

June 30, 2016

Commissioner David Mattax
Texas Department of Insurance
Office of the Chief Clerk
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P.O. Box 149104
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Dear Commissioner Mattax:

We write to collectively urge your rejection of proposed Texas Farm Bureau Insurance Endorsement No. HO-802, which allows policies to include forced arbitration clauses, and to encourage you to maintain your agency's long-standing practice of rejecting such clauses in personal lines insurance products.

Forced arbitration is a critical threat to consumers' rights. Recently, the Consumer Financial Protection Bureau (CFPB) concluded a comprehensive study on the use of such clauses in consumer financial contracts.¹ The CFPB study confirms the concern that forced arbitration clauses effectively foreclose valid legal claims brought by consumers.

The Texas Department of Insurance has long adhered to a policy of rejecting forced arbitration clauses in personal lines insurance products, and for good reason. Insurance policies are contracts of adhesion in which the consumer has virtually no bargaining power, making home insurance customers, who must maintain insurance as a condition of their mortgage, particularly vulnerable to the perils of forced arbitration.

The proposed endorsement's forced arbitration clause would harm consumers in numerous ways, including:

- **Anti-consumer bias:** The proposed endorsement allows the insurer to dictate the arbitration company tasked with conducting the arbitration. While individual claimants are likely to appear only once at an arbitration, the carrier will appear thousands of times. This routine appearance has the effect of prejudicing the arbitrator in favor of the insurance company that is commonly before them.
- **Limited discovery:** The proposed endorsement severely restricts access to discovery, hampering a claimant's ability to demonstrate wrongdoing by their insurance carrier. Only if the arbitrator (who is subject to the bias outlined above) permits expanded discovery will the claimant have access to additional discovery.
- **Secrecy:** Arbitration proceedings are already secretive, which serves to weaken oversight and public accountability of industry practices. Yet the proposed endorsement makes

¹ See <http://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015/>.

things even worse by specifically precluding the disclosure of arbitration results. The shadows of secrecy breed abuse of the process.

- Lack of appeal: Except in the narrowest of circumstances, arbitration decisions are final and unappealable. Coupled with the secrecy mentioned above, this lack of judicial review and due process is dangerous.

Consumers are generally unaware of the effect forced arbitration clauses have on their legal rights. In its study, the CFPB concluded that, “Consumers with such clauses in their agreements generally either do not know whether they can sue in court or wrongly believe that they can do so.”

Additionally, industry’s assertion that the Federal Arbitration Act (FAA) provides legal authority for imposing this endorsement is misguided and will undoubtedly result in years of protracted and fierce litigation. The federal McCarran-Ferguson Act vests exclusive power in the states to regulate the business of insurance. Courts have found McCarran-Ferguson to reverse pre-empt the FAA, forcing insurers to comply with state consumer protection requirements for arbitration.² The industry’s attempt to tie the proposed forced arbitration clause to the FAA is a naked attempt at avoiding the Texas statute’s robust consumer protections under the Texas Arbitration Act.³

We understand that for many years, your agency has maintained a policy of rejecting form and endorsement changes that include pre-dispute binding arbitration. We encourage you to maintain that policy and reject this proposal in order to protect policyholders both in Texas and across our nation.

Sincerely,

Alliance for Justice
 Center for Justice & Democracy
 Consumer Federation of America
 Consumers for Auto Reliability and Safety
 Consumer Watchdog
 Georgia Watch
 Homeowners Against Deficient Dwellings
 National Association of Consumer Advocates
 National Consumers League
 National Consumer Voice for Quality Long-Term Care
 United Policyholders

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 Marilyn.Hamilton@tdi.texas.gov

² See *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998).

³ See, e.g., TEX. CIV. PRAC. & REM. CODE §171.002 (b) & (c).