Reference Guide to Arbitration Forums, Inc.'s Agreements and Rules

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Disclaimer: This reference guide is provided by Arbitration Forums, Inc. (AF) for general informational purposes regarding AF's agreements and rules. It does not constitute legal advice and should not be relied upon as a substitute for advice from qualified legal counsel.

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 or coverage among third-party insurers. (Workers' Compensation Subrogation disputes were added to the Forum in 2004.)

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.

In 1970, the Committee on Insurance Arbitration recognized the insurance industry's need for a Property Subrogation Arbitration Forum. Before the establishment of this Forum, most of the property cases involved an automobile hitting a dwelling or business. The Automobile Subrogation Arbitration Forum heard these cases with the consent of all involved parties. With the arrival of the Property Arbitration Agreement, insurers could become signatories and have all their cases heard in this new Forum.

The Committee on Insurance Arbitration represented all segments of the insurance industry. It included companies belonging to three trade associations (Alliance of American Insurers, American Insurance Association, and National Alliance of Independent Insurers), along with companies without any trade association affiliation. This insurance arbitration committee became the largest system of its kind in the world. Clearly, there was a need to create a legal entity to administer the arbitration programs.

This concern led to the creation of Arbitration Forums, a not-for-profit corporation, to replace the Committee on Insurance Arbitration. The Committee on Insurance Arbitration incorporated in 1981 with the corporate name of Insurance Arbitration Forums, Incorporated. With the corporation's formation, 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.

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.

In 2009, AF moved all processing and call center operations to Tampa, Florida. By having all operations based out of one location, AF created a single management structure providing dramatically enhanced service, consistent processing, accelerated response times, and improved usability for the membership.

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.

Definitions

The following definitions are provided to ensure consistent interpretation of terms used within the various AF Agreements and Rules.

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

Affirmative Pleading – An issue or legal doctrine that could change how damages are awarded. Examples include bailment and joint and several liability.

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 – Certain errors made by Arbitration Forums or the arbitrator. Examples include mathematical errors, switching the parties when recording the liability decision, referencing the lack of or need for evidence that was, in fact, submitted, applying, on their own, a state regulation or statute from a state other than the loss state, or misapplying an AF Rule or procedure.

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 by or against a participating party arising out of the same accident, occurrence, or event, which falls under the same or another coverage group or forum.

Concurrent Coverage – 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 applies only to payments made for damages to the common risk.

Contribution for Concurrent Coverage (Special Arbitration) – Applies only to damages paid due to the negligence of the concurrently insured party to a third party, or for uninsured motorist coverage.

Construction Defect Claim – (Special Arbitration) 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 recovering company under the same coverage group or forum.

Deferment – A postponement of a hearing for one-year from the deferment request date.

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 liability coverage for the claim in dispute (named insured/driver). This applies only to a complete denial of liability coverage based on the event in dispute, which includes a denial based on theft. 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. A Reservation of Rights letter is also not an affirmative denial of coverage.

Evidence – All documentary or physical evidence submitted by a party for consideration by the arbitrator. Except evidence attached to the feature damages section in the Auto forum, evidence is not viewable to adverse parties.

Exclusion (or Jurisdictional Exclusion) – A complete defense that does not address either the liability or damages arguments but instead asserts that the party or the filing is excluded from compulsory arbitration.

Extension – A postponement of the response due date by the responding company to prepare and submit its response. Only one extension may be requested by a responding company; a fee is incurred.

Feature – A set of damages from a claim, i.e., damaged vehicle, injured person, damaged property.

Jurisdictional Error – Occurs when an arbitrator fails to rule on an exclusion, asserts an exclusion 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" shall mean a company that 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 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 relitigating the same matter.

Revisit – An option that allows a recovering company to address specific issues raised by an adverse party regarding policy limits, a jurisdictional exclusion, disputed damages, a newly impleaded party, or where the responding company adds damages.

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 who's 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 parties. May be in the form of a letter, email, etc. Answering a filing, which includes adding an extension or deferment, without an objection to jurisdiction is considered implied written consent.

Article First: Compulsory Provisions

Signatory members must forego litigation and arbitrate claim disputes as specified by Article First of the respective Agreement. A signatory company accepts and binds itself to all the Agreement's Articles and Rules by signing it.

With new signatory companies, a question arises 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 with filed and pending litigation when a company becomes signatory are not considered pending claims. Therefore, they are not subject to compulsory arbitration.

Another point to clarify is each forum 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). **NOTE**: It is imperative that AF be promptly notified in the event of a company change (i.e., acquisition, merger, transfer) to ensure filings are properly handled. For example, a carrier that is signatory to an agreement is purchased by a group that has no signatory subsidiaries or vice versa.

Last, damages sought in AF's forums cannot include an insurer's or self-insured's operating expenses (expenses associated with investigating and adjusting losses) or an insured's out-of-pocket expenses or where an insurer or self-insured seeks an administrative fee as "costs" for pursuing a loss. The deductible, as noted in Rule 5-1, is not "awarded" per se but is included in the decision as a courtesy calculation for the members; the insureds are not a party to the intercompany arbitration case.

Automobile Forum

An automobile property damage claim within the authority of Article First includes all automobile property damage claims arising from the payment of losses to an insured, or a self-insured loss, under the first party automobile coverages. It includes claims arising under collision, fire, theft, and comprehensive coverages or self-insured losses of a similar nature. 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 incurred by a self-insured pursuant to statute or judicial decision. However, as noted in the paragraph above, the disputed claim amount cannot include an insurer's or self-insured's operating expenses

(expenses associated with investigating and adjusting losses) or an insured's out-of-pocket expenses, which includes the deductible. In addition, diminution in value claims are only applicable to states where recovery is permitted pursuant to statute or published case law, and insurer members pay such claims out of the insured's policy, self-insured members that own vehicles incur or pay the damages, self-insured members that lease vehicles (leaseholder) and are charged/billed by the leasing company, via the lease terms, for the vehicle's loss of value.

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

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 a collision carrier. While liability is conceded, the matter is submitted for resolution of the damages dispute.
- 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 rental vehicle is returned by the renter with moderate damage to the right quarter-panel. The renter's collision carrier denies the rental company's claim for reimbursement based on contractual primacy, pre-existing condition, or excessive repair costs. The concurrent coverage dispute is submitted for resolution.
- An insurer pays a diminution in value damages out of the insured's policy and seeks reimbursement from the tortfeasor's carrier.
- A self-insured member that owns vehicles used for normal business operations incurs or pays the damages.
- A self-insured member that is the lessee of a vehicle from a leasing company that is used for normal business operations and is responsible, under the lease terms, for the vehicle's value has been charged/billed by the leasing company.

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

- An insurer or a self-insured seeks an administrative fee as "costs" for pursuing a loss.
- An insurer seeks a deductible without making a payment under its collision or comprehensive coverage.
- An automobile leasing company (lessor) seeks diminution in value damages.

- A self-insured member that leases vehicles for business operations but is not responsible, under the lease terms, for the vehicle's value or has not been charged/billed by the leasing company.

Property Forum

Article First in the Property 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:

- An insurer pays its insured for a fire covered under its homeowner's policy. It is determined the fire started the first night after the installation of a new furnace. The insurer can file against the furnace installation company's liability insurer.
- 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 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 can file 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 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, owned by the transporting company and insured under a commercial inland marine endorsement, was destroyed. The inland marine insurer can

file arbitration against the insurer of the automobile to recover the payment for the destroyed cargo.

- A condominium owner's insurer paid for a fire loss. The Condominium Association also had fire insurance for the same loss with another insurer. The owner's insurer believes the Association's insurer should cover the loss. The condominium owner's insurer files arbitration seeking recovery from the Condominium Association's insurer under a concurrent coverage right of recovery.

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

Special Forum

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 bodily injury and/or property damage 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.

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 provision 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.

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

- A dispute arises when two cars collide and strike a news stand and several pedestrians. The driver's insurers are unable to agree on their respective liability for the injury claims and damage to the news stand.
- A carrier has made an Uninsured Motorists' settlement with its insured (paid under UMBI or UMPD) and a tortfeasor with liability coverage has been identified. The responding company acknowledges coverage for the tortfeasor but disputes liability and/or damages. Note: As in all forums, if the responding company alleges that it does not have coverage for the tortfeasor's liability exposure, the dispute over whether their coverage denial was valid could be filed in the Special Forum under "Non-Compulsory" if all parties consent to the arbitration.

Article First, subsection (b) requires member companies to arbitrate concurrent liability coverage disputes. In this type of dispute, each company provides 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 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.

An example of a dispute resolved in Special Arbitration is:

- An insured invites his neighbor into his garage to show him the work he has been doing to his car when the car slips off of blocks and injures the neighbor. The insured's homeowner's insurer and auto insurer argue over which policy should cover the injury liability claim. One of the two takes the lead in settling the claim and files the primary/excess dispute in 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.

- 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 arbitration.
- An employee, while in the scope of her employment, is injured in an automobile accident. The workers' compensation carrier files arbitration against the adverse driver's insurer because liability and/or damages are disputed.

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 need to secure 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 the carrier 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. Supplemental damages may be sought after a decision has been rendered on an initial filing if supplemental benefits are paid for the same injury after the original filing, as long as the Statute of Limitations has not expired. The original decision is res judicata on the issue of liability, and the sole issue in the subsequent filing is causation and damages (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 who allegedly is responsible for the damages. The dispute may concern liability, damages, or both. The PIP 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, Kentucky, Minnesota, and New York) statutorily mandate the use of arbitration to resolve intercompany PIP disputes, and specifically designate Arbitration Forums, Inc. as the provider (Kentucky statutory authority for PIP arbitration is given to KIAA whose rules reflect that either the KIAA or AF may be selected for arbitration.) New York PIP filings follow the NY PIP Arbitration Rules.

A claim filed in the PIP 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 childcare expenses, provided they were paid out of the insured's PIP coverage. However, the disputed claim amount cannot include a company's operating expenses or an insured's out-of-pocket expenses (except in Massachusetts where the PIP statute allows for the recovery of operating expenses, including the AF filing fee, under allocated and unallocated expenses).

Some examples of disputes resolved in the PIP Forum:

- First-party PIP benefits were paid out to an insured party in an automobile accident, and the other party is disputing liability and/or the amount of damages paid out on the medical claim.
- Primary coverage is disputed between an injured passenger's PIP insurer and the driver's PIP insurer.

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 Payment Forum

The Medical Payment Subrogation Forum resolves disputes arising from subrogation of medical payment 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.

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 recovering 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) it is a watercraft claim arising from accidents on waters under federal or international jurisdiction. (Property Program)
(h) under the insurance policy, settlement can be made only with the insured's consent; or
(i) it is a product liability claim arising from an alleged defective product. (Property Program)

Article Second lists the exclusions to compulsory arbitration. Each Agreement 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 company must raise and support the exclusion in its response for the arbitrator to consider it. The responding company is also free to waive asserting the exclusion 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 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 (SIR). If the recovering company's claim falls entirely within the liability deductible or SIR, jurisdiction is lacking. No award can be made against the responding insurer. The reason is that the arbitration would involve the interests of a party other than the insurance

company. An arbitrator can consider only an amount in excess of the insured's deductible or SIR. In these cases, the recovering 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 recovering 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 the defenses that are available in a court of law, including exclusions 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: Filer is a self-insured leasing company (lessor) seeking $2,000 in property damage to a vehicle it owns, and leases and responder raises the exclusion of Article 2(b) because the jurisdiction doesn't recognize the right of a leasing company (lessor) to seek such damages, i.e., no cause of action. The arbitrator should dismiss the claim.

A question asked is whether the recovering company's submission of a case stops the running of the statute of limitations on a counterclaim by a responding company. The answer depends on the loss state's laws. The rights and defenses of signatory companies are neither greater nor less in arbitration than they are in an action at law. If the filing of a suit tolls the statute of limitations for the original suit as well as a subsequent counterclaim by a defendant, the same would be true in arbitration. If the contrary is true in litigation, it is also applied in arbitration. The Doctrine of Relation Back might relate back filings, for the purposes of the statute of limitations, to the time when the original filing was submitted.

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 exclusion 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 exclusion); 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 (**subparagraph d**). Policy limits is the most common exclusion asserted by a responding company. That said, the arbitrator can only rule on what is clearly asserted and presented in the file. In these cases, it is the responding company's responsibility to properly assert and support its position (i.e., policy declaration page, claim system coverage screen, or some other written documentation that states the policy limits). It is also the responder's responsibility to raise and support any other exposure to its policy under the Additional Exposure section. This information is critical in helping the arbitrator determine, after liability and damages have been decided, if the responding company is out of jurisdiction.

Article Second (d) also allows a recovering company to accept the policy limits and reimburse its insured's out-of-pocket expenses from the award proceeds so arbitration retains jurisdiction over the claim, provided that the total award exceeds the applicable policy limits. AF does not have jurisdiction over the insureds, and they are not a party to the arbitration. Therefore, unless the recovering company specifically selects that they will indemnify its insured from the award proceeds, the policy limits defense will be upheld. To award policy limits to the recovering company would leave the responding company and its insured open for extra-contractual claims and payments if the recovering company has not expressly agreed to handle its insured's out-of-pocket claim.

EXAMPLE: The recovering company's total claim is $6,000, including the deductible. The recovering company does not indicate in the filing that they will accept policy limits. The responding company raises and supports a $5000 policy limit. The arbitrator decides liability at 100 percent and all damages are proven. No award will be entered since the recovering company did not agree to accept the $5000 policy limit. NOTE: a recovering company may agree to accept policy limits up to 60 days after the decision has been published if it did not do so in the initial filing or revisit.

This issue is much more complex when there are multiple parties seeking recovery from the policy limit of a responder. In cases where there are multiple recovering parties, each must agree to accept policy limits and a pro rata share as well as agree to reimburse any insured out-of-pocket expenses, if applicable, for arbitration to retain jurisdiction. The policy limit, nor any portion of it, can be awarded to a party, unless all exposures against the responding company are included in the filing.

There are also scenarios where a potential exposure exists, but the amount is unknown. It is important to present as much information as possible to help the arbitrator determine the impact of the unknown exposure to the policy limits. Additionally, a responding company should request a deferment if it is unsure of claims that may be brought against it. This allows the responding company time to complete its investigation. Stating the recovering company's insured *might have* out-of-pocket expenses is not enough to uphold an exclusion for insufficient limits. In this situation it is strongly recommended for the responding company to communicate

with the recovering company to ascertain if its insured has non-covered damages. A deferment could be requested, if necessary.

A question commonly asked 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 be removed because of the policy limit exclusion.

Subparagraph (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. (For concurrent coverage disputes, the denial may be based on particular damages that are not covered. See Rule 2-4). Before objecting to jurisdiction based on a coverage denial, a responding company should be aware of Rule 2-8. If a case is removed from arbitration's jurisdiction because of a coverage denial and coverage is subsequently accepted, the responding company must reimburse the recovering company for any legal expenses and court costs, if litigation has been filed due to the removal from arbitration. The responding company must also reimburse the recovering company for the additional filing fee incurred.

Subparagraph (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 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.

Subparagraph (g) is specific to the Property program and 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.

Subparagraph (h) 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.

Lastly, product liability claims arising from an alleged defective product are not compulsory in the Property program per **subparagraph (i)**. The exclusion does not preclude a party from filing a claim that is not based on an alleged product defect, even if the responding company presents a defense of product defect. For example, a claim alleging negligent installation or repair against the installer's or repairer's liability insurer would be compulsory, even if the installer's or repairer's liability insurer argues that the installation or repair was done correctly and the damage

was the result of a product defect. With consent, the product manufacturer may even be brought into the arbitration.

Article Third: Decisions

The decision of the arbitrator:

(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 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 a filer 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 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, subparagraph (a) asserts Arbitration Forums' requirement that arbitrators base their decisions on the applicable local jurisdictional law.

Arbitrators must consider the AF rules as well as any state regulations and statutes established by legislative bodies, and previous court decisions within their jurisdiction, if raised. A member can also use all the defenses that are available in a court of law, including an exclusion. If the courts in a particular jurisdiction recognize the validity of a particular exclusion, then the arbitrator must also consider it. 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.

Because parties enter into arbitration in dispute, there will be times when claim representatives will not want to accept an arbitrator's decision. Since the arbitrators are experienced in claim

handling and the use of accepted claim practices, they also apply their knowledge in arriving at their decisions.

Article Third, (b) provides 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.

Article Third, (c) informs 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, except for supplemental damages if the recovering company follows the guidelines in Rule 5-3. Otherwise, a decision is not controlling 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, including the insureds. Since the decision is neither res judicata nor collateral estoppel, there should be no reason to disclose the decision to any other party.

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 hear 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.

NOTE: Adding an extension or deferment is considered an answer consenting to arbitration. This prevents a party from delaying the case until the statute of limitations expires, then objecting to AF's jurisdiction.

In Special Arbitration, at least one of the disputing parties must settle with the claimant 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 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. Consent may also be given within a TRS filing.

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.

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 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 subparagraph (a) permits AF to make the appropriate rules and regulations to perform its duties to resolve disputes among members. To that end, AF 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 subparagraph (b) permits AF to select the location and means to conduct the arbitration hearings.

Article Fifth subparagraph (c) gives AF the authority to determine the qualification criteria to serve as an arbitrator and the way 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 member hear as many cases 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. AF also monitors decision quality and reserves the right to restrict an arbitrator's assignments.

Article Fifth subparagraph (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 subparagraph (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.

Article Sixth: Arbitrator Participation

Signatory companies agree to provide qualified arbitrators from among full-time employees and hear as many cases as they file.

When the various intercompany arbitration agreements were first adopted, an obligation for the signatories was to provide arbitrators to hear the cases. This provision was removed in 2004 as it was deemed understood and unnecessary.

In October 2019, AF's Board of Directors approved a proposal to restore the arbitrator participation requirement to the agreements to convey to the signatories their commitment to each other to provide qualified arbitrators to hear cases. The Board also approved the establishment of a member participation policy, effective June 2, 2020. The policy requires signatories to hear as many cases as they file to help to ensure timely resolution of arbitration cases, and outlines steps AF may take should a signatory not meet its obligation.

To be appointed as an intercompany arbitrator, a representative must be employed and exclusively used by the signatory company. Other individuals such as independent adjusters or third-party administrator (TPA) employees may not serve since they may represent or do work for many different signatory companies. The reason for this restriction is to maintain the objectivity of the panel. By restricting arbitrators to signatory company employees, they are readily identified as disinterested in the cases they hear.

Article Seventh: 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 Seventh provides for withdrawal from an agreement and outlines the steps a signatory must take to do so.

AF requires notice in writing from a senior-level individual of the withdrawing company, who has the authority to make such a decision on behalf of his or her company.

The withdrawal is effective 60 days after AF receives the notice of withdrawal. All cases filed by or against the withdrawing company during the 60-day waiting period are still subject to the provisions of the program. This includes the allowance for the withdrawing company to file a counterclaim after the withdrawal effective date if the original filing was submitted prior to the withdrawal effective date. The counterclaim is considered part of the overall case, and Rule 2-2 requires counterclaims be filed and heard together.

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 various 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 identify the insured name, claim file number or policy number, and correct and current address, if requested, for the representative/company handling the claim for the adverse party. Failure to include current and correct information may cause a filing to be closed or the decision to be voided.

The Preamble provides compulsory arbitration's *condition precedent*, which is an act that takes place before filing arbitration. It has always been intended that members attempt to resolve their particular dispute 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 recovering company to correctly identify the responding company's insured name, claim file number or policy number, and current address, if requested. (Address will be requested only when the responding company has not provided AF with a global email address for electronic notifications.) This minimal information should be easy to acquire through investigation and/or negotiation discussions.

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

Electronic notification eliminates issues regarding lack of notice, primarily in regard to the address that is used. However, there may still be issues that cause a decision to be voided. One example is where the recovering company selects the wrong responding company. If AF's notification is sent to a completely different/separate company, AF may have to void the decision. The recovering company will need to file a new case against 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 recovering company representative and attempt to settle the claim or secure more information, if needed. If the parties fail to settle the dispute, a response needs to be filed by the due date posted by AF for the case (see Rule 2-2). The responding representative must also add or correct any missing or erroneous entries when filing an answer.

A frequent question arises when a claim is assigned to a third-party administrator or some other party. In these cases, the filer should include the information (i.e., address, file number) for the representative handling the claim.

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

Rule 1-1: Geographical Jurisdiction

The Agreements limit jurisdiction to accidents, occurrences, or events occurring in 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. 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. 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 right to apply and enforce the Agreements and Rules within these boundaries.

As noted on page 15, some states have statutorily mandated the use of intercompany arbitration to resolve disputes; some even designate AF as the arbitration administrator. These statutes must be referred to for any questions regarding jurisdiction.

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/exclusion regarding jurisdiction once arbitration is filed. If the suit is not dismissed/discontinued, the party seeking removal of the litigation 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/exclusion.

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 objection 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 recovering company must make every effort to determine if the adverse party is a signatory to the applicable agreement having 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 with 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 recovering company has 60 days to file arbitration to protect against a jurisdictional exclusion based on the statute's expiration. The filing of litigation tolls the statute of limitations, but not for an infinite period.

An exception to Rule 1-2 is KRS 304.39-070 which gives insurers two options for addressing Kentucky PIP disputes: joining as a party in an action that may be commenced by the person suffering the injury or filing intercompany arbitration.

We are also 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 recovering 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 recovering company has not agreed to accept an award up to the policy limit, the arbitrator will close the case, as jurisdiction is lacking. The recovering 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 responding company's insured; however, arbitration would not be compulsory at that point.

Rule 1-3: Monetary Limit

Compulsory arbitration is applicable to a maximum of:

- $100,000 total company-paid damages in the Automobile, Medical Payment, and Property Forums.
- $250,000 Contribution Sought Amount in the 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 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 total company-paid damages.

Rule 1-3 specifies each 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 recovering company to reduce its claim amount, so the matter remains within arbitration's jurisdiction. For example, a recovering company can limit its filing to $100,000 even if paid $110,000 in damages. If the recovering 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 company will be applied to the total company claim amount sought in the arbitration. Using the above example, if liability is decided at 50 percent versus the responding company, the award would be $50,000, not $55,000, exclusive of the deductible amount. In Special Arbitration, the liability percentage will be applied to the Total Settlement Amount, but the award cannot exceed the Contribution Sought Amount.

The monetary limit applies on a per feature basis rather than an aggregate of all features arising out of the same accident, occurrence, or offense. So, there can be multiple features included in a case with an individual claim amount less than $100,000, and each would be subject to compulsory arbitration. The program monetary limit applies separately to each feature.

The second condition in Rule 1-3 pertains to a claim and companion claim under different lines of coverage. There could be a $50,000 Automobile filing and a $150,000 Special Arbitration filing. Although the total amount sought from the responding company equals $200,000, arbitration would retain jurisdiction over both filings because the individual claim amounts do not exceed the monetary limit of their respective forums.

In the Property program, if the recovering company has made a payment under the building coverage, one under the contents coverage, and one under the business interruption coverage, these are considered one claim to be filed as one feature 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 recovering company would be free to limit its recovery to the $100,000 forum limit or secure the responder's consent to arbitrate the case for the full amount. If the above payments were to be submitted as separate cases, the responding company could assert the Jurisdictional Exclusion since the aggregate amount exceeds the compulsory limit. The same applies to Special Arbitration and third-party settlements. The third party's claim or suit against the alleged tortfeasors can be for bodily injury or property damage, or both. The monetary limit refers to the settlement value of the third-party's claim. As such, if the settlement includes both bodily injury and property damage, only one filing is submitted. If there are multiple claimants whose claim has been settled, each would be filed as its own feature.

Legal Fees are not included in the $100,000 monetary limit, unless the responding company's 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 filer has a Company Claim Amount of $85,000. The filer also paid $20,000 in court costs and attorney fees because the responding member raised an invalid exclusion to compulsory arbitration (see Rule 2-8). Arbitration is compulsory even though the Company Claim Amount plus the Legal Fees Sought equal $105,000.

The deductible is also not included in the program's monetary limit. For example, a filing will be heard with Total Company-Paid Damages of $99,000 plus a $5,000 deductible (total damages are $104,000), because the compulsory monetary limit does not include the $5,000 deductible.

Rule 1-4: Impleading

The recovering company should name all involved member companies in its filing and any consenting non-member companies, if applicable. A responding company may add other parties and/or argue the negligence of an unnamed party. Where the negligence of an unnamed party is argued, the recovering company may withdraw its filing and refile at a later date or pursue recovery outside of intercompany arbitration if a non-member is involved or allow the filing to be heard. By allowing the filing to be heard, the recovering company thereby agrees to accept any award against a responding company and waive its right to pursue the balance directly from any unnamed party.

The recovering company has the initial obligation to name all involved parties in the filing. This allows all parties to present arguments and their own damages, if applicable, so all issues are decided. This is especially important when a liable party has a policy limits issue. There may be times, however, where the recovering company does not name a specific party or is not aware of other potentially negligent parties. Rule 1-4 permits the responding company to add additional parties, including consenting non-members, or argue the party's negligence.

If the responding company does not add a party and only argues their negligence, the recovering company may withdraw its filing or allow the filing to proceed as filed. If the case proceeds to hearing, the arbitrator will determine the percentage of liability, if any, for all alleged tortfeasors but enter awards only against each named party based on the facts. In other words, the named responding parties will only pay the percentage of the award amount, if any, based upon the liability finding against its insured. By allowing the case to proceed to hearing, the recovering 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., submitting a new filing against another party, pursuing collections from an unnamed party, 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 recovering company can withdraw its filing to pursue all parties in another venue outside of arbitration, such as litigation, or they can re-file arbitration at a later date, subject to the applicable statute of limitations.

In concurrent coverage filings, all companies need to be included in the arbitration. It is the responsibility of the companies to allege the issue of primary and excess coverage when completing the appropriate selections in TRS.

In these situations where one of parties is non-signatory and has not granted AF consent to hear the arbitration, AF does not have jurisdiction over the non-signatory company or the claim, pursuant to Article Second. In such cases, the signatory company should raise a Jurisdictional Exclusion for Subrogation Prohibited, as AF is unable to resolve the liability or primary and excess coverage issue.

Rule 2-1: Filing Process

The recovering company initiates arbitration by filing via AF's website.

Evidence must be attached to the filing when it is submitted. For Auto filings, evidence attached supporting feature damages sought will be viewable to the responding company for the purposes of the specific arbitration filing and may not be copied for use in any other claim arising out of the same accident. Neither amendments nor reschedules are allowed; the recovering company will have the option to revisit the filing should a responding company assert policy limits, an exclusion, a damage dispute, or add a party.

Special Arbitration should be filed within 180 calendar days of payment to the claimant or the delay may be asserted as a jurisdictional exclusion 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 recovering company and when. The rule also points out the differences between the forums.

While evidence is always to be attached where appropriate within the recovery workflow, this is critical in an Auto filing because evidence attached to support the feature damages must be viewable to the adverse parties. When the recovering company does not properly attach evidence to the Feature Damages workflow step to support its feature damages and this is raised by the responding company in the damage dispute section, the evidence will not be considered by the arbitrator and the damages will not be awarded. An exception is where the responding company has disputed specific damages because the documentation was previously shared.

> *Note: When the recovering company has shared evidence supporting the feature damages, it is permissible to include additional evidence during their revisit that directly* ***refutes*** *the responding company's damage dispute.*

When responding to a damage dispute, the recovering company must present its arguments in either the Damages Justification/Dispute Rebuttal or Revisit sections for proper consideration. Any damage-related issues included in the liability section will not be reviewed.

The last paragraph is specific to Special Arbitration filings concerning contribution for third-party settlements (it does not apply to filings concerning workers compensation subrogation). It specifies a 180-day period following payment to the third-party 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 a jurisdictional exclusion and provide supporting evidence. If the arbitrator determines the delay did not cause prejudice, he/she will decide the matters at issue.

Rule 2-2: Responding Process

The responding company shall answer via AF's website.

The response must be submitted by the response due date, and evidence must be attached when submitted. No amendments may be made after submission. If the responding company has paid damages under its insured's policy and is seeking recovery 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 on or after the response submission date, or, for Auto filings have indicated that salvage was pending at the time of the original filing.

Rule 2-2 provides instructions and time limits for submitting a response to a filing.

If the responding company believes any named party's insured is at fault or partially at fault, it must file the damages paid under its insured's policy that it is seeking to recover. The response with damages must be filed by the applicable due date. For all filings, the only exception to this requirement is if the initial liability decision allows for recovery and the responding company can prove that it paid its insured on or after the Response Submission Date for the original filing or any time after.

There is a second exception for total vehicle losses in the auto forum. If the vehicle salvage has not been sold at the time the responding company submits its arbitration response, the company must indicate a Pending Total Loss before their submission. By doing so, the responding company may later seek recovery of its total loss damages, regardless of whether those damages were paid before, on, or after the Response Submission Date of the original filing.

This step ensures that the responding company can recover damages related to the total loss settlement at a later date. However, this exception does not apply to total loss settlements in which the salvage has been sold and the responding company has been reimbursed for the sale of the salvage vehicle prior to the Response Submission Date.

While evidence is always to be attached where appropriate within the counterclaim recovery workflow, this is critical in an Auto filing because evidence attached to support the feature damages must be viewable to the adverse parties. When the counterclaim recovering company does not properly attach evidence to the Feature Damages workflow step to support its damages and this is raised by the responding company (original recovering company) in the damage dispute section, the evidence will not be considered by the arbitrator and the damages will not be awarded. An exception is where the responding company (original recovering company) can dispute specific damages because the documentation was previously shared.

Rule 2-3: Legal Fees

If seeking legal fees (along with feature damages), a company must list these amounts or they are waived. The justification for them must be explained and the supports must be listed and submitted as evidence.

Rule 2-3 addresses the ***Legal Fees*** section of the filing, if applicable. There are only a few instances where legal fees may be sought in intercompany arbitration, and this must be done in conjunction with filing your feature damages; a filing may not seek only legal fees. Rule 2-8 is one scenario. This is where a responding company asserts an exclusion to jurisdiction (i.e., denial of coverage) causing them to be placed out of jurisdiction, only to subsequently change its position once litigation is filed. Per Rule 2-8, the responding company will owe the filer's legal fees up to the suit dismissal as well as the filing fee for the new arbitration filing.

The more common instance where legal fees may be pursued applies to Special Arbitration. Special Arbitration is different from the other forums because, except for Workers' Compensation subrogation filings, it is a liability carrier filing against another 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 the Special Forum's jurisdiction. For example, if one carrier's coverage position 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 because of the other carrier's coverage denial in conjunction with the compulsory damages. If the arbitrator decides that the responding company's policy was primary and the denial inappropriate, the legal fees may be awarded in addition to the settlement amount. The same goes for a co-defendant negligence scenario. One carrier denies liability so the claimant files suit against that carrier and another. The insurer of the additional tortfeasor can settle the suit and file in Special Arbitration to resolve the two carrier's liability dispute and include its legal fees. If the arbitrator decides that the responding company was 100% liable, the legal fees that the recovering company incurred can be awarded.

In closing, legal fees are awarded on an "all or none" basis. If the recovering company incurred the fees because of an action or inaction by the responding company, 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.

Rule 2-4: Pleadings and Jurisdictional Exclusions

The parties must raise and support pleadings or jurisdictional exclusions where provided or they are waived.

If a denial/disclaimer of coverage is being pled (see definition of Denial/Disclaimer of Coverage (b)), the party will be ruled out of jurisdiction so long as a copy of the denial/disclaimer of coverage letter to the party seeking liability coverage for the loss is submitted as evidence. If no such letter is provided, or where the denial concerns concurrent coverage, the case will be heard and the arbitrator will consider and rule on the coverage defense.

It is critical for the parties to note, where appropriate, if the case involves a pleading or exclusion. Rule 2-4 requires the use of the specific section to assert either. This ensures the parties are aware of any issues regarding jurisdiction and, equally important, alerts the arbitrator. An arbitrator may only consider pleadings or exclusions included in the appropriate section, and nowhere other than the appropriate section.

Revisits/Rebuttals: The recovering company has the option to request a revisit, should the responding company raise a jurisdictional exclusion. This allows the recovering company to

rebut the jurisdictional exclusion that might not have been known at the time of the filing of the arbitration.

Only rebuttals entered in jurisdictional exclusion revisit will be considered by the arbitrator. Arbitrators will not consider rebuttals entered into any other section of the filing.

Please note, TRS will not allow the recovering company to enter a rebuttal relating to jurisdictional exclusions raised for a denial of coverage. The rebuttal for policy limits is limited to accepting policy limits, making a note, and disputing the stated limit amount if it differs from the state minimum or drop down limits.

Pleadings include issues or legal doctrines that could change the allocation of damages (like bailment or joint and several liability). The recovering company presents its liability theory in its Liability Arguments, 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 recovering company's arguments present the theory that the responding company's insured contributed to the accident that caused its damages, and **bailment** is asserted as a pleading specifying that if a percentage of liability is proven versus the responding company's insured (based on the applicable jurisdictional bailment law), the recovering company is entitled to an award of X percent of its damages. If proven, the bailment will be applied.
- The recovering company's arguments present the theory that the responding company's insured contributed to the accident, as did a hit and run driver. **Joint and several liability** is asserted as a pleading specifying that if a percentage of liability is proven against the responding company's insured, the recovering company is entitled to an award of 100% of their damages. If proven, joint and several liability will be applied.

A **jurisdictional exclusion**, on the other hand, is an argument that does not address negligence or damages, but rather raises an objection to compulsory arbitration's jurisdiction over the party or claim based on Article Second, Exclusions of the arbitration agreements, or certain Rule infractions. Regardless of who is at fault or what damages are owed, the assertion of an exclusion suggests the case cannot be heard because arbitration lacks jurisdiction over the matter. Jurisdictional Exclusions include:

- Non-signatory party
- Action does not exist in law or equity (i.e., subrogation prohibited, no right of recovery, or prior release).
- No liability policy in effect, denial of coverage, or policy limits.
- Rule Infraction (i.e., damages needed to have been included in a prior filing (Rule 2-2 or Rule 5-3).

Asserting a jurisdictional exclusion 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 exclusion, as the arbitrator could deny it and continue to hear the case.

If a jurisdictional exclusion is raised, the recovering company will need to support the existence of the cause of action by citing controlling statutes or case law by revisit rebuttal. Failure to establish the existence of the cause of action is grounds to place the case out of jurisdiction.

An example of a legal bar to a right of recovery that would be asserted as a Jurisdictional Exclusion includes Article Second (h) of the Medical Payment Subrogation Arbitration Agreement – medical payment subrogation claims are prohibited by statute or judicial decision. Another example 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 asserted as a challenge to arbitration's jurisdiction in the Jurisdictional Exclusion section of the response.

In addition to specifying how a jurisdictional exclusion must be asserted, Rule 2-4 stipulates what evidence a responding company must submit. For policy limits, a dec page, claim screen shot, or any documentation that provides the policy limit amount may be submitted. If an additional exposure is also alleged, proof must be provided to support the additional exposure(s) that places the policy limits in jeopardy.

There may also be times when a liability policy was in effect at the time of the accident, occurrence, or event, but liability coverage has been denied/disclaimed to the insured. Evidence to submit in these instances is a copy of the denial/disclaimer letter sent by the responding company to their insured or driver seeking liability coverage (and defense) under that responder's policy for the claim. A Reservation of Rights letter is not sufficient to support a Denial of Coverage exclusion since coverage is not affirmatively denied. If a coverage determination is actively pending, a deferment would be warranted until an affirmative coverage determination is made.

Taking a quick step backward, there are two coverage prompts that a responder must answer when submitting its response:

1. A liability policy was in effect at the time of loss.
2. Has coverage been denied for this claim?

In most instances the first prompt is answered with "Yes". Exceptions would be where the wrong responding company is selected or the policy with the named responding company had expired prior to the date of loss. In these instances when "No" is selected, the response is accepted in

good faith and the party is automatically placed out of jurisdiction. (Responders are reminded of the implications of Rule 2-8 before they improperly select "No" to this question.)

If the responding company confirms a liability policy **was** in effect at the time of loss, it will answer the second question indicating whether coverage has been denied for the accident in dispute. The rest of this discussion will pertain to those instances where "Yes" is selected by a responder.

In instances where the named insured or a permissive driver was operating the responder's vehicle, a copy of the denial/disclaimer letter sent by the responding company to their insured or driver seeking liability coverage (and defense) under that responder's policy for the claim is needed. The same is true in the scenario where a non-permissive driver was operating the responder's vehicle.

A denial of coverage letter isn't always necessary to support a denial of coverage defense. If, for example, the responder's jurisdictional exclusion is based on theft, a denial of coverage letter to the thief may not be needed so long as evidence is submitted to prove theft (i.e., police/theft report). In this scenario, the case would proceed to hearing where the arbitrator can either uphold or deny the jurisdictional exclusion, depending on the evidence submitted to support the theft defense. Legal liability for a theft is a jurisdictional exclusion based on no right of recovery. It does not pertain to the duties breached during the events of an accident that caused damages. A legal liability argument will not be considered by an arbitrator in the liability arguments.

At this point, it is important to differentiate between a denial of coverage and a denial of liability. Simply, a denial of liability is not a denial of coverage. If the responding company submits a copy of a denial of liability letter to the recovering company or its named insured or driver, this is not sufficient to be ruled out of jurisdiction. The case would proceed to hearing, and the arbitrator would most likely deny the denial of coverage defense.

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. 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 upheld and it is determined that arbitration lacks jurisdiction, the recovering company would be free to pursue litigation versus the "uninsured" tortfeasor.

Spoliation of Evidence

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. By raising

spoliation of evidence, the party is asking the arbitrator to take into consideration its assertion that the adverse party made it impossible for it to prove its case by destroying or making critical evidence unavailable to it. The company would have to establish through its evidence that the adverse party did in fact improperly dispose of the evidence. Beyond that, there are two ways this pleading could be important. In some states, the recovering 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 recovering 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 spoliation was established.

Spoliation of evidence is similar for the responding company, with the addition of Rule 2-11 that applies only to product liability cases that provide a bar to jurisdiction if a recovering 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 exclusion under Article Second subparagraph (b), if the basis is 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 exclusion. However, it could be a defense to the allegations. The responding company would have to establish that the recovering company 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 spoliation.

The important point, whether it's raised by the recovering 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.

The last part of Rule 2-4 clarifies the effect of a coverage denial on concurrent coverage disputes. Simply, a coverage denial based on concurrent coverage/primacy of policies (i.e., primary/excess application of the disputed coverage) does **not** remove the party/case from arbitration's jurisdiction. If, however, a responding company pleads no liability policy was in effect or a complete denial of coverage based on a policy provision not related to concurrent coverage, arbitration will lack jurisdiction over the party/case.

Rule 2-5: Disputing Damages

Damages must be disputed on the Feature Response workflow step, if applicable. For new Auto filings, evidence attached supporting disputed damages will be viewable to the recovering company and other responding companies, if applicable, for the purposes of the specific arbitration filing and may not be copied for use in any other claim arising out of the same accident. Arguments not properly raised 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 Jurisdictional Exclusion section, a responding company must clearly communicate to the recovering company and arbitrator that damages are disputed.

The recovering company itemizes the various damages it seeks recovery of in the Feature Damages workflow step and enters any prior payment received from the responding company.

When a responding company responds and does not dispute damages, damages are not at issue. The arbitrator will only verify that the evidence supports the recovering company's itemized amounts. The arbitrator will not review whether the damages were appropriate, reasonable, excessive, etc. When determining if damages are proven, the arbitrator will compare the itemized amounts and the damages evidence to ensure the amounts claimed are supported.

For example, if the recovering company seeks $2,300 in Auto Damage and $400 for Rental, the arbitrator will verify that these damages are supported by evidence, i.e., estimate, rental invoice or electronic invoice.

If the responding company disputes the damages claimed, it must do so on the Feature Response workflow step. The responder should dispute the specific damage type, enter the Proposed Amount, indicate the Dispute Type, and most importantly, justify its damage dispute. For Auto filings, evidence attached to support the damage dispute will be viewable to the recovering company and other responding parties. When the responding company does not properly attach evidence to the Feature Response workflow step to support its damage dispute and this is raised by the recovering party, the evidence will not be considered by the arbitrator.

Providing the arbitrator with sufficient information regarding the type and amount of damages in dispute is essential. The more detailed the information is regarding what damages are disputed and what amount, the easier it will be for the arbitrator to resolve the dispute. Simply arguing that the recovering company overpaid the claim or that "rental was excessive" without a specific reason or what the proper amount should be will make it difficult for the arbitrator to consider the argument or agree with the stated position.

In addition, if the responding company has issued a prior payment for damages sought in the filing, the payment amount must be entered in the Prior Payment Made field with proof of payment attached showing the payment has been received and processed. Double-dip arguments (payment issued to insured, repair facility, rental company, etc.) must be raised in the prior payments section. Additionally, AF strongly encourages the responding company to raise the double-dip argument in the damages section as well, allowing the recovering company to enter a rebuttal if warranted. Credit for the double-dip payment can only be applied in the prior payment section. This includes deductibles and any payments alleged to be a double dip. This is especially important if there is a policy limits issue.

In some cases, a responder may dispute that part of the claimed damages are not covered under its policy. For example, work product or costs related to mold in Property filings. These issues can be raised as a damage dispute or exclusion 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 Responder would raise the issue of its mold exclusion noting the amount of the excluded damages. The arbitrator will consider the payment supports from the recovering company and adjust the award for those excluded damages. This applies also to concurrent coverage disputes wherein the responding company asserts that damages included in the filing are excluded under its policy.

Rule 2-6: Companion Claims

Only companion claims/features submitted in the same coverage filing will be heard together.

As the rule states, only companion features under the same coverage (i.e. PIP) will be heard together when they are submitted together.

- If the recovering company has an Auto and PIP claim, these are filed and heard separately. The recovering company can file them at the same time, or file one first to receive a liability decision and see if the other claim can be settled based on it. If not, arbitration can be filed and the prior decision included as part of their evidence. The decision will not be controlling, but it might influence the arbitrator.
- If the recovering company has two PIP claims (i.e., driver and occupant), each feature would be included in the same filing, if possible. If only one feature is ready to be heard, it can be submitted and heard. The other feature may be added to the case later. The initial liability decision will apply. The sole issue will be the damages sought for this feature.

Rule 2-7: Pre-hearing Settlement

The recovering company must immediately withdraw its feature filing online if the dispute is resolved.

Rule 2-7 is straightforward and advises the recovering company of its obligation to promptly 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 recovering company can easily withdraw its filing online by selecting "Withdraw Feature" under Feature Actions.

It must be noted, if payment has been made in full to the recovering company but the case is not withdrawn, the responding company should submit a response and include proof of payment to the recovering company if the payments have been received and cashed.

Rule 2-8: Case Restoration after Improper Objection to Jurisdiction

If a responding company pleads a jurisdictional exclusion and the filing is closed based on no jurisdiction and it is subsequently discovered that arbitration was properly filed, the recovering company may re-file the case in arbitration. The responding company will reimburse the recovering company for all 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 a jurisdictional exclusion that removes a case from arbitration's jurisdiction. Should the responding company subsequently change its position (which places the claim back in arbitration's jurisdiction), the recovering company may recover its feature damages and any legal fees and court costs if litigation is pursued because of the removal from arbitration's jurisdiction, as well as the additional filing fee.

For example, when a responding company asserts denial of coverage, the recovering company is free to pursue the "uninsured" party. If, through litigation, it is determined there is coverage, the recovering company may re-file arbitration. If it incurred legal expenses due to the initial removal of the case, it is entitled to recover these expenses from the responding company that was out of jurisdiction. If not reimbursed by the responding company, the recovering company may list these expenses in the *Legal Fees* section of the filing, outlining why they are being sought in its contentions, and provide evidence/proof to support the amount. The additional filing fee may also be included in the damages.

In closing, legal fees are awarded on an "all or none" basis, not based on the liability decision. If the recovering company incurred the fees because of an action or inaction by the responding company, they are to be awarded

Rule 2-9: Extension

A responding company is permitted one extension of its response due date, so long as the current response due date has not expired. The party requesting the extension is notified of its new response due date. AF will charge the requesting party a fee. No additional extensions are allowed. Companion filings across different coverages are separate cases, i.e., one extension per coverage filing, and will be heard separately.

AF strives to provide the most efficient process possible. There will be times, however, when a responding company needs additional time to submit a response. Rule 2-9 addresses this need.

A responding company can extend its response due date so long as the current due date has not expired. Currently, an extension adds 15 days to the response due date. the requesting party is charged a fee equal to the applicable program's filing fee.

The Response Extension option is located in the Case Actions dropdown menu.

Rule 2-10: Deferments

Any party may add a one-year deferment. The reason for the deferment must be explained in the Deferment Justification section and any evidence attached. There will be no fee for an initial deferment.

An adverse party may challenge the need for a deferment if it believes the delay is not warranted. If challenged, an arbitrator will consider the validity of the deferment. If the deferment is allowed, the case will remain deferred for one year from the deferment request date. If the deferment is not allowed, the case will continue as not deferred and the parties will need to take appropriate steps. Filings across different coverages are treated as separate cases; a deferment will apply to the specific coverage selected.

Any subsequent deferments will follow the above procedure. AF will charge the requesting party a fee for subsequent deferments.

A jurisdictional exclusion is waived if it is available when the deferment is made but is not asserted. This does not prohibit the responding company from subsequently asserting a jurisdictional exclusion at the time it becomes available.

There are times when the hearing of an arbitration case must be postponed for an extended period. Some common reasons include: active coverage investigation, unknown additional exposure amounts, pending BI claim or suit with policy limits implications. In these instances, a deferment (see definition) may be added by a party.

The requesting party's Deferment Justification and evidence, if any, needs to clearly document the *impact on the arbitration case*. This is especially true in the event the deferment is challenged by another party. For example, if there is a companion claim or suit that may impact policy limits, a copy of a demand or suit paperwork will be important as well as proof of the policy limits. The mere existence of a companion claim or suit, on its own, does not necessarily support the need to defer the arbitration. It is important to note that the arbitration decision will not affect the litigation because the Arbitration Agreements (Article Third) specifically state that arbitration decisions are neither *res judicata* nor *collateral estoppel*.

If a deferment is challenged, the arbitrator will consider the Deferment and Challenge Justifications and any evidence in support of the respective position to determine whether the deferment is allowed. Keep in mind that the arbitrator reviewing the deferment request will only see the justifications and evidence specifically attached to the deferment/challenge and only for

the parties involved (i.e., requesting and challenging parties). The arbitrator will not be able to review the full case (i.e., liability arguments, evidence, etc.).

If allowed, the case will be restored to deferred status for one year from the deferment request date. Another deferment may be added after the initial deferment expires, if needed, and the same process as outlined above will follow.

If the deferment is not allowed, the parties will be notified to complete the filing or responding process so the case can proceed to hearing.

IMPORTANT: If the deferment is added by the recovering company (partial filing initiated simply to toll the Statute of Limitations), and no subsequent action is taken within 90 days of the deferment expiration (i.e., add another deferment or submit complete case to be heard), the case will be closed. No further recovery effort will be allowed. This ensures in-progress cases do not sit idle in the application infinitely.

If during the one-year deferment period it is determined the deferment is no longer needed, the requesting party is to withdraw the deferment so the case can proceed to hearing. It is also strongly recommended that the party amend its response, if necessary, to address an exclusion or other issue that the deferment resolved. For example, a responding company requests a deferment because of a policy limit issue (i.e., the recovering company's claim is for a portion of the policy limit, but other potential claimants exist). Hopefully, all claims can be settled on a pro-rated basis during the deferment period. If not, the responding company would amend its response to withdraw the deferment.

A responding company also has an obligation to raise any objection to jurisdiction (exclusion) in its answer even if it or another company has added a deferment. This allows the recovering 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 exclusion, the arbitrator will consider the jurisdictional question first. If the arbitrator determines AF has jurisdiction, he/she will then consider the deferment. If the arbitrator upholds the jurisdictional issue and decides arbitration does not have jurisdiction over the party, the filing will be withdrawn (where there are multiple responders, only the party asserting the exclusion will be out of jurisdiction).

Rule 2-11: Product Liability Evidence

For product liability cases, reasonable accommodations should be made for the inspection of the alleged defective product. Failure to do so may result in case withdrawal if raised as a jurisdictional exclusion 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 recovering 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 recovering company to send the product to the responding company.

If the responding company has requested an inspection of the alleged defective product 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 to proceed with only the recovering 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 allows an exclusion based on Rule 2-11 (reasonable accommodations for the inspection of a defective part were not made), would the recovering company be able to file the case in litigation?" In these cases, the recovering 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 recovering 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 a discussion of spoliation of evidence.

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 Total Company-Paid Amount is $10,000 and above (Property); the *Total Settlement Amount* is $100,000 and above (Special).

(a) The appeal indicating the alleged error by the original arbitrator/panel must be submitted 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 received timely.
(c) AF will have the original file, decision, and appeal positions reviewed by an appeal panel determined by AF. 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 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-dollar claims and/or minimal complexity. This is why decisions cannot be appealed in the Automobile, PIP and Medical Payments forums.

To appeal a Property decision, the Total Company-Paid Amount must be $10,000 or above. To appeal a Special decision, the Total Settlement Amount must be $100,000 or above (for Workers Compensation subrogation matters, even though "settlement" as defined in the Rules is not required, the "Total Settlement Amount" entry must be the total amount of damages paid to the injured employee by the workers compensation carrier. The figure in the "Company Payment" and "Total Settlement Amount" will most likely be the same dollar amount.)

An appeal in the Property and Special forums is not intended to simply facilitate another chance to prevail. The basis for an appeal under Rule 2-12 must be an actual error by the original

arbitrator or panel. Examples include the erroneous interpretation of submitted case law or misreading of evidence.

The right to appeal a decision is limited to the parties that "participated" in the original hearing. In other words, if a responding company did not respond it may not appeal the decision.

The functionality to submit an appeal is located under the filings Decision Actions. The appealing company must pay a non-refundable fee for the appeal. (AF's current fee schedule is available on AF's website.)

In situations where there are related cases or multiple features included in the filing, only one must meet the monetary limit for an appeal. This prevents different decisions for a loss should the appeal panel render a different decision.

Rule 2-13: Confidentiality

All matters related to arbitration proceedings, including filings, communications, hearings, decisions and awards are confidential.

Article Third of the various arbitration agreements administered by AF provides, "All matters concerning an arbitration proceeding shall be held in strict confidence." Rule 2-13 makes it clear that all arbitration fillings are confidential, by expanding confidentiality language applicable to all forums and expressly stating that information and documents filed with AF are confidential.

Rule 3-1: Notice of Hearing

A responding company is notified 30 calendar days prior to the response due date for the initial filing.

AF notifies the responding company when a filing is submitted. This notification includes claim details and the response due date.

Notifications are sent electronically to companies that have provided AF with a designated global email address. If no global email address is on file, the notification is mailed to the address entered by the recovering party.

Important: Companies that elect not to provide a global email address accept the risk that notification delivery may be delayed, which may affect their ability to respond on time.

AF relies completely on the accuracy of the responding company's information provided by the recovering company in compliance with the condition precedent. For this reason, if the recovering company selects the wrong responding company and AF's notification is sent to a wrong party, AF will close the filing or void the decision. The recovering company will need to submit a new case naming the correct responding company. This also applies if an incorrect mailing address is entered (if the responding company does not have a global email address).

As noted previously, 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 recovering company representative and attempt to settle the claim or secure more information, if needed. If the parties fail to settle the dispute, a response needs to be filed by the due date posted by AF for the case (see Rule 2-2).

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 submit a response by specifying that its failure to respond will not delay the hearing. The arbitrator will decide the case based only on the documentation submitted in time, even if only from the recovering company.

Rule 3-3: Arbitration Panel Size

One arbitrator will hear a case; however, a three-person panel may be requested if the Total Company-Paid Damages or Contribution Sought Amount (Special Arbitration) is $15,000 and above. A party requesting a three-person panel will be charged a three-person panel fee.

One arbitrator will hear 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, the membership agreed to establish a monetary limit based on the Total Company-Paid Damages or Contribution Sought (Special Arbitration) amount.

A party must select the three-person panel option. (The option does not appear if the monetary limit is not met.)

AF will charge the requesting party a fee, which varies by forum. Refer to the Fee Schedule on AF's website for more information.

Rule 3-4: Adjournments

The arbitrator may request briefs of law or clarification of submitted materials (including policy limits issues). AF will notify the applicable party of the due date for the requested item. If the requested item is not received by the due date, the case will be heard without it.

An adjournment is an interruption of a hearing at the arbitrator's discretion for a maximum of 30 days. Adjournments are rare, and it is highly recommended that a company submit evidence to support all references to local statutes and case law to avoid any unnecessary delay.

One possible reason for an arbitrator to adjourn a hearing may be to request a breakdown of damages when the recovering company's estimate does not break down front and rear damages.

If an arbitrator adjourns a hearing, AF will notify the party of the due date by which the information must be received. The case will proceed to hearing if the requested information is not received in time, and the arbitrator will render a decision based on the available file material.

Rule 3-5: Requirements for Arbitrator Consideration

The arbitrator may only consider:

(a) Affirmative pleadings or jurisdictional exclusions that are properly raised.
(b) Deferments that are supported in the Deferment Justification section, if challenged.
(c) Evidence listed and attached.
(d) Amount entered as the *Total Company-Paid Damages, Contribution Sought Amount*, and/or *Legal Fees*.
(e) Disputed damages properly argued per Rule 2-5.

Rule 3-5 outlines specifically what an arbitrator has the authority to consider, such as jurisdictional exclusions, deferment challenges, listed and attached evidence, dollar amounts, and disputed damages. It is the party's responsibility to properly bring these items to the arbitrator's attention if they apply to the case.

Rule 3-5 subparagraph (a) pertains to pleadings and jurisdictional exclusions. Per Rule 2-4, the parties must assert these arguments, if applicable, or they are waived. An arbitrator may not raise these arguments for a party. It is also important to note that supporting evidence must be listed and submitted, i.e., case law, statute, etc.

Rule 3-5 subparagraph (b) provides that an arbitrator may only consider a deferment that has been properly requested and subsequently challenged.

Rule 3-5 subparagraph (c) stipulates that evidence submitted for arbitrator consideration must be specifically declared/listed. AF's arbitration application includes an exhaustive list of evidence types from which to select. Except for evidence attached to Feature Damages in the Auto Forum, where evidence is shared and viewable to all parties. The evidence list is the only way for the parties to know what evidence will be presented to the arbitrator. The arbitrator matches the evidence list with the evidence submissions and verifies that the evidence supports the allegations and/or defenses. The arbitrator may not consider evidence if it is not declared/listed, unless it is otherwise viewable to all companies within the filing or damages are disputed and the listing of the evidence is not a disputed issue.

Auto filing evidence that supports the damages sought or disputed damages must be properly attached to the feature damages section. This ensures the arbitrator can confirm the evidence that has been submitted. In the Auto Forum, the arbitrator may not consider evidence or arguments not properly argued or attached in the feature damages section (per Rules 2-1 and 2-5).

Regarding audio and video evidence, AF does not allow or accept audio or links to external websites like YouTube as evidence (evidence containing embedded audio and video is rejected by our system). If a party is unable to upload video evidence, it must request a personal appearance, select the "Video Evidence" evidence type, and upload/attach a mock evidence document in place of the video. AF will contact the Member Representative to schedule a videoconference with the arbitrator to view the video evidence. In the case of audio evidence (such as recorded statements), AF requires the written transcript of the recording be declared and provided as evidence for the arbitrator to view.

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 filing. These entries are critical for the arbitrator to render an accurate award. These amounts are the basis for the arbitrator's award computation. The *company claim amount*, *contribution sought amount*, and *legal fees* amount take precedence over the proven damages amount if the claimed amount is less than the proven damages. For example, if the recovering company's itemization of damages calculates a Total Company-Paid amount as $2,000 but its evidence supports $20,000, the arbitrator's award will be controlled by the $2,000 amount.

Rule 3-5, subparagraph (e) provides that damage disputes, justifications, and rebuttals may only be considered by an arbitrator if properly argued in accordance with Rules 2-1 and 2-5. AF's application includes designated sections for disputing damages and any arguments entered in any other section will not be considered. When disputing damages, this is especially important as the recovering company can specifically request to revisit a filing if damages are disputed.

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 (i.e. statements, photos, invoices, proof of payment), evaluate its applicability and credibility, and render a decision based on their assessment. The exception is Auto filings where evidence supporting damages or disputed damages are not properly attached (Rule 2-1 and 2-5)

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

Rule 3-7: Hearing Attendance

A party may appear telephonically when a case is heard and present witnesses. The intent to do so must be noted where provided.

(a) The representative may only clarify, at the arbitrator's request, its arguments 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 expeditious, easy, and cost-effective. For this reason, AF members typically opt to have cases heard without an appearance. The file is to "speak for itself." That said, Rule 3-7 does allow a party to request and make an appearance when the case is being heard and, if necessary, present witnesses. Appearances are made via telephone conference call with the arbitrator.

If a company representative wishes to make an appearance, this must be indicated in the filing or response (Filing Options & Billing workflow step). This informs the other parties and AF of the appearance and need to schedule a telephone conference call.

A representative should not request an appearance with the understanding that they will verbally present their case. Rather, the arbitrator will have reviewed the case prior to the appearance; the representative will only answer any questions the arbitrator may have. The representative will be dismissed and the conference call ended once the arbitrator has all the information and/or clarification needed.

The same applies should an insured or witness or expert appear. The intention of making an appearance must be indicated and their statement or report must be listed and submitted as evidence. They may not present verbal testimony. They may only answer any question the arbitrator may have. For this reason, personal appearances are extremely rare.

Rule 3-7 also provides that an insured, witness or expert may not appear without the appearance by a company representative. The purpose of this restriction is to minimize the potential for disruption at hearing since insureds and witnesses are not familiar with the intercompany arbitration process.

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 by the member (third-party administrator, outside attorney). Typically, this is the individual who submits or responds to the filing or appears at the hearing to answer any questions the arbitrator may have.

Regarding audio and video evidence, AF does not currently accept audio files or links to external websites like YouTube as evidence (evidence containing embedded audio and video is rejected by our system). If a party is unable to upload video evidence, it must request a personal appearance, select the "Video Evidence" evidence type, and upload/attach a mock evidence document in place of the video. AF will contact the member representative to schedule a videoconference with the ~~A~~rbitrator to view the declared evidence. In the case of audio evidence (such as recorded statements), AF requires the written transcript of the recording be declared and provided as evidence for the arbitrator to view.

Rule 3-8: Arbitrator Neutrality

No arbitrator will hear a case in which they personally or their company has any direct or indirect material interest.

Arbitrator neutrality is critical to the success of any arbitration process. AF takes great measures to prevent an arbitrator from hearing a case that involves their 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 notify AF so the case can be reassigned (Request to Remove Case option).

In addition, AF emphasizes that an arbitrator excuse themselves from hearing any case if they have a direct or indirect interest in the outcome (financial, business, personal, or professional). We also recommend that they excuse themselves from hearing a case that involves a prior employer, coworker, or claim adversary if their decision could create an appearance of impropriety. The mere appearance of impropriety is reason enough for the arbitrator to request reassignment of the case to another arbitrator.

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

Rule 3-9: Post-Decision Coverage Allowances

A responding company may assert the coverage defenses of no liability policy in effect, denial of coverage, policy limits, or liability deductible/SIR up to 60 calendar days from the decision publication date and a minimum of 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 or liability deductible/SIR must accompany the inquiry, or no action will be taken.

When an award exceeds policy limits, the recovering 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.

Article Second of the various Agreements provides that arbitration lacks jurisdiction when there is no liability policy in effect on the date of loss, coverage has been denied, or the award will exceed a member's policy limits or is within an insured's liability deductible/SIR.

It is strongly recommended that these issues be properly asserted and supported in response to a filing. This allows the arbitrator to take appropriate action. That said, Rule 3-9 offers post-decision relief for these coverage defenses, whether the responding company submitted a response or not. (Defenses regarding retrospective, experienced rated policies, or some partial exclusions are not included for post-decision review. These defenses may only be asserted prior to hearing for consideration by an arbitrator.)

The rule includes timeframes to ensure the recovering company has an opportunity to pursue its claim before the applicable statute of limitations expires.

First, the responding company must submit a post-decision inquiry within 60 days of the decision publication date. A copy of the denial/disclaimer letter sent by the responding company to their insured or driver seeking liability coverage (and defense) under that responder's policy for the claim, proof of applicable policy limits, or liability deductible/SIR **must** accompany the post-decision inquiry. The denial of coverage letter must distinctively address the coverage that is being denied. Examples are collision coverage, loss of use, diminished value, administrative fees, property damage liability coverage, etc. A complete denial of coverage will be accepted based on non-payment of premium, cancellation, rescinded policy, etc. Letters which state any and all coverages are being denied for the loss will not be accepted as they often refer to liability

and not a specified coverage. Denials stating a policy is not primary or is secondary are not reviewable under Rule 3-9.

When a policy limit or liability deductible/SIR defense is raised, proof of applicable policy limits, or liability deductible/SIR must accompany the post-decision inquiry. When a policy limit is at issue, the recovering company will have 60 days to decide whether or not to accept the policy limits as final settlement of the claim, if not previously accepted in the filing. During this time, payment of the award should be held until the issue is resolved.

Second, the post-decision inquiry must be submitted at least 60 days before the expiration of the applicable statute of limitations.

If the above timeframes are not met, AF is prohibited from taking any action post-decision.

NOTE: No post-decision relief is afforded under Rule 3-9 for arguments of primacy of coverage if the right of recovery is concurrent coverage. Policy defenses are secondary to the primary issue of concurrent coverage, and, as such, an arbitrator must hear the case and decide such issues. AF is unable to consider these coverage defenses post decision. An exception is if the responding company provides a denial of coverage letter for specific damages to its insured or a complete denial of coverage letter.

Rule 4-1: No Default Judgments

Arbitration panels may not render default judgments. Decisions must be based on the evidence submitted.

A default judgement occurs only when there is no response to the filing and the recovering company does not prevail simply because no response is submitted. 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, and each party has the burden to prove its case.

Rule 4-1 is not applicable when a responding company submits a response.

In Special Arbitration, the purpose is to facilitate prompt and fair resolution of third-party settlements where there is a dispute with another party based on shared liability or concurrent coverage. For that reason, the burden of proof in Special Arbitration is equal among all participating parties and not only on the recovering company.

A common question is whether proof of payment is required to prove damages. It is important to distinguish between proof of payment and proof of damages. Proof of payment is required only when a responding company, through its answer, asserts the jurisdictional exclusion of subrogation prohibited, arguing that no subrogatable claim exists. However, the responding company cannot rely solely on the absence of proof of payment from the recovering company to make this argument.

If not challenged, the presumption is the recovering insurer has made payment to its insured and a subrogation claim exists. While it is not a requirement to submit proof of payment to prove damages, we do recommend it be included in the evidence. Many arbitrators find it useful to verify if the recovering 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. NOTE: The above does not apply to self-insured members that own and repair their vehicles, as a self-insured is not required to make a payment for the loss incurred to their owned vehicle.

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 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 following a decision. AF will void or amend an arbitration decision under very limited circumstances. The involved parties bring these errors to AF's attention by using the Create Post-Decision Inquiry functionality in the Decision Actions dropdown menu. AF can also 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 make necessary corrections. During this time frame, payment of the award should be held until the issue is resolved.

Clerical errors are mistakes made by AF staff or an arbitrator. Examples include mathematical errors, switching the parties when recording the liability decision, referencing the lack of or need for evidence that was, in fact, submitted, applying, on their own, a state regulation or statute from a state other than the loss state, or misapplying an AF Rule or procedure.

* The above does **not** include a decision where the arbitrator makes no comment about a specific evidence item and a party ***perceives*** the silence to infer the item was missed. Examples of referencing the lack of or need for evidence that was, in fact, submitted include:

- Arbitrator states that an insured's statement was not submitted or "would have been helpful"; the insured's statement was submitted (and listed).
- Arbitrator states that an estimate did not include the supplemental damages; the estimate does include the supplemental damages.

If the arbitrator confirms an error was made, they will be free to amend their decision, if necessary.

It is equally important to address what is not a correctible, clerical error on the part of the arbitrator. An example of what is not a correctible error is where an arbitrator determines that an evidence item does not support an allegation. For example, a party argues that their insured's

statement supports that the adverse driver failed to yield the right of way. The arbitrator reviews the statement and finds that the statement does not support this allegation. This is the arbitrator's interpretation of the evidence and is not considered missed evidence. Jurisdictional errors occur when an arbitrator fails to rule on an exclusion, asserts an exclusion 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 exclusion that the statute of limitations expired and supports this defense with the appropriate evidence. The arbitrator does not address this defense in the decision. The party that raised the defense can assert that the arbitrator committed a jurisdictional error by not addressing the exclusion, or objection to jurisdiction, in their decision.
- A responding company does **not** raise the exclusion that the statute of limitations expired even though the filing was filed "late." The arbitrator notices the late filing date and raises the exclusion on their own. Since the exclusion 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 their review of the evidence, feels that the damages paid by the recovering company were excessive or not related to the accident/loss and reduces the award. This would be a correctable error as 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 exclusion. This would be a jurisdictional error (Article Second (d) of the Agreement), and AF would make the necessary correction.
- 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 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.

Direct contact between a party and an arbitrator is prohibited.

Rule 4-3: Decision Publication

Decisions will be posted on the AF website after the case is heard. Electronic signature of the arbitrator will be used.

AF posts the decisions on its website promptly following the hearing by an arbitrator. A member who has filed or responded online via AF's website 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.

Since the decisions are entered by the arbitrators online and posted to AF's website, electronic signatures are used. Every arbitrator has specific login criteria (user ID and password) that they use to access their case assignments. The arbitrator enters their credentials on every case they hear to authenticate themselves as the arbitrator for the case. This prompts their name to appear on the decision notification.

Rule 5-1: Award Payment

A responding company shall pay an award within thirty (30) calendar days of decision publication date. Payments made as a result of the award are to be made only to the recovering company. Payments must include any deductible interest, if applicable, in the interest of good will between the companies.

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.

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 to pay an award.

A party with an award rendered against it must promptly process the payment of it. The only exceptions are where a party: raises a post-hearing coverage defense (Rule 3-9), asserts that a clerical or jurisdictional error was made (Rule 4-2), or files an appeal (Rule 2-12). Otherwise, the responding company must comply with the arbitrator's decision and award within 30 days of the publication date.

Award payments must be made payable only to the recovering company. Intercompany arbitration resolves disputes between the participating companies. These are the only parties at interest. When a third-party administrator (TPA) files arbitration on behalf of a party, the TPA may use the Remittance Information section of the filing to note their address if the award is to be mailed to them instead of their client, but the check must be payable to the recovering company or the client, not the TPA.

In the interest of goodwill between the members, any payment that is made as a result of an arbitration decision must include any applicable deductible interest. The deductible is not 'awarded' per se but is included in the decision as a courtesy calculation for the members. The insureds are not a party to the intercompany arbitration case.

The last paragraph pertains to disputes resolved in Special Arbitration. Where the original settlement of the claim is legally voided via court action, the Special Arbitration decision is nullified, and the award payment must be returned.

Rule 5-2: Unpaid Award Follow-up Process

When a responding company does not pay the award within thirty (30) calendar days after publication:

(a) The recovering company must send a request for payment to the responding company.
(b) If the award remains unpaid thirty (30) calendar days after the request for payment, the recovering company may send a second request for payment to the responding company.
(c) If the award remains unpaid for an additional thirty (30) calendar days, the recovering 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 5-2 outlines the process a member can take when an award is not paid, including taking legal recourse to enforce payment.

Thirty days after publication of the award, the recovering company is to send a request for payment to the delinquent company. The Unpaid Award Request option under Decision Actions sends an electronic notification to the delinquent party. A second request may be issued 30 days after the initial request, if needed (excludes NY PIP filings).

Thirty days after the second notification, the recovering company is free to sue the non-paying responding company to enforce the award. The member should pursue the award in the manner they deem best based on the most appropriate jurisdiction to enforce an award. Per the Rule, the recovering company 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.). The recovery of these interests, costs and expenses may only be done as part of the litigation to enforce the award. They may not be submitted for recovery through an arbitration filing.

In the event litigation is pursued, it is important that the recovering company be able to document its compliance with the above steps and time frames, in the event it is challenged by the non-paying responding company.

Rule 5-3: Supplemental Damages

A recovering company may file for supplemental damages if:

The filing needs to be paid on or after the most recent prior filing submit date. For new Auto filings, evidence submitted by the parties to support or dispute the supplemental damages will be viewable by the parties and may not be copied for use in any other claim arising out of the same accident.

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.

Arbitration should not be filed until a claim is concluded. That said, it is understood that supplemental damages may arise after a previous filing has been submitted by the recovering company. When this occurs, the responding company is strongly encouraged to voluntarily reimburse the supplemental damages based on the initial liability decision. Arbitration should be necessary only if the damages are disputed.

A question often posed is whether the original arbitration filing tolls the statute, or can supplemental damages be filed after the statute of limitations has run. In most situations this is not the case, and each cause of action must be filed prior to the expiration of the statute of limitations. An exception would be when the recovering company submits applicable case law or state statute which supports their position that the original arbitration tolled the statute.

As noted in Rule 5-3, 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. For this reason, the recovering company is to only include the supplemental damages in the supplemental filing and not re-enter damages or recoveries from the prior filing.

Last, for supplemental Auto filings, the evidence submitted by the parties will be viewable. This is intended to facilitate and expedite settlement of the claim since many times a supplemental demand is not sent.

Rule 6-1: Filing Fees

The recovering company incurs a filing fee payable to AF. A responding company that files a counterclaim shall also incur the filing fee.

Rule 6-1 specifies that the recovering company must pay the filing fee. This includes a responding company that seeks recovery of its damages. 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 subparagraph (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 website (www.arbfile.org).

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.

Although rare these days with technology advances, AF will return physical evidence that must be submitted for arbitrator consideration. The submitting party must notify AF to return the physical evidence and provide a self-addressed, stamped envelope of sufficient size with the correct postage.