed and what amount, the easier you, as the arbitrator, will be able to resolve the dispute. Simply arguing that the Applicant overpaid the claim or that "rental was excessive" without a specific reason or what the proper amount of damages should be will make it difficult for you to consider the argument or agree with the Respondent's position. You would have the discretion to deny the Respondent's damage dispute (award "All" proven damages) and explain this in the Damages Decision field. The exception is when the responding company has not been provided with the damages proofs. This is the scenario the "if known" is intended to address. Specifying the disputed dollar amount(s) necessitates that information as to what the filing company is seeking

has been shared. As such, in the scenario where proofs have not been provided, you would be free to reduce the amount of damages at your discretion, based on the evidence, so long as the responding company made its argument in the Disputed Damages section.

Another scenario that may arise is where a responding company disputes damages based on the absence of a settlement attempt prior to filing the arbitration. The preamble to the Rules states “the parties *should* attempt to settle the subject dispute prior to filing arbitration.” The word “should” indicates a recommendation, not a requirement. The absence of a settlement attempt prior to filing is not a bar to recovery. In this scenario, as above, simply verify that the recovering party’s damages are supported.

In the typical scenario involving disputed damages, you must review the points of difference between the parties and **decide the case based on the arguments and evidence presented.** You must accurately record the amount of *proven* damages in the Damages Decision space provided on the online decision entry screen. If you find a conflict between the Company Claim Amount and the amount claimed in the Damages section, you must use the Company Claim Amount figure if it is lower. The online filing system will then apply the liability percentage to the amount of damages proven to determine the award. On occasion, a partial payment may have been made/received, and the filing company is seeking the balance of the claim. In these cases, make sure the award amount accurately depicts the amount that the filing company is owed based on the claim amount, liability assigned, and partial payment. You might also have to use the Override functionality to adjust the Award. This is done primarily to adjust an Award to equal the Respondent’s policy limit or a pro-rata share of the limit.

**When both liability and damages are at issue,** decide liability first. If liability is proven, you then consider damages. This will save you from spending time reviewing and determining damages only to find that the filing party did not prove liability.

In addition, **if liability and damages are both *partially proven*,** you must clearly state the percentage of liability found and the amount of damages proven. This eliminates any confusion when a filer proves liability, say to 75%, but the amount awarded is not 75% of the total damages claimed.

An example of this is:

Liability Decision: Applicant (ABC Ins.) proved liability at 80% versus Respondent (XYZ Ins.) based on: “XYZ’s failure to yield the right-of-way when making a left turn. 20% on ABC for failure to keep a proper lookout.”

Damages Decision: Applicant (ABC Ins.) proved “Reduced Damages” based on: “XYZ proved that rental was excessive and that it only owed 10 days @ \$35, or \$350.”

If the award does not follow a percentage but rather an area of damage (e.g., rear-end damages proven), you will need to use the Award Override option so the proper award amount is entered.

When damages are disputed, the award will be the amount that the filing company has incurred, the amount that the responding company believes it should pay, if any, or an amount in between that the evidence supports. An arbitrator is not to simply “split the difference” for the sake of

compromise. The evidence must support the filer's or responder's position or an amount in between.

Using an Auto Forum case as an example:

Applicant's itemization of damages lists:

Collision payment = \$4,300

Rental = \$600 (20 days @ \$30/day)

**Company Claim Amount = \$4,900**

The Respondent argues that \$800 of the vehicle repair was for prior damages not sustained in the accident in question and that only 15 days' rental are owed, as repairs should have been done in this timeframe. The Respondent's Damages area should explain why the full amounts are not owed and outline the amounts owed:

Collision owed = \$3,500

Rental owed = \$450

**Total amount owed = \$3,950**

As the arbitrator, you must decide if the Respondent's allegations are supported based on the evidence submitted. You will award the full damages if the Respondent's arguments are not supported or if it did not conform to Rule 2-5, which states that any damage dispute is presented in the correct area. You will award the Respondent's amount if its arguments are supported and the damage dispute is presented in accordance with Rule 2-5. If the evidence supports awarding damages that was neither what the Applicant incurred nor what the Respondent believes is reasonable, the arbitrator has the discretion to award the alternative amount and cite how the evidence supports it.

Your Summary of Dispute will note that the Respondent disputed damages due to prior damages being included in the repair estimate and rental being excessive.

Your Damage Decision explanation will provide clear and concise reasoning regarding your decision. For example: "The Respondent proved via vehicle photos and its insured statement that the Applicant's vehicle had prior damage on the front bumper. The Respondent also proved via repair estimate that the repair should have been completed in 15 days, not 20 days. Accordingly, the Applicant is awarded the reduced amount of \$3,950."

It must be noted that sometimes the responding company is at the mercy of the filing company when it is challenging damages. If the filing company has not provided the responding company with full documentation of the damages it is claiming for recovery, it will be difficult, if not impossible, to itemize exceptions to what it has never seen.

If a responding company raises a damages argument in the Disputed Damages section that could be valid, you should review the filing company's proofs for damages to respond to the challenge. The responding company must provide a valid reason for its challenge—causation, pre-existing damages, reasonable and necessary, ACV versus RCV, etc., and not simply indicate "we

challenge all damages.” However, if it provides a valid rationale for the challenge, it should be considered even if the responding company isn’t given the opportunity to itemize it.

If the responding company does not dispute damages in the Disputed Damages section, as per Rule 2-5, damages are not at issue. The damages sought by the filing company are to be awarded, if liability is proven and the amount of damages sought is supported by evidence.

Another area that causes difficulty is when the parties dispute the number or timing of impacts, and the filer does not separate its damages, front versus rear. You’ve all seen this dispute type. One carrier believes its insured’s damages were solely caused by a vehicle that struck it in the rear and pushed it forward into a third vehicle. The insured that struck your insured in the rear (and allegedly pushed it forward into another vehicle) argues that your insured struck the vehicle in front of it first (he/she saw the impact), and as such, it only owes for the rear damages.

When confronted with this type of case and the filer has not separated its damages, it is at your discretion to:

1. Review the estimate and calculate the correct amount of damages to award.
2. Approximate the damages based on impacts and severity (i.e., if the majority of damages are to rear and rear damages are owed, award a greater percentage of the total damages). Be sure to show your math and explain your rationale. You may suggest to the member that a breakdown of damages is helpful in future filings when front and rear damages are involved.
3. If you are unable to approximate the damages, adjourn the hearing and request the filer break down its damages, front versus rear. To adjourn the file, contact your local FAM or send an email to [arbitratorsupport@arbfile.org](mailto:arbitratorsupport@arbfile.org) advising that the Applicant needs to provide breakdown of front and rear damages.

With regard to a bodily injury settlement, medical reports are not required unless the extent of the injury and/or causation is challenged in the Damages Dispute section.

[Click Here](#) to view AF’s training tutorial on Damages Disputes.

Disputed Issue	Respondent	Applicant
<b>Rental</b>		
Rental Duration	Does the Respondent argue and support its disputed number of days? Does the Respondent consider if the vehicle was drivable?	Do labor hours divided by factor approximate days including weekends, holidays, and supplements? Does the Applicant provide evidence to prove and support rental days?

Daily Rate	Does the Respondent argue and support its dispute with the rate/car? Does the Respondent owe basic transportation or another standard?	Does the rental car meet the jurisdictional requirement? Does the Applicant prove and support the rental car/daily rate as reasonable?
<b>Storage</b>		
Storage Duration	Does the evidence support the Respondent’s dispute on why the Applicant’s number of days is unreasonable?	Does the Applicant support that the number of storage days is reasonable?
Daily Rate	Does the Respondent support that this is not in the range of prevailing rates in the area?	Does the Applicant support that the rate paid was reasonable?
<b>Towing</b>		
No Bill	Does Respondent argue that no bill is in evidence at all or is it a “clearinghouse” bill for towing dispatches? It is your discretion to allow whether a tow bill is from the actual towing company.	Does the Applicant include a bill in damages supports <b>OR</b> does the evidence support that a tow was reasonable/necessary?
Mileage	Does the Respondent make and support a strong argument that the tow could/should have been shorter?	Does the Applicant have a plausible reason for a tow that may seem too far?
Charge	Has the Respondent argued and submitted a statute as evidence?	Is there a statute that sets a schedule for tow charges or any other aspects of a tow?
<b>Total Loss</b>		
Value	Has the Respondent proven that the Applicant deviated from the correct equipment or vendor’s guidelines for rating the condition of the vehicle? Has the Respondent included its appraiser’s comments to support its condition rating? Does the Respondent support any other reductions (i.e., prior damage) to the value?	Does the Applicant have accurate information entered into its valuation software? Equipment, mileage, tows, condition, year, make, model? Has the Applicant included its appraiser’s comments and photos to support its condition rating? Do the comparable vehicles match the loss vehicle, and are they from the same general area? Is there support for any refurbishments made

		to the vehicle? Is prior damage accurately addressed?
Total vs. Repair	Has the Respondent included calculations to show that the vehicle would not be considered a total loss in this jurisdiction? Remember: A total loss threshold sets the maximum repairs. Estimates below the threshold should include comments on expected supplements, tear down, or any salvage bids to support totaling the vehicle. If tear down is disputed, is proof provided that the vehicle was an obvious total without tear down? Tear down is a judgment call by the member. A challenge should prove it was not necessary.	Is there a statute or case law that mandates a threshold to total versus repair? Has either party included the applicable <b>statute</b> for your review? Has the Applicant included an explanation as to why it chose to total the vehicle (examples: open items on the estimate, adjuster notes explaining expected supplements)? Do the photos show an obvious total loss? Are there structural issues with the vehicle that would require it to be totaled? Was the vehicle torn down at the time of the inspection? Was tear down supported as being necessary to determine if repairs were appropriate? Tear down is a judgment call by the member.
<b>Parts</b>		
OEM vs. Alternative	Did the Respondent run a parts search close to the estimate/repair dates? Does the Respondent have any statute or case law mandating the use of other than OEM parts?	Did the Applicant use <b>any alternative</b> parts in the repair? Has the Applicant shown it searched for alternate parts or explained why it did not use alternative parts? Was the age and mileage of the vehicle considered? Were the parts proven to be available during repairs? Does the vehicle meet the common practice of using OEM parts on newer model vehicles with low mileage?
Labor Rate	What supporting documentation is provided by the Respondent to support the lower labor rate? If the Respondent uses the repair	Does the Applicant support the rate paid with estimate of completed repairs? Is there an agreed-upon price with the shop listed on estimate?

	estimate it wrote to support a lower rate, does it show that the body shop agreed to the lower rate?	
Betterment	Does the Respondent prove the equipment has depreciated? Who completed an inspection? Is life expectancy taken into account? Are there photos showing wear?	Does the Applicant explain paying the full cost of the equipment and not taking betterment based on age and/or mileage?
Labor Hours	What evidence does the Respondent submit to prove that the labor hours should have been reduced?	Does the Applicant comment on the need for the resulting labor hours for the operation?
Paint Procedures	Does the Respondent prove that it was not necessary or not the responsibility of the at-fault party? Is there evidence to support certain procedure(s) were not necessary?	Does the Applicant prove that the paint procedure was necessary?
<b>Diminution in Value</b>		
	<p>Does the Respondent assert an affirmative defense to jurisdiction based on the Applicant's vehicle being a lease? If yes, was evidence submitted to support this argument?</p> <p>Does the Respondent assert an affirmative defense to jurisdiction based on the jurisdiction not recognizing automobile diminished value damages? If yes, was evidence (case law or statute) submitted to prove the argument?</p> <p>If the Respondent disputed the amount of DIV damages claimed, does it submit evidence that supports a lesser amount or no award at all?</p>	<p>If the Applicant is an insurer, has it provided proof of payment to its insured for DIV, and are there supports included to justify the amount? Is the Applicant a self-insured owner of the vehicle used primarily for business purposes?</p> <p>Has the Applicant submitted evidence to support that the claim arose in a jurisdiction that has clearly addressed the circumstances permitting diminished value damages by statute or settled judicial precedent directly analyzing automobile diminished value damages?</p> <p>Has the Applicant supported the amount of DIV with sufficient evidence such as an</p>

		appraisal, formula, or expert report?
<b>Damage Supports Not Shared</b>		
	Does the Respondent claim the Applicant’s filing is its first notice or that the Applicant did not send a subrogation notice with supports prior to arbitration?	Has the Applicant submitted evidence to prove its damages? Are the Applicant’s damages reasonable?

*The above is provided for training purposes only and should not be considered authority on any specific claim or docket.*

## Burden of Proof

The filing company always has the burden of proof, and the standard used in intercompany arbitration is “preponderance of evidence,” not “beyond a reasonable doubt.” In addition, there are no default judgments in intercompany arbitration. When no answer is submitted, the filer must prove its liability position and support its damages claimed with evidence, such as estimates, bills, or electronic proofs of damage.

In the Auto forum, you may hear a case wherein an “innocent” party (i.e., a legally stopped or parked vehicle or a building) seeks recovery from multiple respondents whose initial accident caused its damages. So, what do you have to consider when an “innocent” party files arbitration against two or more tort feasons (or wrongdoers)?

For starters, the filing company must prove that it is, in fact, an innocent party and did not contribute to the accident in any way, or else its award should be reduced by its percentage of liability. The filing company must also prove that its damages were the direct result of the accident that took place between the responding companies’ insureds. If the filing company proves these two elements, it has met its burden of proof. You will now consider the responding companies’ arguments regarding their respective liability.

Each responding company must prove the other’s insured’s negligence caused the accident and the filing company’s damages, either completely or to a certain percentage. If the arbitrator can determine the respective liability of the responding companies’ insureds, the appropriate awards will be rendered versus each. If each is deemed equally at fault, an award equally apportioned amongst the respondent companies would be appropriate.

In closing, if the “innocent” filing company has met its burden and proven that its damages were the result of the responding companies’ insureds’ negligence, an award is justified and the Applicant should recover 100% of its damages (the award can be split equally between the parties).

It is also important to note that proof of payment is required only when payment is challenged by a party to the arbitration. An arbitrator may not rule against the filer on the issue of damage solely because no proof of payment has been included; it is only necessary to show proof of damages (e.g., estimate, repair bill, medical bill).

## Awards

After you have spent your time on the “hard part” (making the call on liability and/or damages), it’s time for the “easy part”—entering the award amount. As you record the award, check the following:

- Is the percentage you entered in the “Liability Decision” section equal to or greater than any admitted liability?
- Does the award less the Deductible match the Damages Proven? If not, the “why” needs to be answered in the Damages Decision section.
- Are the parties listed correctly? Don’t mix up or switch the parties. Use the company names rather than “Applicant” and “Respondent.”
- If partial damages were proven, was the insured’s Deductible removed or considered? The system will add it back in unless the field is cleared. Be careful. Show your math to help.
- Did you verify what the Company Claim Amount includes? If the Company Claim Amount is only a percentage of the full damages because the member is only seeking a percentage, awarding that percentage in the award grid makes the award a percentage of the percentage. The same might apply to a partial payment and a comparative negligence decision.

## Policy Limits

When a Respondent asserts and supports (via a policy declaration page, claim system coverage screenshot, or some other form of written documentation that states the policy limit), and the award exceeds its policy limit, arbitration lacks jurisdiction. This is because arbitration lacks jurisdiction over the insured’s interest; simply, AF cannot compel the Respondent’s insured to pay any award amount over the Respondent’s policy limit.

A filer is permitted, however, to indicate that it will accept an award not in excess of the policy limit, so arbitration can retain jurisdiction over the matter. By agreeing to do so, the filer waives any right to pursue the balance of the claim directly against the Respondent’s insured.

Therefore, if you hear a case wherein the Respondent has raised and supported an Affirmative Defense of policy limits (stated amount and provided proof thereof), you will:

1. Hear the case, deciding liability and damages, to determine the award and deductible amounts.
2. If the award and deductible amounts are less than or equal to the Respondent’s policy limit, enter the award and deductible amounts.
3. If the award exceeds the policy limit, confirm whether the filer has agreed to accept the policy limit as the award.
  - a. If the filer has, award the policy limit by distributing it between the award and deductible by using the override automatic calculations box. For example, if

\$5,000 is to be awarded and there is a \$1,000 deductible, the award entries will be \$4,000 and \$1,000 in the appropriate fields (note such in the override explanation section). See below for example.

Override automatic award calculation

Explanation of override:

Payments Accepted by Applicant: \$ 0.00

Include Credit for Prior Payments

	Damages (not including deductible)	Insured-Paid Deductible	Legal Fees	Total
<b>Respondent 1 - BETA INSURANCE OF COLORADO</b>	\$ 4000.00	\$ 1000.00	\$ 0.00	\$ 5000.00
<b>Total Award</b>	\$ 4000.00	\$ 1000.00	\$ 0.00	\$ 5000.00

- b. If policy limits have not been accepted, you will grant the Affirmative Defense by selecting “Yes” and, in the explanation box, advise the parties that the amount that would have been awarded exceeded the Respondent’s policy limits and that since the filer did not indicate it would accept policy limits as full settlement, arbitration lacked jurisdiction. The filer will be free to re-file arbitration (agreeing to accept policy limits) or pursue the full claim outside of arbitration.

**Findings (for ADs and Defer Challenges)**

**Affirmative Defense Findings**

**Respondent 1**

**Affirm. Defense Requested:** Respondent 1 raised an affirmative defense of type **Policy Limits - One Exposure (Applicant's Claim)** with the following justification: *'Our limits are \$10,000. Please see dec page.'*  
Policy Limits: \$10,000.00

**Affirm. Defense Granted?** Yes

**AD Upheld Reason** Amount sought exceeds policy limit, no consent to accept available limit.

**Explanation** Applicant able to prove 100% exceeding the Respondent's policy limits. Case cannot be heard, as Applicant did not accept policy limits.

If the Respondent also asserts that another party(ies) is also claiming damages against its policy limits (i.e., Applicant’s insured or other involved party), you now have a pro-rata situation. The parties will need to:

- Prove the damages of the other parties and provide proof that the other parties have agreed to/released the Respondent.
- Applicant will need to specifically indicate that it will accept a pro-rata share of the policy limits in the Affirmative Pleading section.

It is also important to note that the Respondent may cite potential out-of-pocket expenses on the part of the Applicant’s insured as a justification to uphold an Affirmative Defense. Stating that the Applicant *may* have out-of-pocket expenses is not enough to uphold an Affirmative Defense for insufficient limits. There must be proof that out-of-pocket expenses exist to uphold for this

reason. For the Affirmative Defense to be denied, the Applicant will indicate it will make its insured whole for out-of-pocket expenses in the Affirmative Pleadings section.

## Liability Deductibles

Applying a liability deductible to one of your third party claims is very similar to an auto claim with a collision deductible, right? Is it the same when you’re hearing an arbitration case that includes a respondent with a liability deductible? In many ways, it is but with some important steps to include.

One possibility exists when the applicant’s Company Claim Amount is less than the respondent’s liability deductible. In this instance, the respondent should assert an Affirmative Defense challenging Arbitration Forums’ jurisdiction over the case and it would look like this, stating, “Respondent 1 raised an affirmative defense of type Claim amount within Liability Deductible/Self-Insured Retention with the following justification: Insured has a \$5,000 liability deductible. Alpha’s Company Claim Amount is within the deductible.”

The respondent would include a copy of their dec page or a screen shot of their coverages to prove the liability deductible and the arbitrator should grant the Affirmative Defense:

Another possibility exists when the respondent has a liability deductible but the applicant’s Company Claim Amount exceeds the liability deductible. The respondent may assert an Affirmative Defense so the arbitrator should determine if the liability assessment would result in an award over or under the liability deductible. If the award will be under the liability deductible, the same action as above applies, i.e. granting the Affirmative Defense.

If, however, the liability decision results in an award that exceeds the liability deductible, the Affirmative Defense should be denied because AF retains jurisdiction over a portion of the award:

The liability decision will be entered, allowing the system to calculate the total award, in excess of the liability deductible.

State negligence law applied: Pure Comparative

Override automatic award calculation

Payments Accepted by Applicant: \$ 0.00

Include Credit for Prior Payments

	Damages (not including deductible)	Insured-Paid Deductible	Legal Fees	Total
Respondent 1 - BETA INSURANCE OF COLORADO	\$ 5487.00	\$ 0.00	\$ 0.00	\$ 5487.00
<b>Total Award</b>	\$ 5487.00	\$ 0.00	\$ 0.00	\$ 5487.00

The arbitrator will then check the “Override automatic award calculation” box, enter the explanation, and manually reduce the award by the liability deductible amount:

State negligence law applied: Pure Comparative

  Override automatic award calculation

Explanation of override: Reducing award by the amount of the \$5K liability deductible.

Payments Accepted by Applicant: \$ 0.00

Include Credit for Prior Payments

	Damages (not including deductible)	Insured-Paid Deductible	Legal Fees	Total
Respondent 1 - BETA INSURANCE OF COLORADO	\$ 487.00	\$ 00.00	\$ 0.00	\$ 487.00
<b>Total Award</b>	\$ 487.00	\$ 00.00	\$ 0.00	\$ 487.00

## Credit for Prior Payments

On occasion, you will hear a case wherein a prior partial payment has been made by the responding company to the filing company. We will review a couple of common scenarios and provide guidance on how the awards should be recorded.

### Scenario 1

The filing company files for recovery listing its full claim amount. The responding company argues that a partial payment has been made to the filing company.

1. If the responding company supports that its payment is cleared/cashed (or sent for EFTs), the credit for the proven payment amount must be entered. Your award will reflect the

amount of additional damages owed by the responding company. For example, the Applicant files for \$1,000. The Respondent asserts and supports that it has paid \$500 to the Applicant. You determine liability at 80% and award “All Damages”. This generates an award of \$800 (\$1,000 x 80%). You will need to select “Include credit for prior payments” and enter \$500 in the “credit for” field creating a final award of \$300 (don’t forget to apply prior payments to deductible, if applicable).

Payments Accepted by Applicant:		\$	500.00		
		<input checked="" type="checkbox"/>	Include Credit for Prior Payments		
	Damages (not including deductible)	Insured-Paid Deductible	Legal Fees	Total	
<b>Respondent 1 - BETA INSURANCE OF COLORADO</b>					
Award Against	\$ 800.00	\$ 0.00	\$ 0.00	\$ 800.00	
Credit For	\$ 500.00	\$ 0.00	\$ 0.00	\$ 500.00	
Net Award Against	\$ 300.00	\$ 0.00	\$ 0.00	\$ 300.00	
<b>Total Award</b>	<b>\$ 300.00</b>	<b>\$ 0.00</b>	<b>\$ 0.00</b>	<b>\$ 300.00</b>	

2. If it is not supported that the responding company’s payment is cleared/cashed, or sent for EFTs, sent, then you will not enter a credit for the payment. For example, the Applicant files for \$1,000. The Respondent asserts that it has paid \$500. You determine liability at 80% and award “All Damages”. This generates an award of \$800 (\$1,000 x 80%). In the “What evidence caused you to render this decision and why?” section, you will note that a prior payment was alleged to have been made, but the submitted evidence did not support that the payment had been cleared/cashed or sent, so no credit is given. The parties will be free to resolve any issue, if the payment was received after the response was submitted.

Payments Accepted by Applicant:		\$	0.00		
		<input type="checkbox"/>	Include Credit for Prior Payments		
	Damages (not including deductible)	Insured-Paid Deductible	Legal Fees	Total	
<b>Respondent 1 - BETA INSURANCE OF COLORADO</b>					
	\$ 800.00	\$ 0.00	\$ 0.00	\$ 800.00	
<b>Total Award</b>	<b>\$ 800.00</b>	<b>\$ 0.00</b>	<b>\$ 0.00</b>	<b>\$ 800.00</b>	

### Scenario 2

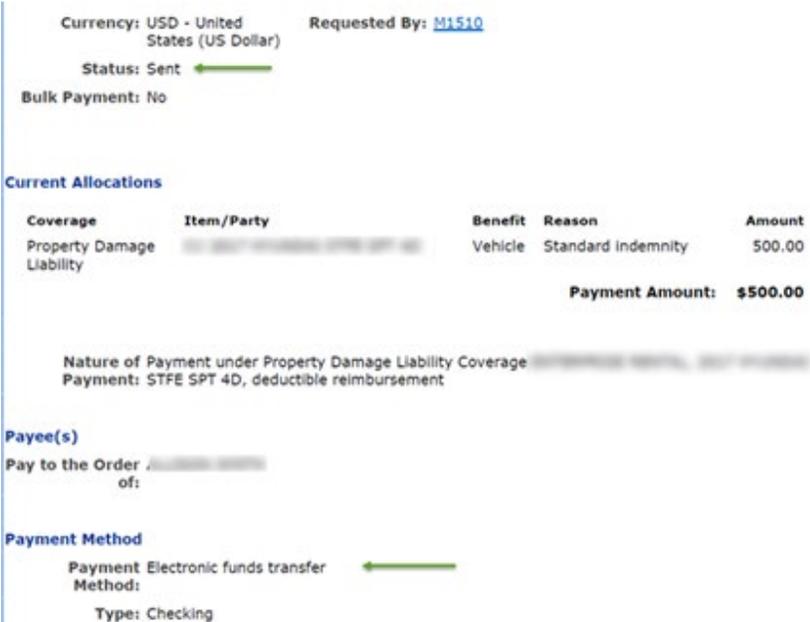
The filing company files for recovery listing its full claim amount (same as above scenario) but notes a partial payment has been received from the responding company. The responding company also notes a prior payment(s), but an amount greater than what the Applicant has noted.

Since the filing company has acknowledged its receipt of the partial payment, the amount entered by the Applicant company will automatically be entered. If the responding company

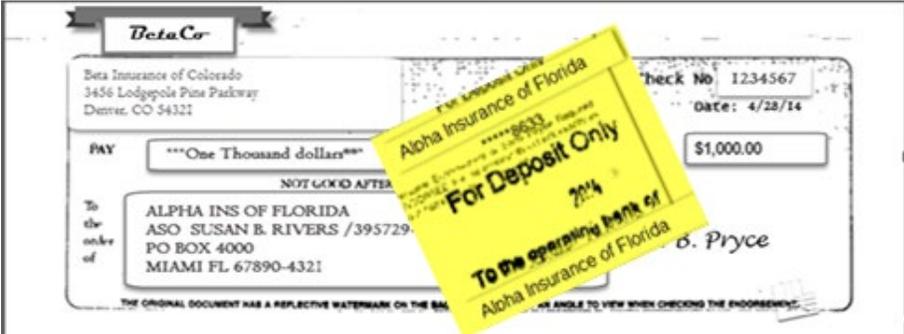
supports that its payment(s) is cleared/cashed, or sent for EFTs, you will need to enter the greater payment amount so the responding company receives the full proven credit.

**Examples of Proof of Payments:**

- *A print screen of EFT with status of “sent”:*



- *An actual check/draft with status of “deposit/cashed”:*



- *A print screen of check/draft with status of “honored/cashed”:*

S7894033	Draft: 0010789	Stat: HONORED		Total: 4,123.64	
Paid					
To: ALPHA INSURANCE AS SUBROGEE FOR JANE MONTFORD PO BOX 6788					
PAYMENT CLAIM# 78342-Q9383-7598759					
DOL 2/1/14					
Cov	Issue-Date	Adj	Create-Dt	Status-Dt	Amount
PD	6/12/14	S. Podrasky	6/12/14	6/19/14	4,123.64

## Spoliation of Evidence

Spoliation of evidence refers to the destruction of, or denial of access to, relevant evidence that harms another party’s position. It can be raised as an Affirmative Pleading by the filing party 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 asserts that the responding party made it impossible for it to prove its case by destroying or denying access to relevant evidence. The filing company must 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 automatically rests with 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 you as the arbitrator to decide whether the filing company 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. Rule 2-11 provides a bar to jurisdiction if a filing company does not make “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, on 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 your discretion as the arbitrator 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.

## Decision Quality

As an arbitrator, you have considerable discretion. You are not bound by formal rules of evidence that govern litigation, and *any* evidence the parties wish to submit is admissible, so long as it is listed in the filing. Your role is to weigh all submitted evidence in conjunction with the contentions. **It is important to understand that your decisions will be final and binding without the opportunity for rehearing or appeal** (except in qualifying Property and Special cases).

For these reasons, it is imperative that you:

- Allow the time that is necessary to hear the case; this means enough time to consider all arguments made and evidence submitted. **Decision quality is the first priority!**
- Address all arguments raised by each party, including the rules and applicable state laws.
- Base your decision on the contentions and evidence presented by the parties. **Do not speculate or infer facts.** Do not be swayed by verbal testimony or arguments if a personal appearance is made.
- Explain how the evidence influenced your decision clearly and concisely. What did a specific item prove or not prove?
- Use the company names, not “Applicant” and “Respondent.”
- Ensure awards correspond with the liability and/or damages finding.

To many members, the explanation or rationale for your decision is more important than the decision itself. Win or lose, your explanation provides the basis for your decision. Was their position accepted or rejected? If rejected, why didn’t the evidence support their arguments? What was contained in the adverse party’s evidence that overcame the content of their own submitted evidence? Remember, parties in arbitration cannot view one another’s evidence in Online Filing.

AF realizes the role of the arbitrator is difficult. As an objective third party, you are presented with, in most cases, two fact patterns from strong advocates. It is your responsibility to review the evidence submitted and render a rational decision. The decision you make may be questioned by one of the parties, but you can mitigate its concerns by ensuring two things—the decision was based on the evidence submitted, and your decision-making rationale is clearly documented in the explanation fields.

[Click Here](#) to view AF’s tutorial on “Decision Clarity.”

[Click Here](#) to view AF’s Online Decision Entry Procedure.

## Pre-Publication Review and Quality Audits

Arbitration Forums, Inc. is driven to provide high-quality decisions to our members. Our Pre-Publication Review (PPR) is one initiative we have implemented to help member arbitrators ensure quality decisions.

AF representatives review decisions prior to publication to ensure the fields are accurately and clearly entered, especially the “What evidence caused you to render this decision and why?”

field. The decision should clearly state the breach(es) of duty that caused the loss and explain the evidence items that influenced the arbitrator in reaching the decision entered.

In addition to the pre-publication review, AF conducts post-decision audits of a sampling of decisions to measure their compliance to the above quality standard—state the breach(es) of duty and explain the evidence items that influenced the decision.

AF's overall goal is to ensure member satisfaction in regard to decision quality and to help identify any arbitrator training opportunities.

# Miscellaneous Items

## Personal Appearances

Most cases are heard by one arbitrator with file material only and no personal appearances made. On occasion, a personal appearance may be made or a three-person panel may be requested.

Rule 3-7 covers personally representing a case. The important things to remember are:

- The party must have indicated its intent to appear in its filing or response.
- The representative may only clarify, at the arbitrator's request, its contentions and submitted evidence.
- Insureds or witnesses may not appear without the presence of a company representative.
- Insureds or witnesses may appear only if their written or transcribed recorded statement or report is listed as evidence and their appearance is known to AF and all parties. 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.
- All parties will be dismissed after their appearance and subsequently notified of the decision.

If you are assigned to hear a case where a personal appearance will be made:

- Review the case prior to meeting with the representative.
- Hold the hearing open for the personal appearance a maximum of 5 minutes after the scheduled start time. If the member fails to call-in and/or promptly reports a problem to our Member Services Department, you will deem that failure a Waiver of Request for Personal Appearance and hear the case.
- Introduce yourself and advise that you have read the contentions and evidence and oral arguments are not permitted.
- Remind the representative that he/she is only permitted to answer any questions you may have regarding the contentions and evidence and may not present any new arguments or evidence (Rules 3-5 and 3-7 outline this).
- Ask any questions that you have.
- Remember that you are in control! Do not let the representative intimidate you. If he/she becomes repetitive or argumentative, regain control by reminding him/her that you have reviewed the materials and have heard the points discussed.
- When you have no further questions for the representative, thank him or her and advise that he/she will receive the decision notification by email and can view the decision online. Do not give the representative any indication of what your decision will be.

[Click Here](#) to view AF's training tutorial on Personal Appearances.

## Three-Person Panels

On occasion, member companies prefer qualifying claims be heard by three arbitrators so that the decision is a result of rich discussion and varied opinions and backgrounds.

Each forum has specific criteria for when a three-person panel can be requested:

Auto, Med Pay, and PIP = \$7,500 and above  
Property and Special = \$15,000 and above

The procedure for three-person panels will vary slightly, but **each arbitrator** must review the case in its entirety to ensure consensus on the decision.

After the file is reviewed, one arbitrator will enter the decision online, but each arbitrator will have to enter his/her specific password to note his/her participation on the panel. It is important to note, a decision requires only a majority vote; it does not have to be unanimous. Entering your password does not confirm your agreement with the decision, only that you participated on the panel. Each arbitrator should read the decision before entering his/her password to confirm that it accurately reflects the intent of the majority of the panel.

If the file has a companion or counterclaim, the companion or counterclaim must also be heard by the same three arbitrators, even if the companion or counterclaim file does not qualify for a panel of three. When the decision is entered into the companion or counterclaim, you must click “Yes” in the override field and provide an explanation that the related docket was a panel of three.

[Click Here](#) to view AF’s training tutorial on Three-Person Panels.