Advance Property Insurance Claims Update

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SOUTH TEXAS
CHAPTER
Inc. 1977
RIMS


El Arroyo
I HAVE A ZOOM
MEETING TODAY! TIME
TO CHANGE INTO
MY BUSINESS PAJAMAS

Weather and Climate Disasters

	Events	Cost
Since 1980	360 8.2 per year	$2.575 Trillion $58.5 Billion per year
Past 5 Years	90 18.0 per year	$617.3 Billion $123.5 Billion per year
2023 (as of July 11)	12	$12 Billion

Source: NOAA National Centers for Environmental Information (NCEI)
https://www.ncei.noaa.gov/access/billions/

Presentation Outline

- Policy Trends
- Claims Handling Trends
- Coverage Traps and Pitfalls

2023 LEGISLATION

- **HB 1706** – Insurance policies issued in Texas cannot prohibit an insured from contracting with a public adjuster – **PASSED**

- **SB 796** – Limiting arbitration provisions in surplus lines policies - **VETOED**

The Insurance Program You Thought You Purchased for Your Client

The Insurance Program You Actually Purchased

New Trends in Policies and Insurance Programs

- Multiple Layers
- Subdivided Layers
- Follow-Form Policies

Follow-Form Policy Language

- This Policy is subject to the same provisions, terms, conditions, exclusions and endorsements of the Followed Policy identified in Item 7 of the Declarations, . . .
- **<u>except</u> as provided otherwise by the Company's Limits of Insurance, General Conditions and other terms, conditions and exclusions of this Policy including any Attached Endorsements.**

The Devil is in the Details

Applicable Law; Court Jurisdiction

The laws of the State of New York, without regard to any conflict of laws rules that would cause the application of the laws of any other jurisdiction, shall govern the construction, effect, and interpretation of this insurance agreement.

The parties irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York, and to the extent permitted by law the parties expressly waive all rights to challenge or otherwise limit such jurisdiction.

New Trends in Policies and Insurance Programs

- Surplus Lines Carriers

- Risk Pools

Deductibles

- Traditionally - One Standard Deductible
- Current Trend - Deductibles for Specific Perils

Claims Handling Trends

Claims Handling Trends

- Denials based on damage outside the policy period
- Denials based on wear and tear
- Denials based on construction defects

Construction Defect Exclusion

The Company will not pay for loss or damage caused by or resulting from any of the following:

Faulty, inadequate or defective:

(1) Planning, zoning, development, surveying, siting;

(2) **Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;**

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance;

of part or all of any property on or off an insured premises.

However, in the event an excluded cause of loss that is listed in 3.a. through 3.c. above results in a Covered Cause of Loss, the Company will be liable only for such resulting loss or damage.

Best Practices

- Periodically Document the Condition of the Property.

Cosmetic Damage Limitation

We will not pay for “cosmetic loss or damage” to any “roof surface” caused by wind and/or hail. “Cosmetic damage” means marring, pitting, or other superficial damage caused by wind and/or hail that alters the physical appearance, but does not prevent the roof from continuing to function as a barrier to entrance of the elements to the same extent as it did before the “cosmetic loss or damage” occurred.

Cosmetic Damage Limitation

- Limited Coverage—Cosmetic Damage:
- We will pay up to $100,000 per Occurrence for cosmetic damage to Covered Property resulting from a covered loss.
- Cosmetic damage is damage that is superficial or aesthetic and only alters the physical appearance but does not result in structural damage that compromises the integrity of the Covered Property or prevents the Covered Property from performing its intended function.
- We will determine <u>at our sole discretion</u> whether damage is structural or cosmetic.

Concurrent Causation

- Typical Anti-concurrent-causation exclusion

  - Bars coverage for “loss or damage caused directly or indirectly by any [excluded cause or event], regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

    Example: Wind (usually covered) but Flood (usually excluded)

JAW The Point, LLC V. Lexington Ins. Co. (Texas Supreme Court 2015)

- City ordinance provided that repairs $\geq$ 50% of market value must raise the ground level of the structure to a minimum base flood elevation.

- Issue: What peril (wind or flood) triggered the ordinance?

- Ruling: The evidence clearly established the damage triggering the ordinance was both wind and flood. Take nothing judgement against the policyholder.

Concurrent Causation-Extreme Position

Overstreet v. Allstate Vehicle and Property Insurance Company (5th Cir 2022)* Certified questions to the Texas Supreme Court

- whether the concurrent cause doctrine applies where there is any non-covered damage, including "wear and tear" to an insured property, but such damage does not directly cause the particular loss eventually experienced by plaintiffs;

***The parties settled, so the case was dismissed in September 2022**

Concurrent Causation

Methodist Hospitals of Dallas v. Affiliated FM Ins. Co., (5th Cir. December 2021)

- Holding that a policy exclusion was triggered when the covered and non-covered perils were interdependent.
- A storm caused the power surge, the power surge caused the chillers to shut down, and the disabled chillers caused the temperature and humidity to rise.
- The concurrent causation doctrine barred recovery.

Coverage Traps and Pitfalls

- Appraisal Provisions
- Choice of Venue/Choice of Law Provisions
- Arbitration Clauses

Traditional Appraisal Provision

If we and you disagree on the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser and notify the other of the appraiser selected within 20 days of such demand. The two appraisers will select an umpire. If they cannot within 15 days upon such umpire, either may request that selection be made by a judge of a court having jurisdiction. Each appraiser will state the ***amount of loss.*** If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding as to the amount of loss.

Each party will:

a. Pay its chosen appraiser; and

b**.** Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal:

a. You will still retain your right to bring a legal action against us, **subject to** the provisions of the Legal Action Against Us Commercial Property Condition; and

b. We will still retain our right to deny the claim.

Recent Appraisal Case Law

- ***Barbara Technologies v. State Farm Lloyds***—Texas Supreme Court 2019

- ***Ortiz v. State Farm Lloyds***—Texas Supreme Court 2019

- ***Hinojos v. State Farm Lloyds***—Texas Supreme Court 2021

More Complicated Appraisal Provision

If you and we fail to agree on the actual cash value, amount of loss or damage or the cost of repair or replacement of the loss or damage, either one may make a written demand for appraisal. Each will then select a competent and disinterested, independent appraiser and notify the other of the appraiser's name within 20 days after the written demand is received. The appraisers will choose a competent, independent or disinterested umpire. . . Any person or entity which has performed services for either party at any time as respects the particular loss or damage or loss event at issue in the claim may not serve as an appraiser or the umpire.

The appraisers will then set the amount of loss or damage, stating separately the actual cash value, the repair or replacement cost and a description of the damage and extent of damage for each item of property. If the appraisers submit a written agreement to us, the agreed amount will be the amount of loss or damage and actual cash value. If the appraisers cannot agree, they will submit their differences to the umpire. . . A written agreement signed by any two will set the amount of loss or damage and actual cash value. Each party will pay the appraiser it chooses. The umpire and all other expenses of the appraisal will be paid equally by you and us.

Interpretation of this policy and whether any particular loss or damage to covered property is in fact insured under this policy may not be determined under this provision.

Current Trends in Appraisal

- Requirement of greater specificity of the appraisal award
- Restrictions on what the appraisal panel can determine
- Post-Appraisal causes of action

Post-Appraisal Causes of Action

- <u>No</u> Breach of Contract
- Bad Faith Claims are Possible, but Limited
- Prompt Payment of Clams Act (PPCA) survive appraisal

You should NOT agree to Appraisal:

- When the insurer has denied liability
- When causation is at issue
- When the insurer only wants to appraise part of the loss

Choice of Venue & Choice of Law

- Where Does the Lawsuit Belong?
  - What State?
  - Federal or State Court?
    - What Laws Apply to the Dispute?

Choice of Venue & Choice of Law-Trend

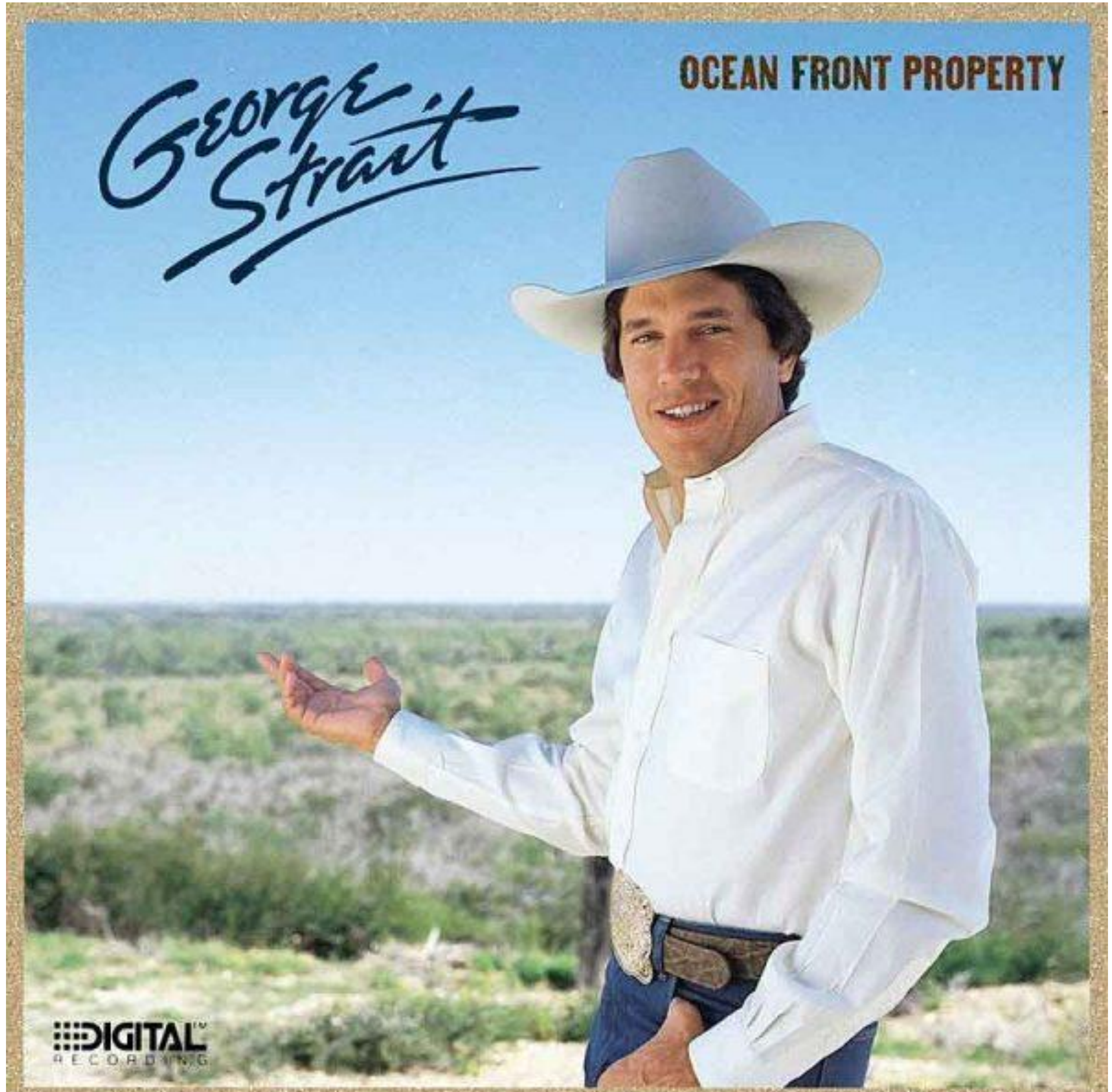
- Policy Selects a Location Favorable to the Insurance Company

- Policy Selects Laws that Favor the Insurance Company

Arbitration

The Case For Arbitration

- Efficient Quick Resolution
- Flexible Scheduling
- Simplified Rules of Evidence and Procedure
- Privacy
- Impartiality Because the Parties Choose the Fact-finder
- Less Expensive than Litigation
- Finality


George Strait
OCEAN FRONT PROPERTY
DIGITAL
RECORDING

Realities & Pitfalls of Arbitration

- Avoid the Jury System
- Carriers Know the System
- Potential for Arbitrator Bias
- Rules of Civil Procedure, Rules of Evidence, and Substantive State Law May Be Avoided
- The Expense of Arbitration Discourages the Policyholder
- No Appeal
- Secrecy

Problematic Arbitration Provision

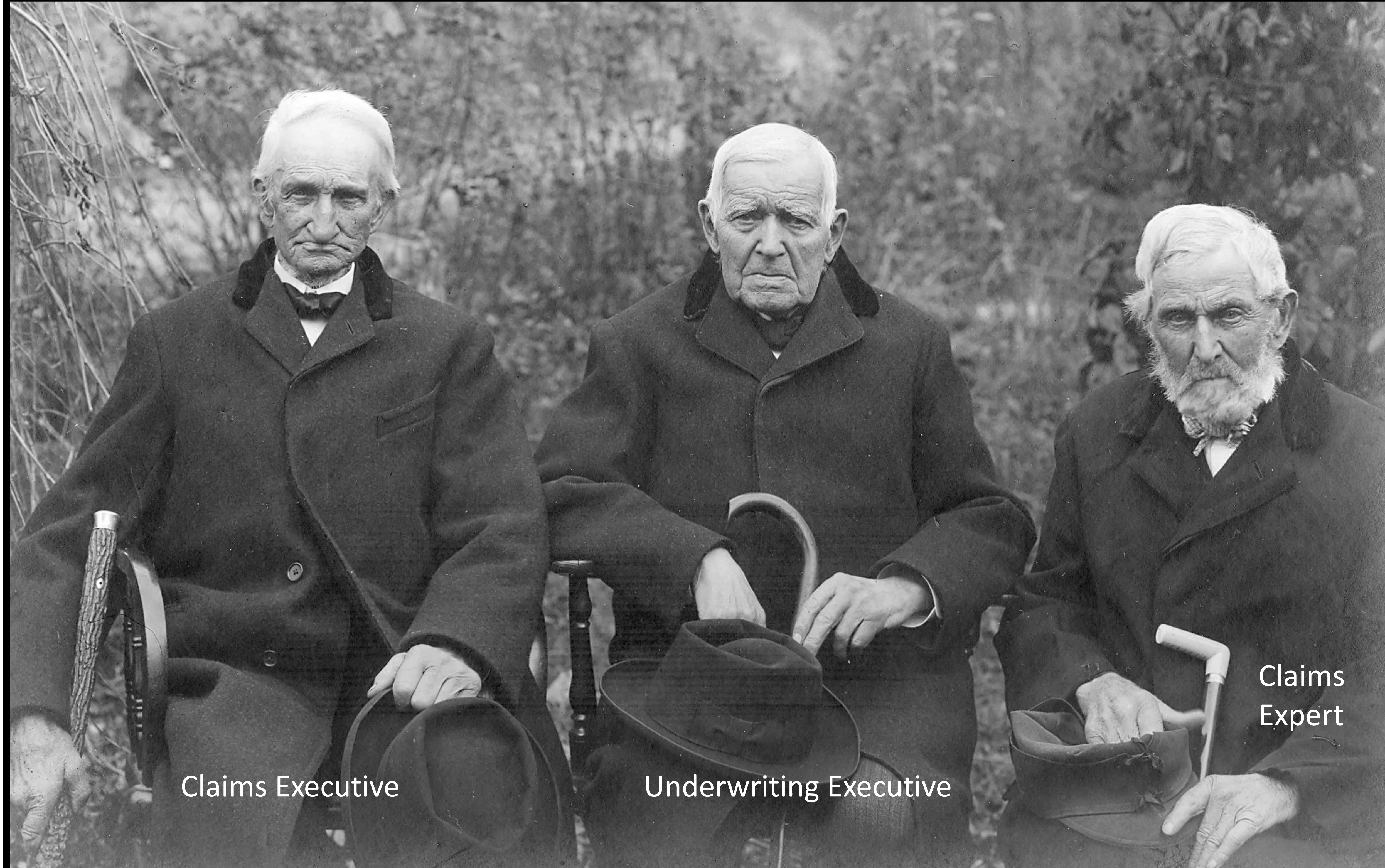
- All matters in dispute between the Insured and the Companies in relation to this insurance, including its formation and validity, and whether arising during or after the period of this insurance, shall be referred to an Arbitration Tribunal in the manner hereinafter set out. . . .
  - Unless the parties otherwise agree, the <u>**Arbitration Tribunal shall consist of persons employed or engaged in a senior position in Insurance underwriting or claims**</u>.

Problematic Arbitration Provision

<u>The seat of the Arbitration shall be in New York</u> and the Arbitration Tribunal <u>shall apply the law of New York</u> as the proper law of this insurance.

Problematic Arbitration Provision

The parties agree to submit their dispute to a confidential, binding arbitration held according to the JAMS Comprehensive Arbitration Rules & Procedures in effect as of June 1, 2021 (the “Rules”) . . . Unless the parties consent in writing to a lesser number, the arbitration panel shall consist of three (3) arbitrators, the first to be appointed by the Insureds, the second to be appointed by the Insurer, and the third (the “Chairperson”) to be appointed by the two (2) arbitrators so appointed. The Chairperson shall either **(1) have a minimum of 10 years’ experience working in the insurance industry or (2) have handled a minimum of 5 insurance-related arbitrations or trials.**


Claims Executive
Underwriting Executive
Claims
Expert

Arbitration Best Practices

- Be aware of provisions and endorsements
- Discuss with your clients
- Negotiate terms of the policy

Arbitration Best Practices

- Arbitration Tribunal
- Location of Arbitration
- Choice of Law
- Limitations on Damages
- Procedural Provisions
- Cost-sharing Provisions

Choosing Qualified Legal Counsel

QUESTIONS

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