Affirmative Defense, Policy Limits. Clarity, Please!

Kristen Carter, Panel Administrator

It is never AF’s intent to allow an award to be rendered which puts the Respondent in a position to pay above their available policy limit. That said, the arbitrator can only rule on what is clearly presented to them in the file. The most common Affirmative Defense raised by a Respondent is lack of jurisdiction due to insufficient policy limits to cover all damages. It is the Respondent’s responsibility to clearly outline their position. The Respondent must identify all claims against their policy, and the parameters under which they will grant jurisdiction to AF in the Affirmative Defense section of the contentions sheet. (Evidence must be submitted to support the limit amount.)

For example: The Respondent (ABC Company) has a property damage policy limit of $5,000 for this loss. Applicant’s (XYZ Company) damages of $4,500 plus the out-of-pocket rental claimed by their insured in the amount of $850 exceeds this limit. AF does not have jurisdiction in this matter because the insured is not bound by the decision rendered here. Thus the Respondent (ABC Company) asks that this case be withdrawn unless the Applicant expressly agrees to handle the out-of-pocket claims of their insured themselves.

In some cases it is enough for a Respondent to simply raise an Affirmative Defense for insufficient limits by providing their policy limit amount and indicating that their policy is not adequate to cover the damages presented against them by the Applicant company. If the only claimant in a loss is the Applicant company, this defense is sufficient as representation of the Respondent’s position. In such a case, if the Applicant agrees to accept the limit (by either marking the appropriate box on the application form or stating so in their contentions) the arbitrator(s) can deny the defense and rule on the case, awarding up to the policy limits of the Respondent if the Applicant prevails on liability and/or damages. Of course, if the Applicant does not agree to accept the available limits, the arbitrator(s) would hear the case for liability and/or damages to determine if the limit is actually compromised. If the arbitrator(s)’s decision would result in an award above the available limit, the arbitrator(s) would uphold the defense and withdraw the case as it would be outside of the jurisdiction of AF. However, if their liability decision does not compromise the available limits, they can render an award against the Respondent for the percentage of liability found against them.

Example: Applicant’s total claim is $6,000. Applicant does not indicate if they will accept policy limits if that defense is raised. Respondent raises a proper Affirmative Defense due to a policy limit of $5,000. Liability decision is 50% adverse to the Respondent. The arbitrator(s) can render a decision and deny the defense because the limits are not exceeded based on the liability placed against the Respondent. The arbitrator(s) would award the Applicant $3,000.

In most cases though, the issue is much more complex than that. There may be more than one claimant (applicant’s insured, another vehicle, a building owner or the city/county for damage to a pole, etc…) seeking recovery from the policy limit of the Respondent, which would require the Respondent to be specific and clear in their Affirmative Defense.

AF does not have jurisdiction over any OOP damages the Applicant’s insured may be entitled to. For their out-of-pocket expenses, the Applicant Insured is considered a non-member. Thus, unless the Applicant company specifically agrees in their contentions to make their insured whole from the policy proceeds they are awarded, any time the Respondent company notes the Applicant’s insured’s out-of-pocket expenses as part of their Affirmative Defense, the defense would be upheld and the case withdrawn. To rule on a case and award policy limits to the Applicant would leave the Respondent and their insured open for extra-contractual claims and payments if the Applicant has not expressly agreed as a part of their acceptance, to take on their insured’s claims themselves.

Any time there is more than one party with claims to a policy limit, all parties must agree to accept the limits and/or their prorata share in order for the arbitrator(s) to render an award. If any one claimant (another car, the city, the Applicant’s insured, etc…) is not present in the file (as an Applicant or via clear acceptance of limits/prorata submitted as evidence), the limits of the at-fault Respondent cannot be awarded.

If the arbitrator(s) is unclear about the intent of any Affirmative Defense they can adjourn the case and request clarification from the party. If no response is received from that party, the case will go forward at the next hearing regardless. The best way to protect your policy is to be clear and specific from the start.

Remember, the arbitrator(s) cannot rule on speculation. Respondents, if you are unsure of the claims that may be brought against you, request a deferment to allow yourself time to complete your investigation. Stating the Applicant insured may have out-of-pocket expenses to claim against your policy is not enough to uphold an Affirmative Defense for insufficient limits. Your best bet if you are not sure of the situation at the time the case is filed is to communicate with the Applicant carrier to ascertain their insured’s intent and then request a deferment if necessary. Remember, deferments are not automatic, so be sure to clearly explain your situation and present any evidence you may have to support that position. If your deferment is denied, the case will be heard for liability and damages that same day, so be sure to present that portion of your case as well.

AF would like to render decisions on as many files as we can for our customers. However, to do this, both the Applicants and Respondents must provide a clear explanation of the circumstances in the case at hand. By giving the arbitrator(s) what they need you protect your company, your insured, and this process.

3350 Buschwood Park Drive, Suite 295, Tampa FL 33618-4313
www.arbfile.org