

NAIC CONSUMER LIAISON
REPRESENTATIVE RECOMMENDATION
TO THE NAIC EXECUTIVE (EX) COMMITTEE

Recommended By: Peter Kochenburger and Brendan Bridgeland (Center for Insurance Research), 2016 NAIC Consumer Representatives

Date: June 10, 2016

Issue:

As discussed during the April 2016 Consumer Liaison meeting and in the attached document, insurers are filing policy forms that contain mandatory arbitration and choice of law clauses. Arbitration provisions that allow one party to insist on arbitration should a dispute later occur (pre-dispute mandatory arbitration clauses) deny consumers access to the courts, are inconsistent with the nature of insurance contracts and, along with choice of law clauses, often restrict or eliminate existing state laws that would otherwise protect the consumer. These types of clauses, common in many consumer contracts, have been roundly criticized and challenged.

Such arbitration provisions can already be found in title insurance policies and insurers are now beginning to file forms with such clauses in other lines, including lender-placed insurance and homeowners insurance. States should act promptly and proactively to prohibit such clauses. Approximately half the states have statutes or regulations prohibiting or restricting the use of arbitration provisions in various lines of insurance (or more generally, in consumer contracts), and in the majority of instances where insurers have challenged these laws (arguing they are preempted by the Federal Arbitration Act (FAA)) they have been upheld on McCarran-Ferguson grounds. However, these existing state laws often omit important areas of insurance, leaving some insurance consumers unprotected. Also, state statutes that do not specifically refer to insurance contracts, and, ideally, reference state authority under McCarran Ferguson to regulate the “business of insurance,” are more vulnerable to federal preemption. We realize that in several states without explicit statutory bans, commissioners have used their plenary regulatory authority to strike arbitration clauses, and we agree that this is an appropriate use of that authority, but ideally a model should be provided that would apply to insurance consumers consistently when purchasing insurance products for individual or family purposes, and that will maximize the likelihood that they will be upheld against FAA challenges. These challenges are likely to increase as insurers try to insert these provisions in insurance contracts and regulators need the best set of tools to preserve their regulatory authority and protect policyholders.

Insurance consumers deserve full protection of their states’ laws and the industry should have clarity as to what clauses will not be allowed. Attached is a short document provided at the spring 2016 Consumer Liaison meeting that addresses these issues in more length and provides a list of references at the end. We are happy to provide significantly more information in this area and respond to questions as the NAIC considers this recommendation for adoption.

COMMITTEE REFERRAL RECOMMENDATION:

(A)_____ (B)_____ (C)_____ (D) **X** (E)_____ (F)_____ (G)_____

Action Requested/Charge Recommended:

(1) Amend the Model Unfair Trade Practices Act to specifically prohibit these clauses.

Or:

(2) Develop a new Model Law prohibiting the use of: (1) pre-dispute mandatory arbitration clauses in any insurance policies sold to individuals and small businesses (perhaps defined as those that do not employ a professional risk manager), and (2) choice of law provisions that purport to apply the law of a jurisdiction other than that where the policyholder resides or insured property located.

NAIC ACTION:

RECOMMENDATION ACCEPTED:

RECOMMENDATION DECLINED: