

Arbitration Agreement

USE NOTES: The policyholder's insurer has either denied all coverage or has agreed in writing to resolve a liability dispute by arbitration. The policyholder and the plaintiff desire to cooperate and to enter into a reasonable, non-collusive settlement including resolution of the liability dispute by arbitration. Several of the following paragraphs suggest alternative language. Adapt the contract below by using the Legend. Before sending the text below, delete everything above this line.

ARBITRATION AGREEMENT

RECITALS

1. Parties

This Arbitration Agreement (**Agreement**) is among &Client& (**&Client&**) and &Plaintiff& (**&Plaintiff&**)

2. Liability Action

&Plaintiff& sued the &Client& in an action entitled &Plaintiff& v. &Client& (**Liability Action**). The &Client& was represented by &IndependentCounsel& (**&IndependentCounsel&**). &Plaintiff& was represented by &PlaintiffCounsel& (**&PlaintiffCounsel&**).

3. Liability Insurance Coverage

- A. &InsCo1& (**&InsCo1&**) issued a policy of liability insurance bearing Policy no. ___ to &Client& with limits of liability of \$___ by which it agreed to pay those sums that &Client& becomes legally obligated to pay as damages because of physical injury to tangible property, including all resulting loss of use of that property and loss of use of tangible property that is not physically injured and agreed that it has the duty to defend the &Client& against any lawsuit seeking those damages.
- Alt. B. &InsCo2& (**&InsCo2&**) issued a policy of liability insurance bearing Policy no. &Blank& to the &Client& with limits of liability of \$___ by which it agreed to pay on behalf of the &Client& amounts that the &Client& becomes legally obligated to pay as the result of claims made against it for any error, act, omission, neglect, or breach of duty by the &Client&. &InsCo&1 and &InsCo&2 are sometimes referred to as the **Insurers**.

4. Notice of Suit

On &Date&, &Client& notified the Insurers of the Liability Action and requested that it defend and indemnify &Client&. The Insurers agreed to defend &Client&, but then withdrew its defense. Thereafter, a Second Amended Complaint was filed in the Liability Action. On &Date&, &Client& notified the Insurers of the amended pleading and requested that it defend and indemnify &Client&. On &Date&, &Client& notified of Liability Action and requested that it defend and indemnify &Client&. On &Date&, &Client& notified of Liability Action and requested that it defend and indemnify &Client&.

5. Failure to Investigate

After notice, the Insurers did not conduct a thorough investigation. The Insurers did not contact or interview &Client&, &IndependentCounsel&, &Plaintiff&, &PlaintiffCounsel&, or any witnesses.

Alt. 6. Coverage Denial

The Insurers denied coverage and failed to faithfully defend or indemnify &Client& in the Liability Action.

Alt. 6. Agreement to Defend

The Insurers agreed to defend &Client& in the Liability Action, but failed to faithfully defend or indemnify &Client& in the Liability Action.

7. Failure to Pay for Defense

&Client& retained &IndependentCounsel& to defend &Client& in the Liability Action. &Client& transmitted to the Insurers &IndependentCounsel&'s invoices for defense fees and costs. Each invoice constituted a first party claim. The Insurers failed to timely pay invoices in the amounts required by law.

8. Settlement Opportunity

On &Date&, &Plaintiff& offered to settle the Liability Action with &Client& on terms set forth in Exhibit 1 attached hereto, for a sum that is less than the Insurers' policy limits. &Client& notified the Insurers of this settlement offer and requested that the Insurers accept the offer of settlement on terms set forth in Exhibit 2 attached hereto. The parties believe and notified the Insurers that this offer was fair and reasonable when made because &Client& was faced with a substantial likelihood of a recovery by &Plaintiff& in excess of the applicable limits of the Insurers' insurance policy based on the damage claimed by &Plaintiff& and the evidence regarding &Client&'s legal responsibility for causing such damage. "The law favors settlements." (*Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal.2d 592, 602.)

9. The Insurers' Refusal to Settle

The Insurers rejected &Plaintiff&'s settlement offer because they denied coverage under the policy.

10. &Client&'s Inability to Pay Settlement

Certain provisions of the Insurers' policies seem to require &Client& to adjudicate liability and damages. &Client& requested that the Insurers consent to settlement of the Liability Action without an adjudication. The Insurers refused to consent. &Client& was not financially capable of accepting &Plaintiff&'s settlement offer in part because &Client& had incurred or paid &IndependentCounsel&'s defense invoices which the Insurers failed to reimburse.

11. Procedural Agreement

&Client& and &Plaintiff& have stipulated to certain procedural efficiencies. &Client& notified the Insurers of the Parties' stipulation on terms set forth in Exhibit 3 attached hereto.

12. Coverage Action

&Client& sued the Insurers in an action entitled &Client& vs. Insurers. (**Coverage Action**).

13. &Client&'s Liability and &Plaintiff&'s Damages

&Client& is concerned that &Client& may be found to be legally obligated to pay damages to &Plaintiff& because of breach of duties it owes to &Plaintiff& and because of physical injury to tangible property and loss of use thereof caused by an accident and exposure to harmful conditions in a substantial sum.

14. Arbitration

The Parties desire to enter into this Arbitration Agreement to fulfill the Parties' and the Insurers right to due process of law by resolving the Liability Action through final and binding arbitration and to honor the language of the Policies, even though the Insurers are in breach of their duty to defend &Client&.

15. Assignment and Covenant

&Client& and &Plaintiff& desire to cooperate with each other to protect their mutual interests and to assign certain rights and to assume certain obligations to each other. &Client&

“need not indulge in financial masochism. . . . [h]aving executed an assignment . . . may relax into neutrality or even smile benevolently upon the [&Plaintiff&’s] efforts to collect from the Insurers. (*Critz v. Farmers Ins. Group* (1964) 230 Cal.App.2d 788, 801.).

16. Notification to the Insurers

“[I]f an insurer denies coverage to the insured, the insured’s contractual obligation to notify the insurer ceases.” (*Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 238.) Nonetheless, &Client& notified the Insurers that: 1) &Plaintiff& sued &Client& in the Liability Action; 2) &Plaintiff& offered to settle the Liability Action with &Client&; 3) &Client& was concerned about &Client&’s exposure to to pay damages to &Plaintiff& in a substantial amount; 4) &Plaintiff& and &Client& intended to resolve their liability dispute by arbitration [“When an insurer wrongfully refuses to defend, the insured is relieved of his or her obligation to allow the insurer to manage the litigation and may proceed in whatever manner is deemed appropriate.” (*Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 196)]; and 5) &Client& incurred defense fees and costs through &IndependentCounsel& and transmitted invoices to the Insurers.

17. Potential Conflicts of Interest

&Client& and &Plaintiff& understand and acknowledge that: 1) their interests conflict in the Liability Action; 2) they share some common interests in the Coverage Action and the Malpractice Action; 3) their relationships with other Parties will change upon execution of this Agreement; 4) each has had the opportunity to consult with independent counsel who are not a Party to this Agreement; 5) potential conflicts of interest that may divide &Client& and &Plaintiff& regarding this Agreement; 6) each must give informed written consent to execute this Agreement. &Client& and &Plaintiff& desire to resolve disputes and waive potential conflicts of interest between them by executing this Agreement.

AGREEMENT

1. Agreement to Arbitrate

The Parties agree to submit all claims, causes of action, and the entire controversy asserted on the complaint and cross-complaint in the &Plaintiff& Lawsuit to binding arbitration before a single neutral arbitrator. The Parties agree to abide by and perform any award rendered by the arbitrator, and that a judgment of any court having jurisdiction may be entered on the award. California law shall apply.

2. Identity of the Arbitrator

The Parties agree that the neutral arbitrator shall be _____, or such other neutral arbitrator as the parties may designate in writing prior to the commencement of the arbitration.

3. Time and Place

The neutral arbitration shall be held in [city, state] between [dates]. Formal notice of arbitration is waived. The neutral arbitrator may adjourn the hearing from time to time as necessary. On request of a party to the arbitration for good cause, or upon his own determination, the neutral arbitrator may postpone the hearing to a date agreed upon by the parties.

4. No Further Discovery

The Parties agree that neither party shall conduct any additional discovery prior to the arbitration.

5. Witnesses and Documents

The Parties agree to use their best efforts to cause witnesses to appear at the arbitration to testify and to produce documents. The failure to list a witness or a document shall not bar the testimony of an unlisted witness or the introduction of an undesignated document at the hearing,

on a showing of good cause as determined by the arbitrator.

The agreed list of witnesses is:

- a.
- b.

The agreed list of documents is:

- a.
- b.

The above list of documents designated with a * may be admitted into evidence without objection or the laying of any foundation.

6. Authority of the Neutral Arbitrator

The neutral arbitrator shall preside at the hearing, shall rule on the admission and exclusion of evidence and on questions of hearing procedure and shall exercise all powers relating to the conduct of the hearing. The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed. On request of any party to the arbitration, the testimony of witnesses shall be given under oath. The neutral arbitrator may consider sworn declarations of witnesses who for good cause are unable to attend the arbitration in person.

7. Conflict of Interest Waiver

&Client& and &Plaintiff& have read and understand Rules of Professional Conduct, Rule 3-310 and acknowledge that &CoverageCounsel& has made written disclosure to them of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to each by entering into this Agreement. &Client& has been advised by &IndependentCounsel& and &Plaintiff& has been advised by &PlaintiffCounsel& regarding Rule 3-310 and this Agreement. &Client& and &Plaintiff& acknowledge that each has had the opportunity to consult with independent counsel who have no interest in this Agreement regarding the subject matter of this Agreement. &Client& and &Plaintiff& give their informed written consent and agree to waive potential conflicts of interest that may divide &Client& and &Plaintiff& regarding execution of this Agreement.

8. Miscellaneous

A. Truthful Testimony

The Parties agree to give truthful testimony upon reasonable notice without the necessity of service of legal process, *e.g.*, a subpoena in deposition, at trial, upon any court hearing or legal proceeding in each Action.

B. Additional Documents

The Parties agree to sign all papers and to execute and deliver such other additional documents as may be required to effectuate each of the terms of this Agreement. This Agreement is not the only agreement among these Parties.

C. Costs

Except as otherwise provided, each Party shall bear his or its own respective costs and attorneys' fees incurred in connection with preparation and execution of this Agreement.

D. Binding Effect

This Agreement and all the terms, conditions and obligations contained herein are binding upon and inure to the benefit of the heirs, executors, administrators, personal representatives, successors in interest and assigns of each Party.

E. Warranty of Authority

Each Party executing this agreement directly or in a representative capacity represents and

warrants that he or it has the authority and is empowered to do so.

F. Attorneys Fees and Costs

The Parties agree to pay their own costs, expenses, and attorneys' fees incurred in connection with negotiation and execution of this Agreement. Should any Party hereto institute any legal action or proceeding to enforce any provision of this agreement or for damages by reason of any alleged breach of any provision of this agreement, the prevailing Party shall be entitled to receive from the losing Party all of its costs and expenses, including, without limitation, reasonable attorney fees, court costs, and disbursements actually and reasonably incurred in connection with said proceeding.

G. Time Is of the Essence - Condition

Time is of the essence in this Agreement. This Agreement is conditioned upon acceptance of these terms by all parties in writing no later than &Date& and completion of all obligations by the dates specified in this Agreement and Related Documents. The signatures of each Party to this Agreement shall constitute his or its signature, where required, to each of the Related Documents.

H. Construction

This Agreement shall be construed without regard to who drafted same, and shall be construed as though all hereto participated equally in the drafting of the Agreement. The Parties agree that any rule pertaining to the construction of contracts to the effect that ambiguities are to be resolved against the drafting party shall not apply to the interpretation of this Agreement.

I. California Law

This Agreement, including matters of construction, validity and performance, shall be interpreted, governed by and construed in accordance with the laws of the State of California. If any provision of this agreement is invalid or contravenes California law, such provision shall be deemed not to be a part of this Agreement and shall not affect the validity or enforceability of the remaining provisions. Any action arising out of this Agreement shall be brought in the Superior Court for the State of California, County of Los Angeles.

J. Counterparts

This agreement may be executed in multiple counterparts, each of which shall be deemed to be an original and all of which together shall constitute one document. A facsimile, scan or PDF copy of an originally executed counterpart signature shall be afforded the same validity as the originally executed counterpart.

K. Headings

The paragraph headings contained in this Agreement are for convenience only and shall not be considered for any purpose in construing this Agreement.

L. Number and Gender

As used in this Agreement, the singular shall include the plural, and the masculine shall include the feminine and neuter gender.

M. Amendment

This Agreement may not be modified, amended, supplemented, or terminated, and no provision of this Agreement shall be waived, except by a writing executed by all of the Parties to this Agreement.

N. Notices and Demands

Any notice or demand hereunder shall be made in writing mailed by certified mail, return receipt requested, or hand delivered, to the Parties addressed as follows:

&Client&
care of
&IndependentCounsel&

&Plaintiff&
care of
&PlaintiffCounsel&

I. Effective Date

This Agreement is executed at Los Angeles, California and shall be effective on the following date.

Date: _____

&PlaintiffCounsel&

&Plaintiff&

By:

&Client&

&IndependentCounsel&

By:

By:

&CoverageCounsel&

By: