September 24, 2018

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Office of the Corporate Secretary
FINRA
1735 K Street, NW
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RE: FINRA Request for Comment: Discovery of Insurance Information in Arbitration

The American Insurance Association (AIA), the National Association of Mutual Insurance Companies (NAMIC), and the Property Casualty Insurers Association of America (PCI) appreciate this opportunity to comment on proposed amendments to FINRA's Discovery Guide and Firm/Associated Persons Document Production List. AIA is composed of approximately 340 member companies writing over $134 billion in annual premiums. NAMIC has more than 1400 members and supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. PCI is composed of approximately 1,000 member companies and 340 insurance groups, representing a broad cross section of home, auto, and business insurers. Together, AIA, NAMIC, and PCI represent a large majority of the property casualty insurance market.

The proposed amendments would make documents concerning third-party insurance coverage in customer arbitration proceedings "presumptively discoverable" and would require that coverage be disclosed by the respondent in arbitration. Although the proposal suggests that the information would not be prejudicial to the defendant because it would not *usually* be presented to the arbitrators, a required disclosure would certainly prejudice the respondent by shifting from an even playing field to providing claimants with a strategic advantage. The proposal suggests that the purpose of the disclosure would be to "increase the ability of customers to determine a litigation strategy to maximize the monetary compensation they could expect to receive." Yet the only relevant question in arbitration should be the value of the claim, not the depth of the respondent's pocket. Further, the proposal also recognizes that requiring disclosure will increase the potential that the arbitrator might receive this information. This is a significant enough concern that FINRA itself proposes to train arbitrators to address potential prejudice. In other words, FINRA understands this could result in prejudice to defendants but will try to educate past it.

Unfortunately, however, because the arbitrator is *both* judge and jury the solution cannot be to paper over this problem. The comparison between this proposal and the required disclosures under the Federal Rules of Civil Procedure and the procedural rules of various states fails. Though the court rules may require the disclosure of insurance information, it is only the judge, who is generally *not* the trier of fact, that will know of the presence of insurance. The court rules continue to recognize that the presence or absence of insurance is not relevant to the dispute.

The goal of all parties in an arbitration, and certainly FINRA's goal, should not be to "maximize monetary compensation." Instead, the goal of arbitration proceedings should be to: (1) establish whether the defendant firm is liable to the plaintiff, and if so; (2) the actual damages the plaintiff has incurred. The existence of liability insurance policies and the policy limits thereof is not in any way relevant to either of those questions. Therefore, no legitimate purpose may be served in requiring their production.

FINRA's stated objective would tend to encourage litigants to view FINRA proceedings not as an exercise in determining liability in which the goal is fairness and justice, but an effort to win the largest award possible, regardless of true liability. It is disappointing that FINRA would even propose this as a legitimate objective. Although the proposal states FINRA's view that arbitrators would always determine monetary awards based on actual damages, it does not explain how justice would be served by encouraging plaintiffs to seek more than actual damages based on the availability of insurance.

FINRA has already acknowledged several other arguments against the proposal, but they bear repeating. First, the existence of liability insurance does not necessarily establish that coverage is available because the policy may contain coverage limitations or exclusions that would impact the ultimate insurance payout. Thus, litigants and their attorneys might misunderstand the true amount of coverage available and may be prompted to inflate claims unjustly and based on inaccurate information.

Second, there is a potential that insurance coverage information will fall into the hands of arbitrators inappropriately and without authorization. In such an event, FINRA should take the strongest possible action to sanction the offending party, as this would not only punish the guilty but serve as a warning to others that such behavior will not be tolerated. However, we strongly urge FINRA to consider that the potential for such abusive behavior could be substantially mitigated by declining to adopt the proposed amendments.

Third, if the objective of requiring disclosure of insurance is to maximize recoveries as FINRA has stated, the adoption of the proposal could shift arbitration from a level playing field to a claimant-favored forum and could lead to a worsening of loss experience for liability insurers and their policyholders. This may have significant unintended consequences including upward pressure on insurance rates resulting from increases in loss costs.

Notwithstanding these strong reasons for rejecting the proposed amendment, if FINRA were to proceed with requiring the disclosure of insurance information it will only be fair for claimants to fully disclose all damages being sought and documenting the same with their demand for policy information. If indeed the information on the existence and policy limits of insurance coverage is needed to aid the settlement of matters, then the same is certainly true of all damages claimed. Thus, if this proposal to disclose insurance is adopted, reciprocity in the disclosure of alleged damages by claimants must also be an essential component of the amendment, not only in the interest of fairness but also to achieve FINRA's stated goals.

For the foregoing reasons, we strongly urge FINRA not to adopt the proposed amendments.

Sincerely,

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