

Comments of the Center for Economic Justice

To the NAIC Pre-Dispute Mandatory Arbitration Working Group

May 24, 2017

In response to the working group's request of May 19, 2017 for specific information on use of pre-dispute mandatory arbitration agreements in insurance, the American Land Title Association, an advisory organization developing policy forms for its members that are filed in most states, added a pre-dispute mandatory arbitration provision to several of its policy forms in recent years.

For example, the 2013 Homeowners Policy of Title Insurance includes the following:

<https://www.alta.org/policy-forms/>

11. ARBITRATION

- a. If permitted in the state where the Land is located, You or We may demand arbitration.
- b. The law used in the arbitration is the law of the state where the Land is located.
- c. The arbitration shall be under the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). You can get a copy of the Rules from Us.
- d. Except as provided in the Rules, You cannot join or consolidate Your claim or controversy with claims or controversies of other persons.
- e. The arbitration shall be binding on both You and Us. The arbitration shall decide any matter in dispute between You and Us.
- f. The arbitration award may be entered as a judgment in the proper court.

12. CHOICE OF LAW

The law of the state where the Land is located shall apply to this policy.

This provision reflects common anti-consumer themes in mandatory arbitration provision in financial services contracts, including:

1. Ban on consumer's access to courts, no matter how egregious the arbitration decision;
2. Exclusion of insurance regulators in any dispute, including claim settlement disputes, subject to mandatory arbitration

3. Ban on class arbitrations, indicating that the goal of arbitrations is to eliminate consumer access to justice as opposed to simply a desire for efficiency;

4. Arbitration rules written by -- and for -- the title insurance company and agent members of ALTA.

The ALTA Rules of Arbitration found on the ALTA website are dated 2006 and are attached

There are a number of troubling rules and omissions, including

a. The rules apply to any issued covered by arbitration and the applicable rules may ones amended from those in effect at the time of policy issuance.

b. The rules establish the forum for arbitration, which tilts the scales to the title insurers since the forum's continued appointment depends on acceptance by title insurers and agents using the arbitration and can be changed if title insurers and agents feel that too many outcomes are going against them

c. The rules are silent on public access to the proceedings or outcomes of the proceedings.

5. For title insurance in particular a consumer is unlikely to notice the inclusion of an arbitration provision because the title insurance is adjunct purchase to a much larger transaction - the purchase and financing of a purchase of property. Consequently, the title insurance policy will be part of a large package of documents given to the consumer as part of the closing process.

Arbitrator

The ALTA Rules of Arbitration specify the National Arbitration Forum as the arbitrator. That entity no longer has that name and is known as Forum.

The National Arbitration Forum has been the subject of regulatory action. In 2009, NAF entered into a settlement with the Minnesota Attorney General including an agreement to cease arbitration of consumer disputes. The AG stated in an interview with National Public Radio:

Ms. LORI SWANSON (Attorney General, Minnesota): The thrust of it is, is that that National Arbitration Forum held itself out as neutral and independent and operating like an impartial court system, but it wasn't impartial at all. It had financial ties to the collection industry and other ties to the collection industry as well.

(<http://www.npr.org/templates/story/story.php?storyId=106913248>)

Public Citizen also reported in 2007 that “The results of mandatory arbitration demonstrate a stunning bias against consumers. In the more than 19,000 cases in which NAF appointed an arbitrator, 94 percent of decisions were for business.

<https://www.citizen.org/media/press-releases/new-public-citizen-report-shows-credit-card-companies-set-arbitration-trap>

CEJ believes that pre-dispute mandatory arbitration provisions like those in title insurance policies should not be permitted.