SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
09/26/2002

09/23/2002

CLERK OF THE COURT
FORM V000A

HON. GARY E. DONAHOE

S. Yoder
Deputy

CV 1999-009432

FILED: _____

DANIEL B RIFLEY

RICHARD T TREON

v.

AMERICAN FAMILY INSURANCE GROUP, et al.

JAMES T ACUFF

LEON J BRANDRIET

DECISION AND ORDER

The Court has considered the arguments of counsel. Pursuant to the stipulation of counsel, this constitutes this Court's final ruling on the merits of the claims and the parties have waived post-trial motions. Therefore, no party shall file any motion provided for by Rule 59, Arizona Rules of Civil Procedure, or motion for reconsideration.

Before turning to the merits of the case, there are a number of motions that have been filed. The Court has considered the pleadings.

IT IS HEREBY ORDERED denying Plaintiff's Motions to Strike Bench Memoranda Re: Limited Judicial Review of Administrative Decisions and Legality of Arbitration Clause is a Question of Federal Law. It is the Court's opinion that whether the arbitration clause is consistent with Arizona law regarding the required provisions for a fire insurance contract is a question of state law.

IT IS FURTHER ORDERED denying Plaintiff's Motion to Strike Deposition of Posey Moore Nash.

IT IS FURTHER ORDERED denying Defendants' Motion to Strike Testimony of Marn Rivelle Due to Plaintiff's Violation of Rule 26.1.

IT IS FURTHER ORDERED overruling Defendants' objection to Exhibit 3 to John Moody's deposition and the testimony related to that exhibit.

The Court's rulings on the objections to Cindy Thimmesch's and Barbara Morton's testimony have been filed separately.

IT IS FURTHER ORDERED granting Plaintiff's motion to amend the pleadings to conform to the evidence pursuant to Rule 15(b), Arizona Rules of Civil Procedure, because (1) the claim was raised on January 4, 2002, (2) the issue was tried with the implied consent of the parties, and (3) no prejudice results to Defendants because similar tort "damages for pain, humiliation and inconvenience, as well as for pecuniary losses" are recoverable on the "bad faith" claim. *Rawlings v. Apodaca,* 151 Ariz. 149, 726 P.2d 565 (1986).

Turning to the merits of the case, the Court has considered the evidence presented at trial including the exhibits and designated portions of depositions. Many facts are not in dispute while several critical facts are hotly contested. The Court has resolved those factual disputes. The trier of fact must resolve issues of credibility, is free to accept or reject, in whole or in part, the testimony of any non-expert or expert witness and is to "consider all of the evidence in light of reason, common sense, and experience." **See** RAJI Civil Standard Nos. 6 and 7. The trier of fact must "decide the credibility and weight to be given to any evidence presented in the case." **See** RAJI Civil Standard No. 2. The Court has accepted the testimony that the Court has determined to be credible and rejected that determined to be not credible. The Court has also

applied the "burden of proof" rules to Plaintiff's claims and Defendants' counterclaims.

The Court has reviewed Plaintiff's Complaint filed May 26, 1999. The docket does not reflect that the Complaint was ever amended. The material allegations are:

- American Family “made material misrepresentations” regarding the deletion of the appraisal provision. ¶s VIII, XI
- American Family’s representation in the policy “that if any provision was contrary to Arizona law, it would be altered to conform to Arizona law” was false. ¶s IX, X
- Plaintiff suffered damages as a result of relying on American Family’s representations that its policy complied with all requirements of Arizona law. It is alleged that these acts violated the Consumer Fraud Act. ¶ XI
- After the fire loss, American Family insisted on arbitration rather than appraisal before Arizona Department of Insurance had decided the arbitration provision was inconsistent with Arizona law. ¶ XVI
- American Family breached the contract of insurance and breached the duty of good faith and fair dealing. ¶ XVII
- American Family breached the contract of insurance “by failing to pay insurance benefits in a timely and appropriate manner.” ¶ XVIII
- As a proximate result of the wrongful conduct of American Family, Plaintiff suffered emotional distress. ¶ XX
- John Young breached “a duty to Plaintiff to provide him with a policy that conformed with Arizona law” that contained an arbitration clause. ¶ XXII

Based on the Court's resolution of witness credibility and conflicts in the testimony as well as weighing of the evidence, the Court finds and concludes as follows:[1]

A. Background, Insurance Coverage, Claim Against John Young and Consumer Fraud Claim.

1. On December 28, 1997, Plaintiff Daniel B. Rifley owned a single-family dwelling at 6550 North Central Avenue in Phoenix. (**See** Exhibits 114, 240, 260, 275 and 312 for interior and exterior photos; Exhibits 126 and 306 for floor plan.) Mr. Rifley had purchased the 100-year-old house standing at 6550 North Central Avenue in Phoenix, Arizona for $250,000 in 1994. The seller of the property was asking $539,000.00 for the house which sat on 2.3 acres of land. (**See** Exhibit 140.) At the time of the sale, the real estate market was depressed. Instead of purchasing the entire parcel, Mr. Rifley purchased the house and .5 acres of land at a discounted price in return for agreeing to do infrastructure work on the four lots that were created out of the other 1.8 acres of property. Those four lots became known as the Central Enclave. (**See** Exhibit 126.002.)

2. On or about May 9, 1994, Mr. Rifley purchased a homeowner's insurance policy from American Family to insure the house and its contents. (**See** Exhibit 19.) Included within the coverages was the right for the insured to be indemnified for losses sustained to the physical structure and to contents in the house as a result of a fire. The May 9, 1994 policy originally provided $226,000 of coverage for the dwelling and $169,500 of coverage for personal property. (**See** Exhibit 19.) Mr. Rifley had been insured by American Family since the late 1980's on various houses, autos and businesses. His agent was John Young.

[1] Although the Court has attempted to group findings by topic or claim, the findings are to be considered as a whole in that certain findings relate to more than one claim.

3. The American Family policy was known as the "HO5" homeowner's "Gold Star" policy. One of the features of the "Gold Star" policy was that it provided for "Increased Building Replacement Coverage." This feature makes it possible for the insured to receive "replacement cost without deduction for depreciation" and "without regard to the limit" on a structural loss under the following conditions:

> Buildings which have a permanent foundation and roof will be settled at replacement cost without deduction for depreciation, subject to the following:
>
> (1) Increased Building Replacement Coverage
>
> If at the time of loss, the Increased Building Replacement Coverage as provided under the Supplementary Coverages - Section 1 applies, we will pay the full cost to repair or replace the damaged building without deducting for depreciation and without regard to the limit, but not exceeding the smaller of:
>
> (a) the cost to replace the damaged building with like construction for similar use on the same premises; or
>
> (b) the amount actually and necessarily spent for repair or replacement of the damaged building. (**See** page 8 of 16, Exhibit 151.)

The policy further provides:

> The Increased Building Replacement Coverage only applies to dwellings and detached garage(s) that are repaired or replaced after a covered

loss. This coverage does not apply to dwellings or detached garage(s) under construction until completed and occupied. (**See** page 4 of 16, ¶ 6, Exhibit 151.)

4. On or about June 21, 1997, Mr. Rifley borrowed $450,000 against the residence. (**See** Exhibit 300.) Mr. Rifley borrowed another $90,000 against the residence on or about August 13, 1997. (**See** Exhibit 301.)

5. Because of the increased mortgage amounts, Mr. Rifley was required to increase his coverage to $500,000 on the structure. (**See also** Exhibit 112 AFR00579.) As a result of the increase in the structure limit, the content coverage automatically increased to $375,000 because content coverage is 75% of the structure coverage. The new coverage amounts were effective July 29, 1997. (**See** Exhibit 151.)

6. There is no evidence that American Family questioned the value of the structure or the contents when it wrote the new coverage or accepted the premium.

7. Thus, on December 28, 1997, the date of the fire, Mr. Rifley was insured by American Family Insurance Company pursuant to its "HO5" homeowner's "Gold Star" policy. (**See** Exhibit 151.)

8. Mr. Young has been an insurance agent for American Family since April 1, 1986. Mr. Rifley had been a customer of Mr. Young's for approximately thirteen years prior to the time of the fire. As noted above, Mr. Rifley had purchased a number of different policies from Mr. Young including homeowner's, auto and business policies.

9. During the sixteen years that Mr. Young has been an insurance agent, no insured has ever asked him about the dispute resolution provision in a policy. There is no

evidence that Mr. Rifley ever inquired about the dispute resolution provision before purchasing any policy from Mr. Young in the thirteen years prior to the fire. There is no evidence that Mr. Rifley relied on any information he received from American Family regarding the dispute resolution provision in the policy either in purchasing the policy or keeping the policy in force.

10. From an insurance agent's perspective, the dispute resolution provision in a policy is a rather minor point.

11. There is no credible evidence that even if Mr. Young had pointed out to Mr. Rifley the substitution of the arbitration provision in the 1994 version of the homeowner's policy that Mr. Rifley would not have purchased the policy.

12. It is unreasonable to impose a legal duty on an insurance agent in Arizona to independently compare a policy of insurance approved by the Arizona Department of Insurance (ADOI) to the Arizona Standard Policy (**see** ARS § 20-1503, ¶ 130) to assure conformance. The Court finds, as a matter of law, that an insurance agent in Arizona is not required to second-guess ADOI or the carrier who submitted its policy forms for approval to ADOI, and that an agent is not required to conduct an independent legal analysis of policies approved by ADOI to confirm that approved policies are consistent with Arizona law in order to avoid liability for disputed provisions in such policies. An insurance agent is entitled to presume that a policy approved by ADOI is valid. An agent has a right to sell an approved policy in the State of Arizona without obtaining an independent legal opinion or conducting an independent review of the policy for conformance with Arizona law until notified that a provision of the policy is somehow inconsistent with Arizona law.

13. John Young did not breach any duty owed to Mr. Rifley. Mr. Young did not breach his contract with Mr. Rifley and did not breach the covenant of good faith and fair dealing.

14. Plaintiff has failed to prove all the elements necessary to hold American Family liable for the alleged violation of the Consumer Fraud Act.

B. The Arson Issue; the Personal Property Issue; American Family's Breach of Contract, Fraud and Concealment Claims.

15. On December 28, 1997, at about 1:15-1:20 p.m., the Christmas tree in Mr. Rifley's house caught on fire. The fire spread from the tree and extensive damage was caused to the house and contents from the fire, smoke and water used to suppress the fire. (**See** Exhibits 111, 115, 120, 125, 131.002, 247, 254, 256, 257, 261 and 264.)

16. American Family had its origin and cause expert, Mr. Jim Dimond, do an investigation of the fire scene. (**See** Exhibits 21, 22.) Mr. Dimond concluded in his December 31, 1997 report that the origin of the fire was in the Christmas tree and that the cause of the fire was "probable result of overheated lights and a dry tree. My conclusion is that this fire was accidental."

17. The remains of the Christmas tree lights were left at the scene so that the insurer, if it chose, could analyze the lights. There is no evidence that American Family had the Christmas tree lights analyzed.

18. Shortly after the fire, a friend of Mr. Rifley's, Meg Steiner, recommended that he retain a lawyer. Mr. Rifley retained Ms. Steiner's firm and his case was assigned to John Moody. Mr. Moody hired Thomas Pugh to do a cause and origin investigation concerning the fire. Mr. Moody hired Mr. Pugh for a number of reasons including that Mr. Moody had heard of rumors and gossip concerning Mr. Rifley

starting the fire and Mr. Moody wanted to be in a position to have an expert witness in the event the insurance claim did not go smoothly.

19. Mr. Pugh concluded that the fire started in the Christmas tree, that it was accidental and that it was caused by a probable electrical malfunction in the Christmas tree lights.

20. The City of Phoenix Fire Department conducted an investigation of the origin and cause of the fire. (**See** Exhibit 131.) The chief investigator was Captain Bernard Caviglia. Captain Caviglia concluded that the fire probably started in the Christmas tree. He was not able to determine the actual cause of the fire. He found no other probable point of origin than the Christmas tree.

21. Cindy Thimmesch had an acrimonious relationship with Mr. Rifley. However, she did confirm that she had heard rumors that Mr. Rifley intentionally started the fire.[2]

22. According to Phoenix fire fighter Benjamin Butts, Jr., standard firehouse humor included saying, “They built Mr. Burn It a new house” whenever he drove by Mr. Rifley’s new house. Mr. Butts did not investigate the cause and origin of the fire and has no basis for labeling the fire “a torch job.”

23. The fire was not incendiary in nature or staged. The fire started in the Christmas tree as a result of an electrical malfunction in the Christmas tree lights. Mr. Rifley did not start the fire that destroyed his home.

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[2] The Court overruled the objections regarding these hearsay statements because the Court has considered those statements not for the truth of the matter asserted, but for the fact that such rumors were awash in the neighborhood. This finding also bears on Plaintiff’s claim for damages for emotional distress and humiliation.

24. Mr. Rifley promptly advised American Family of the fire and that he was making a claim for losses under his policy.

25. American Family promptly responded to the claim. American Family initially assigned Brent Bowen to the claim. Mr. Bowen visited the fire scene the following day and reviewed the coverages available under the policy with Mr. Rifley. On December 30, 1997, Mr. Bowen met Mr. Rifley at the scene. Mr. Bowen took a recorded statement (**see** Exhibits 141, 255, 297) from Mr. Rifley and "walked the loss" with Mr. Rifley in order to get a general idea of the contents. Mr. Bowen knew that the specifics of the contents would be provided later on the contents inventory. Mr. Bowen advised Mr. Rifley to begin preparing an inventory of the contents of the house.

26. On December 30, 1998, American Family advanced $4,000.00 to Mr. Rifley on the contents claim. (**See** Exhibit 112 AFR00581.)

27. By letter dated January 9, 1998 to Mr. Rifley, Mr. Bowen summarized the coverages. (**See** Exhibit 53.)

28. On January 12, 1998, American Family learned that its criminal records search regarding Mr. Rifley found nothing. (**See** Exhibit 112 AFR00571.)

29. Shortly after the fire, Mr. Rifley visited the store owned by James M. Mussallem. Mr. Mussallem and Mr. Rifley discussed Oriental rugs. Mr. Mussallem was of the opinion that a high quality Oriental rug could be obtained at an estate sale for $5,000.00 to $8,000.00.

30. On February 5, 1998, Mr. Moody submitted Mr. Rifley's contents inventory to American Family. (**See** Exhibit 215.) Mr. Moody forwarded the contents list on Mr. Rifley's behalf, stating, "(a)s you suggested, please let me know when you want to meet at the residence to go through the

inventory listing." (**See** Exhibit 52.) The items listed on Mr. Rifley's personal property inventory totaled $264,593.31. (**See** Exhibits 57, 215.)

31. Mr. Bowen responded on February 25, 1998, and requested invoices, receipts or documentation regarding the various personal property items. (**See** Exhibits 22, 109.)

32. Mr. Rifley told Brent Bowen of American Family that he did not have receipts for any of the items for which American Family requested receipts. (**See** Exhibit 66; Exhibit 112 AFR00179.)

33. On February 26, 1998, Rob Morris, District Property Claims Manager for American Family, wrote in his loss evaluation:

> We believe that it is conceivable that Mr. Rifley would have the items he has claimed in the house. Our investigation reveals that Mr. Rifley has no financial difficulties, is a successful businessperson and had the means by which to make the purchases he is claiming. (**See** Exhibit 22.)

34. On April 3, 1998, Mr. Bowen was advised that James F. O'Toole had been retained by Mr. Rifley to represent him in adjusting the fire loss. (**See** Exhibit 190.) Mr. Rifley retained Mr. O'Toole on March 25, 1998. (**See** Exhibit 112, Document AFR00053.)

35. The contents inventory was prepared by Jill Schirripa, a family friend, who was hired by Mr. Rifley to assist in preparing the inventory. She prepared the comprehensive list by going room-by-room throughout the burnt-out structure. She was familiar with the contents having been in the house many times before the fire. She prepared the

inventory based on her memory of the house's contents and remnants of items she saw while walking through the fire scene. Ms. Schirripa's testimony about the contents of the house is credible.

36. During American Family's investigation of the contents, no American Family representative spoke with or interviewed Ms. Schirripa.

37. On March 9, 1998, Mr. Bowen noted that the contents claim was a "huge amount of dollars . . . with very little documentation." He recommended paying actual cash value "per sheets as undisputed and leave rest open per documentation." (**See** Exhibit 112 AFR00261.)

38. On March 10, 1998, Mr. Morris noted that of the $239,000 in contents claimed, the amount substantiated was $130,000.00. (**See** Exhibit 112 AFR00259.)

39. On March 13, 1998, American Family paid $71,972.24 on the contents. (**See** Exhibit 55; AFR00061). That amount appears to have included the $1,200 limit for business property and the $2,500 limit for jewelry. The remaining $68,272.24 was the total actual cash value of the items for which American Family made payment at that time. Mr. Bowen was still awaiting documentation for approximately $130,000.00 of the contents. (**See** Exhibit 112 AFR00296, AFR00262.)

40. On April 20, 1998, American Family paid an additional $15,448.00 toward the "high dollar" contents, including $1,500 for each Oriental rug, the antique oval table, Chippendale chairs, the two rectangle tables, the couch and loveseat, antique sleigh bed, marble end table and wingback chairs. (**See** Exhibit 134.)

41. It is not uncommon for an insurance company to require its insured to submit to an "examination under oath" when

an insurance company suspects that its insured has committed fraud or concealment in a claim or that the insured caused the fire. On May 20, 1998, Mr. David Burtch wrote Mr. O'Toole stating: "because Mr. Rifley apparently does not have documentation to support his true replacement purchase expenses, we will likely request that Mr. Rifley submit to a Statement Under Oath regarding these purchases."

42. Mr. O'Toole responded on July 1, 1998, stating: "If American Family wishes to take a statement under oath regarding the purchase of the replacement personal property, we will be more than happy to oblige. Please notify us how you wish to proceed." However, American Family never requested Mr. Rifley to submit to such an examination.

43. Ms. Posey Moore Nash was not in Mr. Rifley's house after January 1997. Her recollection of the contents of the house some eleven months before the fire is of little, if any, probative value.

44. With regard to the value of Beanie Babies purchased by Mr. Rifley for his daughter, Kaytlin, American Family requested receipts for the Beanie Babies which had been purchased for $5 to $10 dollars each at different times. Some of the Beanie Babies appreciated in value. In his inventory, Mr. Rifley listed actual cost of the Beanie Babies as well as the appreciated value (i.e., the "replacement value cost") based upon a then-current catalog listing price for these Beanie Babies. To date, American Family has paid $20 for two Beanie Babies.

45. As of October 27, 1998, American Family had paid $94,773.06 toward the actual cash value of Mr. Rifley's personal property claim. Of the amount, $3,611.68 was paid under the "computer" coverage which had a limit of $5,000.00, and the limits on "jewelry" and "business

property" coverages of $2,500.00 and $1,200.00 respectively were paid. (**See** Exhibits 55, 57; ¶ 39.)

46. With the exceptions noted in this paragraph, the Court finds that the contents alleged by Mr. Rifley to have been in the house at the time of the fire and listed on his inventory were, in fact, in the house. That property was destroyed as a result of the fire. Further, the values that Ms. Schirripa and Mr. Rifley assigned to the items that were disputed by American Family were, with two exceptions, accurately stated values. The two exceptions are the Beanie Babies and the Oriental rugs. With respect to the rugs, the evidence supports a value of $5,000.00 per rug for a total of $15,000.00 for the three rugs. With respect to the Beanie Babies, the price guide used by Ms. Schirripa over-valued the Beanie Babies by at least 50%. The value of a Beanie Baby also decreases by up to 50% if the Beanie Baby has been played with. The Court finds that it is more probable that Mr. Rifley owned Cubbie Bear as opposed to Brownie Bear. The Court further finds that Kaytlin and Ms. Schirripa had played with the Beanie Babies. The values of the Beanie Babies owned by Mr. Rifley at the time of the fire are:

Cubbie Bear	$ 15.00
Bronty	$ 135.00
Chilly Polar Bear	$ 228.75
Humphrey Camel	$ 237.50
Web the Spider	$ 175.00
Velvet Panther	$ 17.50
Roary the Lion	$ 6.00
Splash Orca Whale	$ 27.50
Rightly Elephant	$ 60.00
Slither the Snake	$ 75.00
Stinky Skunk	$ 100.00
Spot the Dog	$ 325.00
Total	$ 1,402.25

Therefore, American Family owes an additional $1,382.25 for the Beanie Babies and an additional $10,500.00 for the three rugs.

47. By letter dated October 20, 1998, Rifley demanded appraisal of the contents claim. (**See** Exhibit 112 AFR01943.)

48. By letter dated October 27, 1998, Mr. Burtch agreed to appraisal of the contents loss. (**See** Exhibit 112 AFR01933-01935.) Because this lawsuit was filed, the appraisal of the contents did not take place.

49. Mr. Rifley did not materially breach the insurance contract or waive his claim for personal property losses by not proceeding with the appraisal on the contents because (1) coverage issues cannot be decided in the appraisal proceeding, (**see** Exhibit 57), (2) the contract of insurance did not provide for appraisal, and (3) the contract of insurance did not provide that appraisal was the insured's exclusive remedy.

50. American Family's burden of proof on its counterclaims based on breach of contract, and more specifically, breach of the concealment or fraud clause is preponderance of the evidence.

51. Mr. Rifley did not intentionally misrepresent the existence and/or value of certain items of personal property lost in the fire.

52. Mr. Rifley did not conceal or misrepresent the true cause and origin of the fire.

53. Mr. Rifley did not breach the concealment or fraud clause of the contract. Therefore, the insurance policy is not void.

54. Accordingly, American Family owes Mr. Rifley $97,706.36 plus sales tax in the amount of $6,644.03 plus interest on the contents claim.

55. Mr. Rifley is the prevailing party on American Family's counterclaim for breach of contract and is entitled to an award of reasonable attorneys' fees pursuant to ARS § 12-341.01 and taxable court costs.

C. Bad Faith Stemming from Arson Allegations / Intentional Infliction of Emotional Distress Claim

56. Shortly after the fire, anonymous letters and telephone calls were received by the City of Phoenix Fire Department and by American Family alleging that Mr. Rifley had burned his house down. (**See** Exhibit 131.001.)

57. On or about January 23, 1998, American Family received a two-page letter alleging that Mr. Rifley burned his house down. The letter mentioned the name of Posey Moore Nash. (**See** Exhibit 72.)

58. In a memorandum dated January 28, 1998, David Burtch wrote to Rob Morris:

> We have an anonymous letter mailed in on the Rifley fire. Neighbor thinks insured torched his own house. No offer of evidence to back it up. I will advise Jim Diamond [sic] of letter to see if he wants to follow up with named Rifley friend Posey Nash to see if there is anything behind this letter. (**See** Exhibit 112 AFR00546.)

59. Mr. Dimond did not do any follow-up investigation or interview Posey Nash.

60. Prior to the fire and for several months thereafter, Mr. Rifley was a friend of Posey Nash and her husband. Mr.

Rifley had lunch with Posey Nash and her husband at Houston's Restaurant immediately before the fire occurred. After the fire, Ms. Nash and Mr. Rifley spoke a number of times and he expressed his concern that people in the neighborhood thought he started the fire.

61. On January 29, 1998, Mr. Bowen advised Mr. Moody that American Family had received an anonymous letter and an anonymous telephone call. (**See** Exhibits 103, 104.) The letter was read to Mr. Moody and he requested a copy, but Mr. Bowen deferred to obtaining a legal opinion. On January 30, 1998, Mr. Moody again requested a copy of the letter, but Mr. Bowen refused to give Mr. Moody a copy citing "work product of the claims file." (**See** Exhibits 106 and 107.) Mr. Moody advised American Family that if they received any additional communications regarding arson allegations that he or Mr. Rifley should be immediately advised.

62. Mr. Bowen told Mr. Moody that the anonymous calls and letters would have no impact on American Family's handling of Mr. Rifley's claim and he promised Mr. Moody that if at any time these allegations began to impact the handling of this claim, American Family would so advise Mr. Rifley and his counsel.

63. As noted above, American Family refused to provide a copy of the letter to Mr. Rifley or to his attorney. Mr. Rifley was unable to analyze the contents of the letter and to try to correlate it with the other communications that had been made to the City of Phoenix Fire Department.

64. On February 19, 1999, American Family received a call from an anonymous telephone caller concerning the Rifley fire. Oscar Siementhal, an American Family employee, tape-recorded the conversation. In that call, the anonymous caller accused Mr. Rifley of having burned his house down and made other allegations. (**See** Exhibits 245.)

65. A.R.S. § 20-1902(B) provides:

> If an insurer has reason to believe that a loss in which it has an interest may be based on a false or fraudulent claim such insurer shall, in writing, notify an authorized agency and provide it with all material developed from the insurer's inquiry into the loss. Notice to any one of the authorized agencies listed in section 20-1901, paragraph 1, subdivisions (a) through (g) shall be sufficient notice for the purpose of this subsection.

66. On February 22, 1999, American Family prepared a FRAUD REFERRAL to the Arizona Department of Insurance in order "to initiate investigation." (**See** Exhibit 72.) In that fraud referral, American Family stated:

> American Family Insurance has received two separate anonymous allegations that this insured set the fire at his home on December 28, 1997 and has mentioned this to acquaintances in the neighborhood. We had no physical evidence to point to arson and fire report listed cause as accidental.
>
> * * *
>
> In this case the person indicates that Mr. Rifley made inquiries as to how to start a fire without it being detected as arson. The caller indicates that he or she is a neighbor and that all of the information about this fire has come from the caller's daughter. He indicates that his daughter has heard Mr. Rifley brag about the fact that he set the fire and got away with it, that the caller would like to come forward but he

> believes that Mr. Rifley has a violent reputation and that he has been in jail for it.
>
> * * *
>
> We have during our investigation questioned whether or not some of the items claimed to have been damaged in the fire were in fact in the home, and have declined to pay for some of the items claimed pending further documentation of ownership. Our initial investigation, however, did not uncover specific physical evidence pointing to arson.
>
> * * *
>
> If the Department of Insurance would like any or all of our claims file, please notify us and we will be happy to provide whatever information is needed in order that an investigation be conducted.

Following the referral, ADOI on three occasions, requested American Family to provide a complete copy of the claim file. American Family did not provide ADOI with the claim file so ADOI closed the case on April 22, 1999.

67. American Family did not advise Mr. Rifley or his attorney of the February 19, 1999 anonymous telephone call.

68. David Smith, American Family's expert, testified consistent with Arizona law that American Family had a duty to do a thorough investigation of the fire. Mr. Smith was of the opinion that a thorough investigation would have included getting all the fire videos, testing the suspicious can and rug tassels, interviewing Maggie Gray and following up with Posey Moore Nash about the letter with her name in it. Mr. Smith was also of the opinion

that it would have been reasonable and fair for American Family to have allowed its insured to have listened to portions of the taped anonymous call to see if the insured could identify the caller.

69. American Family first disclosed the existence of the tape-recorded telephone call during Posey Moore Nash's deposition on July 13, 2001. At that time, the tape-recorded call was played by counsel for American Family. Prior to the deposition, neither the tape recording nor a copy of a transcription which American Family had typed up in January of 2000 had been disclosed by American Family.[3] It appears that Mr. Rifley had left the room before the tape was played.

70. American Family did not provide a copy of this tape recording to Mr. Rifley's attorney until late July or early August of 2001.

71. Mr. Rifley listened to the tape, but did not immediately recognize the caller although he suspected it might be his uncle, Bryan Patrick Rifley. Mr. Rifley had not spoken to Bryan Patrick Rifley for over a decade because of a family feud that existed between Bryan Rifley and Plaintiff's father, William Rifley and other family members. Because Plaintiff's father was in ill health, and because he did not want to cause him adverse health consequences, Mr. Rifley did not immediately have his father or his mother listen to the tape recording.

72. Eventually, Mr. Rifley did allow his parents to listen to the anonymous telephone call. They indicated that they strongly believed the caller was Bryan Patrick Rifley. Mr.

[3] During closing argument, American Family's attorney stated that when ADOI produced the documents related to the fraud referral, Plaintiff received the phone call. Exhibit 72 does not reflect that. The documents were produced by ADOI around May 11, 2001. There is no indication that the tape or the transcript of the tape was included in those documents. (**See** Exhibit 72.)

Rifley is of the opinion that the caller was probably Bryan Patrick Rifley.

73. After the fire and after Mr. Dimond did his origin and cause investigation determining that the cause of the fire was accidental and that it was probably the result of an electrical malfunction of the Christmas tree lights starting the Christmas tree on fire, American Family did no further investigation of the fire in order to determine whether or not the fire may have been caused as a result of arson. American Family did not conduct a reasonable or thorough investigation of the fire.

74. American Family never informed Mr. Rifley prior to the time that the house was demolished that it was considering the possibility of alleging that Mr. Rifley committed arson or that it was considering alleging that Mr. Rifley committed fraud and concealment by claiming that certain items of personal property were in the house at the time of the fire.

75. After the appraisal award was paid on April 23, 1999, the house was demolished. American Family did not advise Mr. Rifley that it was going to claim that he was an arsonist before all the evidence regarding the cause and origin of the fire was destroyed.

76. Mr. Rifley endured comments to the effect that he was an arsonist. American Family knew these comments were being made from the very nature of the anonymous information it received. These comments were upsetting to Mr. Rifley and caused him emotional distress and humiliation. The comments have stigmatized Mr. Rifley in his neighborhood as an arsonist.

D. The “Bid Rigging” and “Low Balling” Allegations

77. Almost immediately after the fire, American Family referred the estimating of the structural repairs to the engineering firm of Madsen, Kneppers & Associates ("MKA"). (**See** Exhibit 112 AFR00580.) MKA is a consulting company that has its principal place of business in California. It was hired by American Family to prepare a scope of work and an estimate. (**See** Exhibits 112 AFR00494, 235.) It was not hired to rebuild the house. It did not need to be a licensed contractor to perform the work it was hired to do by American Family. On January 2, 1998, Mr. Rifley walked the entire residence with a representative from MKA and described the upgrades and finishes.

78. American Family also retained a soils engineer (Gregg A. Creaser of Speedie & Associates) and a structural engineer (Ronald Starling of Rader-Starling Associates) to assist in evaluating the structural loss.

79. In his "draft" report dated January 20, 1998, Mr. Creaser advised that "if the foundations can be proved to meet the current building code, it is our opinion that they can be salvaged. The decision to salvage would be an economic and constructability issue not limited to the following factors . . ." (**See** Exhibit 112 AFR00540.) The final report was dated February 5, 1998. (**See** Exhibit 112 AFR00454-00460.)

80. By January 27, 1998, MKA had prepared a "room by room survey" for cost estimating purposes. (**See** Exhibit 112 AFR00506-00535.)

81. On February 2, 1998, American Family received a report dated January 30, 1998 from Rader-Starling Engineers. (**See** Exhibits 112 AFR00478-00490, 238.) Mr. Starling noted that "portions of the main residence are salvageable," but because of "expense of the careful demolition required to save these elements," he recommended that "the main

residence be demolished and rebuilt to the required current building codes and standards."

82. There is no evidence that American Family provided a copy of the Rader-Starling report to Mr. Rifley or Mr. Moody.

83. MKA's first estimate dated February 18, 1998 was for $576,833.61. (**See** Exhibit 112 AFR00324-00433.) On February 20, 1998, MKA revised its estimate upward by $9,743.00 for "an elastomeric coating on the exterior stucco" bringing the total to $586,576.61. (**See** Exhibit 26.) On March 4, 1998, MKA increased its estimate by $24,640.25 to include "removal and replacement of the perimeter foundation at the main residence" thus bringing its estimate to $601,473.86 to restore the house to its pre-loss condition. (**See** Exhibits 30, 236.)

84. On February 23, 1998, Mr. Rifley called American Family and said that he was "upset with the bid on the house" and that "he is very insulted." (**See** Exhibit 112 AFR00311.) Mr. Rifley said that he was going to have his own bids done off MKA's scope.

85. American Family requested Craig Seymore from Seymore Construction to give a bid on the structure. Mr. Seymore submitted an estimate on March 3, 1998 in the amount of $694,515.83. (**See** Exhibit 28.) Mr. Seymore's bid was to replace the house "down to the foundation and certified pad." Mr. Seymore would later revise his bid downward. (**See** ¶s 97, 101.)

86. Because of Mr. Rifley's construction background, he estimated shortly after the loss that it would cost a minimum of $1.2 million or more to rebuild his home. When Craig Seymore was doing his estimate, Mr. Rifley indicated that the number should be between $800,000.00 and $900,000.00.

87. Mr. Rifley was unhappy with the amount of Mr. Seymore's estimate and told Mr. Seymore that if he could build the house for $694,515.83 to pre-loss condition, he would sign a contract for Mr. Seymore to do the reconstruction. Mr. Seymore advised Mr. Rifley that he could rebuild the house to pre-loss condition for the amount of the estimate, but could not do the additional work requested by Mr. Rifley for that price.

88. Mr. Rifley was also unhappy over the fact that American Family provided the MKA bid to Mr. Seymore. (**See** Exhibit 112 AFR00304.) On March 4, 1998, Mr. Moody complained of "bid rigging" to American Family. He was told that Mr. Rifley "has always been free to get his own bids." (**See** Exhibits 29, 112 AFR00304.)

89. Seymore Construction is on American Family's preferred contractors' list. Seymore Construction was not paid for preparing an estimate. There is no evidence that Mr. Seymore's estimate was influenced by his company being on American Family's preferred contractors' list.

90. On March 25, 1998, Mr. Rifley hired public adjuster James O'Toole to handle Mr. Rifley's claim.

91. At Mr. Moody's instruction, on March 26, 1998, American Family paid an undisputed amount of $611,216.86 on the structure by paying $456,326.84 to Greenpoint Mortgage Company, $89,749.18 to The CIT Group and the balance to Mr. Rifley. (**See** Exhibit 112 AFR00079.)

92. On April 3, 1998, O'Toole hired Edwards & Edwards to generate an estimate on the structural repairs on Mr. Rifley's behalf. From April 3, 1998 through June 3, 1998, Edwards & Edwards spent a total of 66.5 hours estimating the structural repairs costs. (**See** Exhibits 166, 166.001 and 166.002.)

93. On May 14, 1998, Edwards & Edwards sent Mr. O'Toole a 13-page scope of work (without unit cost estimates) to restore Mr. Rifley's house to its pre-loss condition. (**See** Exhibit 163.)

94. On April 15, 1998, American Family provided copies of the MKA and Seymore estimates to Mr. O'Toole. (**See** Exhibit 161.)

95. In May 1998, Rob Morris asked Brent Bowen to reconcile the MKA and Seymore estimates. (**See** Exhibit 112 AFR01365.)

96. On May 12, 1998, Mr. O'Toole wrote to American Family:

> Secondly, with regard to Seymore and MKA, it appears that both contractors have written their estimate based upon the recommendation of American Family. It has become quite apparent that Seymore has no intention of doing the repairs to the structure and this estimate is merely that, an assessment of damage. As I brought up to you in the past regarding MKA, we could find no license for them as a contractor in the State of Arizona, or them being qualified as engineer in the State of Arizona. ... I also wish to point out that in the past when we have requested that Seymore perform the work to return the structure back to its pre-loss condition as they alleged they could, that Seymore Builders had refused to enter into a contract with the insured. . . .

97. On May 12, 1998, Mr. Bowen met with Mr. Seymore and reviewed his bid in light of MKA's estimate. As a result, Mr. Seymore reduced his bid by $10,481.39. His total bid was $681,252.49. (**See** Exhibit 34.)

98. On May 21, 1998, Morris noted in the claim file to Brent Bowen and Dave Burtch:

> Let's get another bidder if possible.
> Get Seymore's bottom line price by 6/1/98.
> Loss is 6 mo old and we have not got our AP yet- we need it now-
> ALE will end at 12 mo. We have to have a reasonable basis to discontinue so we need total structure undisputed paid by 6/30/98 so then have 6 mo. to rebuild it. (**See** Exhibit 35.)

99. On May 29, 1998, Mr. Bowen wrote:

> "This was Seymore's bottom line. David pointed out need to take out window coverings as well and have them review two additional costs on double oven and vinyl overhang/siding.
>
> * * *
>
> As requested, please request OK to pay up to $700,000 under coverage A. We are having Kowalski Contractors prepare another bid. We are providing them with floor plan and some photos of amenities asking for an independent bid to be completed asap. Will give us another bid to compare. Hopefully will be around the reserve amount." (**See** Exhibit 112 AFR01333.)

100. On June 1, 1998, Mr. Bowen invited Mr. O'Toole to submit a "scope/estimate" from Mr. Rifley's "chosen contractor." Mr. O'Toole was advised that Kowalski had been asked "to do an additional scope and estimate on the structure." (**See** Exhibit 112 AFR01338.)

101. On June 2, 1998, Mr. Seymore revised his estimate from $694,515.18 to $676,371.24. (**See** Exhibit 230.)

102. On June 5, 1998, American Family noted that the difference between the Seymore and MKA bids was $65,154.39. (**See** Exhibit 112 AFR01295.). Mr. Morris noted on June 5, 1998, that Seymore Construction "is a reputable firm we are familiar with." (**See** Exhibit 112 AFR01292.) Mr. Morris advised Mr. Bowen that he would attempt to get approval to pay to the Seymore estimate as the undisputed amount on the structure. (**See** Exhibit 112 AFR01291.)

103. On June 9, 1998, O'Toole paid Edwards & Edwards $1,072.50 for estimating services.

104. On June 15, 1998, Dwight Gribble, Regional Claims Administrator, in a message to Jan Neary and Rob Morris authorized payment of the claim:

> Rob,
> Per my voice message, Carol Friedreich [sic] called and authorized you to complete dollar settlement on this fire loss. Coverage was accepted during the last home office committee (3/10/98); and so now you can proceed with concluding the settlement. (**See** Exhibits 24, 112 AFR01270)

105. On June 23, 1998, Edwards & Edwards completed its structural cost estimate in the amount of $1,692,308.05. (**See** Exhibit 210.)

106. On August 25, 1998, Mr. O'Toole presented a proof of loss (**see** Exhibit 178) and an estimate for $1,692,308.05 prepared by Edwards & Edwards (**see** Exhibit 163), which contemplated the complete demolition and reconstruction of the house. Mr. O'Toole also demanded payment of the undisputed amounts at that time.

107. On September 1, 1998, David Burtch rejected Plaintiff's proof of loss. Mr. Burtch wrote:

> Please understand that we have already paid the undisputed amount toward this structural settlement. With regard to any overstatement of the scope of repair, as you mentioned, please understand that until we have a finished product from Kowalski Construction, we have already supplied to you the approved scope of repair from American Family as outlined in our undisputed settlement. Any observations that we noted will be incorporated into any supplement that may be necessitated in future adjustments. (**See** Exhibit 179.)

108. In a September 3, 1998 memo, Mr. Burtch noted that American Family would await the Kowalski estimate before paying any additional funds toward the structure claim. (**See** Exhibit 112 AFR00728.)

109. In response to Mr. Burtch's September 1, 1998 letter, on September 9, 1998, Mr. O'Toole took exception to American Family's rejection of the proof of loss and demanded appraisal on the structure. (**See** Exhibits 42, 180.) Previously, American Family had indicated in the Feavel and Brammer cases that it would go into appraisal despite the policy's arbitration provision. (**See** Exhibit 169 dated June 30, 1998.)

110. On September 22, 1998, American Family named Mark Fowler as its appraiser on the structure claim. (**See** Exhibits 44, 112 AFR01975.)

111. On September 30, 1998, Mr. Rifley named John Hall as his appraiser. (**See** Exhibit 183.) Later, Attorney Donald Petrie of Gallagher & Kennedy was selected as the umpire.

112. Mr. Rifley had been getting numerous complaints from neighbors and citations from the City of Phoenix about the unsightly structure. On September 9, 1998, Mr. O'Toole requested that Mr. Rifley be permitted to begin tearing down the house. (**See** Exhibit 42.) American Family responded on September 12, 1998: "You have requested that Mr. Rifley begin demolition on this property. We do not have an agreement as to the structure estimate. Kowalski Construction has not yet finished their bid." (**See** Exhibit 182.) After a hearing before the City of Phoenix Rehabilitation Appeals Board, Mr. Rifley was given until April 8, 1999 to demolish the burned structure. (See Exhibits 203, 205.)

113. American Family contacted Mr. Fowler during the appraisal process. On November 23, 1998, a conversation took place between Mr. Burtch and Mr. Fowler. (**See** Exhibit 112 AFR01882.) Mr. Burtch had asked Mr. Fowler "where he was at" with the appraisal. Mr. Fowler indicated that he was in the range of $680,000 to $700,000. Mr. Burtch stated that he only had authority for $618,000.

114. Mr. Fowler did not feel that Mr. Burtch attempted to interfere with his appraisal. Mr. Fowler testified that the contact did not affect his appraisal.

115. On November 11, 1998, Kowalski submitted its estimate of $641,322.17. (**See** Exhibit 232.) American Family then provided that estimate to Mr. Fowler. (**See** Exhibit 112 AFR01888.)

116. In a letter dated November 23, 1998 to Mr. O'Toole, Mr. Burtch stated:

> We are currently discussing the estimate figures from Seymore Construction and Kowalski Construction with our appraiser, and will contact you early next week if the Actual Cash Value

> computation affects that amount we have previously paid toward the structure.
>
> * * *
>
> Our initial settlement to Mr. Rifley was full (sic) a Replacement Cost settlement in an effort to expedite the settlement process and get Mr. Rifley's dwelling repairs underway. As we evaluate the Kowalski bid with Mr. Mark Fowler (our appraiser), please understand that any future adjustments for this structure will be computed on an Actual Cash Value basis according to the policy provisions since the loss occurred over 10 months ago, and Mr. Rifley has not begun to repair the dwelling to our knowledge as of this writing." (**See** Exhibit 112 AFR01885.)

117. On December 8, 1998, Mr. Fowler met with Mr. Burtch and they reviewed the Kowalski and Seymore bids. Mr. Fowler advised that it was his opinion that the Kowalski bid was the more reliable. (**See** Exhibit 112 AFR01866.)

118. Mr. Fowler re-worked the Kowalski bid resulting in an estimate of $642,273.87 which he submitted to American Family on December 17, 1998. (**See** Exhibit 112 AFR01840-001854.)

119. The difference between what was paid ($611,218.86) and Mr. Fowler's estimate was $31,057.01. On December 18, 1998, American Family chose to make an undisputed payment on the basis of Mr. Fowler's "rough draft computation." American Family deducted an overpayment on additional living expenses and a $3,500.00 deposit which had been retained by Mr. Rifley's landlord on the rental house out of the $31,057.01, reducing the payment to $17,057.01. (**See** Exhibit 112 AFR01838, AFR01760, AFR01693.)

120. On January 25, 1999, Mr. Burtch provided Mr. O'Toole with a copy of the reports by Mr. Starling and Mr. Creaser. (**See** Exhibit 112 AFR01781.)

121. In February 1999, John Hall, Mr. Rifley's appraiser, submitted an estimate of $1,297,532.42 as the replacement cost. (**See** Exhibit 113 O'Toole01058.) Before submitting the report, Mr. Hall allowed Mr. O'Toole and others to review a draft. (**See** Exhibit 113 O'Toole01094.)

122. The appraisal of the structure was concluded on March 18, 1999. The two appraisers and the umpire made a unanimous award to Mr. Rifley of $1,064,467.08 to rebuild his home and an additional $49,860.00 in additional living expenses for the nine-month period it was estimated it would take Plaintiff to rebuild his house. (**See** Exhibit 112 AFR01689, AFR01650.) American Family therefore owed Rifley an additional $422,193.21 on the structure claim. That amount was paid on April 23, 1999. (**See** Exhibit 51.) The appraisal award on the structure was approximately $627,000.00 less than the Edwards & Edwards estimate and approximately $400,000.00 more than the estimates American Family had received.

123. On the structural portion of the claim, Rifley repeatedly represented that he was going to ". . . make sure that his home is returned to pre-loss condition and like, kind and quality. . . ." (**See** Exhibit 144.) For example, his public adjuster, O'Toole, wrote:

> We have provided you with a scope of work that clearly lays out the pre-loss material in like, kind and quality, breaking out brick, plaster, drywall, etc. That is what is owed to my client, not the cheapest means for an engineer and an architect to randomly determine what should be plaster, what should be drywall, where

> bricks should be, and bricks should not be. If the home had drywall over plaster, you owe for drywall over plaster. If one wall in a room was brick which was plastered, you owe for the brick and the plaster over the brick. Another issue which we discussed on our walk-through, was that of the hardwood floors. You indicated that my client was either entitled to carpet or to hardwood floor, but he was not entitled to both. This is a contradiction of the policy. My client is entitled to both, and my client is entitled to rebuild his home and to sell it where the purchasers would remove, or could remove, the carpet, thus having the usable hardwood room. . . So, it is not an issue of obsolescence, as between the lines it appears that this is where you wish to go. Every double surface in this building serves a purpose and has a purpose, and the rebuilding of the structure shall be calculated as such. . . .
>
> * * *
>
> . . . Again, pre-loss condition is to return the structure back as it was prior to the fire. . . .
>
> (**See** Exhibit 180.)

124. On May 26, 1999, Mr. Rifley filed suit without completing the contents appraisal he had demanded.

125. Although he has not documented the construction with any receipts, Mr. Rifley claims he spent $1,200,000 to build the new house, which is approximately $200,000.00 more than he was awarded by the appraisers as the cost to rebuild his home to like kind and quality.

126. Whether the MKA, Seymore or Kowalski estimates were accurate or not will never be known because Mr. Rifley did not rebuild the house to its pre-loss condition. The new

structure is approximately 2510 square feet larger than the original residence and contains substantially different features than the original house. (**See** Exhibit 140.001.) A reasonable inference that can be drawn is that if the current house was built in its grand style for $1.2 million, Edwards & Edwards' estimate of nearly $1.7 million was not even close. Another reasonable inference is that the estimates received by American Family that were in the $700,000.00 range were closer to being accurate.

127. Mr. Rifley has failed to prove by a preponderance of the evidence that the MKA, Seymore and/or Kowalski estimates were "low-ball" bids, the result of "bid rigging" or the result of any improper conduct by American Family.

D. Arbitration v. Appraisal

128. Mr. Rifley protested the estimates as being "low-ball" estimates and accused American Family of bid rigging and low-balling estimates. Mr. Rifley asked Mr. Bowen what he could do if he was not satisfied with the construction estimates. Mr. Bowen told Mr. Rifley that if he was dissatisfied, he could always go to arbitration as provided in the policy.

129. The American Family Gold Star policy contained a provision requiring the insured, in the event of a dispute with the insurer over valuation of the claim, to file for arbitration through the American Arbitration Association.

130. With regard to fire insurance policies covering property located in Arizona, A.R.S. § 20- 1503 provides:

> A. No policy of fire insurance covering property located in this state shall be made, issued or delivered unless it conforms as to all provisions and the sequence thereof with the basic policy

> commonly known as the New York standard fire policy, edition of 1943. Such policy is designated as the Arizona standard fire policy.
>
> B. The director shall file in his office and thereafter maintain so on file, a true copy of the Arizona standard fire policy, designated as such and bearing the director's authenticating certificate and signature and the date of filing. Provisions to be contained on the first page of the policy may be rewritten, supplemented and rearranged to facilitate policy issuance and to include matter which may otherwise properly be added by endorsement.

The 1943 New York standard fire policy provides that disputes over valuation will be resolved by "appraisal." The provision is set forth beginning on line 123 in Exhibit 13.

131. From 1984 until 1994, American Family's homeowner's policies provided for "appraisal" to resolve disputes over valuation. On April 14, 1994, American Family applied to the Arizona Department of Insurance (ADOI) for approval for a number of revisions in its homeowner's policies. (**See** Exhibits 118.001, 118.002.) Prior to the application, American Family had formed a policy rewrite committee. One of the recommendations was to substitute arbitration for appraisal. Barbara Morton was a member of the committee from its inception. She testified that the recommendation to substitute arbitration for appraisal as the dispute resolution mechanism came from a senior claims management individual, Property Claims Manager Marvin Mundt. In a memo sent to Underwriting Directors for Business and Personal lines dated August 21, 1989, Mr. Mundt wrote:

> In 1979, the Appraisal Clause was replaced by an arbitration provision in the Homeowner's Policy.

Claims had very acceptable results with the Arbitration Clause during the time that that contract was used.

* * *

There are numerous advantages to arbitration. While there are some disadvantages to arbitration, there are many more disadvantages [to the insurer] to appraisal. (**See** Exhibit 2.)

132. A.R.S. § 20-1112 provides:

A. Insurance contracts shall contain such standard provisions as are required by the applicable provisions of this title pertaining to contracts of particular kinds of insurance. The director may waive the required use of a particular standard provision in a particular insurance policy form if he finds such provision unnecessary for the protection of the insured and inconsistent with the purposes of the policy and the policy is otherwise approved by him.

B. No policy shall contain any provision inconsistent with or contradictory to any standard provision used or required to be used, but the director may approve any substitute policy or provision which, when viewed in its entirety, is substantially equivalent to or more favorable to the insured or beneficiary than the standard provisions or optional standard provisions otherwise required.

C. In lieu of the standard provisions required by the provisions of this title for contracts for particular kinds of insurance, substantially similar standard provisions required by the law

> of the domicile of a foreign or alien insurer may be used when approved by the director.

Thus, the Director of ADOI is authorized to waive any particular standard provision in a particular insurance policy and to approve substitute policies or provisions that are substantially equivalent to or more favorable to the insured than the standard provision.

133. At the time the application was submitted, Ms. Morton was not aware of the provisions of ARS § 20-1122.

134. American Family obviously favored arbitration over appraisal because it was more favorable to the insurer. American Family elected to obtain a ruling from the ADOI regarding the use of an arbitration clause as opposed to an appraisal clause. Barbara Morton and Bradley Gleason, the actuarial vice president for American Family, swore in their filings with the Arizona Department of Insurance (ADOI) that the arbitration provision in the policy complied with all Arizona insurance laws and regulations. (**See** Exhibit 16.) However, they testified that American Family did nothing to verify the legality of the arbitration clause before it changed from appraisal to arbitration. Prior to signing the certification, Mr. Gleason had made no inquiry or investigation and knew nothing of the facts. Mr. Gleason testified that he relied upon the work of Ms. Morton. Mr. Gleason testified that he signed these affirmations as a matter of course for changes in policies nationwide, but never reviewed the content of the changes or the legality of the change.

135. American Family did not request a legal opinion from its corporate legal department concerning this change. However, Ms. Morton believed that all submissions are reviewed by American Family’s legal department.

136. The application of American Family clearly discloses that it is seeking approval of a change from appraisal to arbitration. The Summary Explanation document states:

> Arbitration
> (C) The Appraisal provision previously included in this policy is replaced with the Arbitration provision similar to our Farm/Ranch Policy. (**See** Exhibit 118.002.)

Presumably, the Director of ADOI was free to reject the change if arbitration was not found to be substantially equivalent to or more favorable to the insured than appraisal.

137. On July 28, 1994, Albert Manzer of the ADOI approved the changes American Family requested, including the arbitration provision. There is no evidence that ADOI acted improperly in connection with the 1994 approval of the arbitration provision.

138. American Family, after the policy changes were approved for new and renewal customers, represented to its renewal customers about the changes in their policy by stating in a brochure: “The following Conditions are added or changed: * Arbitration (new) (does not apply in MN).” Nothing is said about the deletion of the appraisal clause in favor of the arbitration provision.

139. In 1998, Brian Manahan, a Property and Casualty Analyst for the ADOI, was directed by his supervisor, Dean Eller, to review the arbitration provision of the American Family policy. Mr. Manahan completely reviewed for compliance the entire 1994 filing by American Family.

140. Mr. Manahan’s concluded that the approval of the arbitration clause was “obviously wrong.” However, Mr. Manahan did not feel the coding of (C) was incorrect in that the proposed change to arbitration did not change

coverage, but changed a condition in the policy. It was Mr. Manahan's opinion that American Family was not "trying to sneak it by," but he did agree that the arbitration provision does not conform to the Arizona Standard Policy. Finally, Mr. Manahan testified that the policy change and approval were a mistake by both American Family and ADOI, but he did not believe either acted dishonestly or in bad faith.

141. On April 23, 1998, Mr. Manahan sent a letter to American Family and directed American Family to either submit "an amendatory endorsement addressing this inconsistency" if one existed or submit "as a new filing corrected forms." (**See** Exhibits 7, 118.001.)

142. The Court finds that there is nothing improper in an insurer following the statutory procedure allowed to it to seek a change in its policy from the standard policy language. Based on the ADOI approval, American Family could have reasonably assumed that ADOI had found that the arbitration provision was substantially equivalent to the appraisal clause.

143. Rob Morris, Regional Property Claims Manager, solicited Steve Tully of Lewis & Roca, to give an opinion regarding whether the arbitration clause was legally enforceable. In a May 2, 1997 letter to Rob Morris, Tully wrote:

> It was a pleasure meeting you the other day on our trip to the scene. At that time, I promised I would send you some legal citations to use in reply to those demanding an appraisal, rather than an arbitration, of their fire claims. I cannot say that the arbitration provision is enforceable. However, I think American Family

> can fairly argue that it is enforceable for the following reasons.
>
> * * *
>
> The only potential objection from a plaintiff demanding an appraisal would be that the director overstepped the authority granted to him pursuant to A.R.S. § 20-1112. For instance, a plaintiff could argue that the arbitration provision in the American Family policy is not substantially equivalent to or more favorable to the insured than the appraisal provision of the standard policy. I am not sure that would be a particularly persuasive argument, but it is one a plaintiff could make.
>
> * * *
>
> I would also notify them that the Director has approved the form of the policy. At that point it would be incumbent upon the plaintiff demanding appraisal to file a declaratory action to determine the validity of the policy. (**See** Exhibit 18.)

144. By May 2, 1997, American Family reasonably knew that although the arbitration clause had been approved for use by ADOI, there was a question over its enforceability.

145. In a companion claim, *Feavel v. American Family*, adjusted by public adjuster James F. O'Toole, Mr. O'Toole received a letter from David Burtch, property claim specialist on the Feavel case and the Rifley case. Mr. Burtch wrote:

> I wish to clarify the issue of American Family's HO-5 Goldstar policy regarding arbitration. We

> have referred this to our local law firm. They have reviewed this issue, and found that our Arbitration clause is not in conflict with the Arizona Standard Fire Policy, and subsequently acceptable to the Director of Insurance. Should you have any questions regarding this issue, please review A.R.S. 20-11112 [sic]. (**See** Exhibit 17.)

The letter ends with Mr. Burtch advising Mr. O'Toole of the person to contact at the local office of the American Arbitration Association to request arbitration.

146. Then came the ruling in a Maricopa County Superior Court case captioned *Brown v. American Family*, (Case No. CV 97-05341). At the same time American Family filed its Answer and Counterclaim, it filed a motion to compel arbitration pursuant to the arbitration clause in the homeowner's policy. In their response to that motion, Mr. Brandriet, on behalf of the Browns, specifically argued that "the arbitration provision in the policy is invalid as it fails to comply with the New York standard fire policy as required by A.R.S. § 20-1502." **See** Response, p. 3, ls. 12-14. American Family's reply pointed out that ADOI had approved the policy and cited A.R.S. § 20-1112 as authority for ADOI allowing the change. **See** Reply, pp. 3-4. Thus, the Browns clearly challenged the legality and enforceability of the arbitration clause. On November 12, 1997, Judge Albrecht ruled as follows:

> Based on the matters presented to the Court, the Court finds the arbitration provision contained in the insurance policy is consistent with Arizona law and has been approved by the Department of Insurance.
>
> IT IS ORDERED granting the Motion to Compel Arbitration.

> IT IS ORDERED staying this matter pending arbitration pursuant to the terms of the insurance agreement. (**See** Exhibit 289.)

147. Following that ruling, American Family had the approval by ADOI endorsed by a ruling of the Superior Court. So, as of November 12, 1997, American Family could have reasonably assumed that its arbitration provision was valid because Judge Albrecht found it to be "consistent with Arizona law."

148. Mr. Rifley was a person experienced in the construction field and was knowledgeable about construction estimating. There is no credible evidence that Mr. Rifley knew the practices and procedures for either an appraisal or arbitration proceeding. As noted above, Mr. Moody initially represented Mr. Rifley. However, Mr. Rifley became concerned about the hourly charges of Mr. Moody. On March 25, 1999, Mr. Rifley hired James F. O'Toole Public Adjusting Company to represent him in connection with the handling of his claim because Mr. O'Toole was willing to handle the claim on a contingent fee basis and because Mr. O'Toole was experienced in dealing with American Family on the issue of arbitration and appraisal. Mr. Moody assisted Mr. Rifley in negotiating the contract with Mr. O'Toole. (**See** Exhibit 153.) The existence of the arbitration clause coupled with Mr. Bowen's representation that arbitration was his exclusive remedy contributed to Mr. Rifley retaining Mr. O'Toole.

149. On or about April 3, 1998, James F. O'Toole, President of James F. O'Toole, Inc., advised American Family of his representation of Mr. Rifley.

150. In his practice as an insurance adjuster, Mr. O'Toole represented a number of other clients who were also insured under the American Family homeowner's insurance policy containing the arbitration provision. In each instance, Mr. O'Toole either demanded appraisal or discussed

appraisal with an American Family adjuster. In each case he was either denied appraisal or informed by American Family that the appraisal provision was not applicable. In connection with Mr. Rifley's claim, Mr. O'Toole had conversations with Rob Morris, Dave Burtch and Brent Bowen of American Family who told him on more than one occasion "we've been through it O'Toole, not to even bother, it's an arbitration policy."

151. On May 19, 1998, Barbara Morton and Brian Manahan spoke over the telephone. Ms. Morton's notes read, "It [is] embarrassing to them to have arbitration lang[uage] in the policy. Pol[icy] must conform to NY STD Fire Policy & Appraisal language must be in there." Ms. Morton advised Mr. Manahan that American Family had already decided to return to appraisal later in the year. However, American Family has yet to change back to appraisal in any state unless it has been ordered to by the appropriate state insurance department because of "corporate priorities." (**See** Exhibit 8.) In that conversation, Mr. Manahan directed Ms. Morton to acknowledge in writing the inconsistency, confirmed that all claims must be adjusted with appraisal available to the insureds rather than through the American Arbitration Association, and told Ms. Morton six months was too long to take to file an amendatory endorsement.

152. On May 22, 1998, Ms. Morton wrote a letter to Mr. Manahan at the ADOI acknowledging that ADOI had determined that the arbitration clause was inconsistent with Arizona law and agreeing to send out the necessary amendatory endorsement. (**See** Exhibit 9.) American Family also agreed to notify all claims personnel to use the 10/84 appraisal language for the adjustment of claims.

153. During her deposition on August 29, 2001, Ms. Morton was asked multiple times if she was willing to acknowledge that the arbitration provision in the 1994 homeowner's

policy is inconsistent with Arizona law. Ms. Morton was unwilling to concede that the arbitration provision was inconsistent with Arizona law.

154. This Court finds and concludes that the arbitration provision in America Family's 1994 homeowner's policy is inconsistent with Arizona law. The arbitration clause in American Family's 1994 homeowner's policy is not substantially equivalent to the appraisal provision in the Arizona Standard Policy nor is the arbitration provision more favorable to the insured.

155. Pursuant to Ms. Morton's representation to Mr. Manahan and at her request, Carol Friedrich, Property Claims Director (who replaced Marvin Mundt) sent a memo, dated May 27, 1998, to all senior claims management individuals, including Rob Morris, the claim manager on Plaintiff's case, which referenced "Appraisal Condition in the Homeowner's Policy," stating:

> I have just received the attached from Staff Underwriting that has requested in the State of Arizona that the appraisal language from the 10/84 edition of Homeowner's Policy be used rather than the arbitration language contained in the 6/94 edition of the Homeowner's Policy. As most of you are aware, the appraisal language was changed to the arbitration language in the 6/94 version of the Homeowner's Policy. Since that time we have had several states question or request a change in the language from arbitration back to appraisal. (**See** Exhibit 3.)

156. On June 4, 1998, Ms. Morton had a discussion with Ms. Friedrich during which Ms. Morton took detailed notes. (**See** Exhibit 4.) Ms. Friedrich told Ms. Morton that she had spoken with Rob Morris regarding the arbitration clause issue. The notes from the conversation state: "Rob Morris

- DPCM-Phoenix - told Carol he was disappointed to go from Arbitration to Appraisal. They were winning the arbitration awards." However, there is no evidence that an arbitration had ever occurred in Arizona.

157. Ms. Morton's notes state that American Family does not want to change the appraisal language in all the states to include "disinterested appraisers and disinterested umpires" because the company wants to continue to use the engineers the company has "confidence in." (**See** Exhibit 4.)

158. American Family was not authorized to sell insurance in the State of Arizona until 1984. While the 1984 homeowner's policy (the 10/84 policy) contained an appraisal provision, that provision did not comply with Arizona law because it did not require disinterested individuals to act as appraisers and umpires. In April 1998 when ADOI ordered American Family to go back to appraisal and to file an amendatory endorsement to bring its policy in compliance with the law, American Family attempted to utilize the 1984 appraisal language which did not comply with the Arizona Standard Policy. Subsequently, the ADOI ordered American Family to use the exact language mandated by the statute which was to provide for "competent and disinterested" appraisers and umpires.

159. Ms. Morton's handwritten notes confirm American Family's concerns that the engineers it uses in appraisal might not be considered disinterested by various state courts.

160. Ms. Friedrich unequivocally said "no" to adding "disinterested" in any other state but Arizona, stating the change in language should only be done in states that require the change.

161. In a memo transcribed from a voice mail from Brandon LaSalle to Ms. Morton, LaSalle said:

> I'm sure you know why I'm calling. Just on this arbitration versus appraisal issue down in Arizona, our law firm down there that we use for corporate issues, Low and Childers, got a consumer complaint indicating American Family and the department had exceeded their joint authority in changing from appraisal to arbitration and that it was unfair and anti-consumer and people should be allowed to have appraisal.
>
> * * *
>
> I have memos from Jim Rusch from early '96 and late '95 indicating there was a homeowners' rewrite committee and that Claims Department had suggested that we go with arbitration to improve our settlement negotiating ability as outside professionals are the ones doing the negotiating . . . . (**See** Exhibit 5.)

162. In accordance with the directive from Ms. Friedrich, on July 1, 1998, American Family, in the Feavel and Brammer claims, wrote letters to O'Toole informing him that it would now offer those insureds appraisal. (**See** Exhibit 169.) Based on that, a reasonable person would have assumed that American Family would also offer appraisal in the Rifley claim.

163. Marn Rivelle, Plaintiff's actuarial expert, opined that the American Family policy containing the arbitration clause is worth $30 less than an American Family policy containing the appraisal cause. As is the prerogative of the trier of fact, the Court rejects that opinion.

Additional Findings of Fact, Conclusions of Law; Discussion.[4]

164. Mr. Rifley bears the burden of proof in establishing entitlement to benefits under his homeowner's insurance policy. *Pacific Indem. Co. v. Kohlhase*, 9 Ariz. App. 595, 597, 455 P.2d 277, 279 (1969) (the insured has the burden of proving coverage under her policy). Likewise, American Family has the burden of proof in establishing fraud, concealment or arson. ("The insurer, on the other hand, has the burden of showing that the loss was within a policy exclusion." *Id*.) Also, "[w]here the evidence is conflicting, the question of whether the loss is within the risks of the policy or excepted therefrom is ordinarily for the trier of fact." *Id*. Mr. Rifley has satisfied his burden with regard to his contents claim based upon the factual findings detailed in Section B. American Family has not proven that Mr. Rifley committed arson, fraud or concealment.

165. Whether an insurance company acted in bad faith is determined by a two-pronged test: the plaintiff must show: (1) the absence of a reasonable basis for denying benefits; and (2) the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. *Noble v. National Am. Life Ins. Co*., 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981). The court wrote:

> [A]n insurance company may still challenge claims which are fairly debatable. The tort of bad faith arises when the insurance company intentionally denies, fails to process or pay a claim without a reasonable basis for such action.

The first prong is an objective test based upon the negligence standard of reasonableness. *Trus Joist Corp. v.*

[4] It is the Court's intent that the discussion contained in this section be deemed "findings of fact" to the extent facts not previously listed are raised.

Safeco Ins. Co., 153 Ariz. 95, 104, 735 P.2d 125, 134 (Ct. App. 1986). The second prong is a subjective test inquiring into whether the insurer had intent. The court wrote:

> From these cases, it is apparent that there are two elements to the tort of bad faith:
>
> 1) that the insurer acted unreasonably toward its insured, *and*
>
> 2) that the insurer acted *knowing* that it was acting unreasonably *or* acted with such reckless disregard that such knowledge may be imputed to it.
>
> The first element is clearly an objective test based upon a simple negligence standard: did the insurance company act in a manner consistent with the way a reasonable insurer would be expected to act under the circumstances. This is the threshold test for all bad faith actions, whether first or third-party. Where an insurer acts reasonably, there can be no bad faith. However, the converse of this proposition is not necessarily true: merely because an insurer acts unreasonably does not mean that it is guilty of bad faith. Negligent conduct which results solely from honest mistake, oversight, or carelessness does not necessarily create bad faith liability even though it may be objectively unreasonable. *See Apodaca,* 151 Ariz. at 161, 726 P.2d at 577. Some form of consciously unreasonable conduct is required. This requirement of consciously unreasonable conduct is fulfilled either by the insurer's knowledge that it is acting improperly *or* by reckless conduct which permits such knowledge to be imputed to it. It is this second,

> subjective, element of knowledge that elevates bad faith to a quasi-intentional tort.
>
> Both the "equal consideration" and "fairly debatable" tests at issue here encompass the above elements, each being merely a shorthand method for applying the law of bad faith to different breaches of the overall duty of good faith.

166. In *Zilisch v. State Farm Mut. Auto. Ins. Co*., 196 Ariz. 234, 238, 995 P.2d 276 (S.Ct. 2000), the court wrote that:

> The carrier has an obligation to immediately conduct an adequate investigation, act reasonably in evaluating the claim, and act promptly in paying a legitimate claim. It should do nothing that jeopardizes the insured's security under the policy. It should not force an insured to go through needless adversarial hoops to achieve its rights under the policy. It cannot lowball claims or delay claims hoping that the insured will settle for less. Equal consideration of the insured requires more than that. The court of appeals therefore erred in concluding that fair debatability is both the beginning and the end of the analysis.

167. To prove intent, the plaintiff must show that American Family committed "consciously unreasonable conduct," which requires a showing that the insurer either (1) acted knowing it was acting unreasonably, or (2) acted with such reckless disregard that such knowledge may be imputed to it. *Trus Joist Corp*., 153 Ariz. at 104, 735 P.2d at 134.

> 168. In Arizona, a plaintiff claiming bad faith is not entitled to punitive damages unless he can show "something more" than the mere commission of a tort. *Rawlings v. Apodaca*, 151 Ariz. 149, 161, 726 P.2d 565, 577 (1986), and *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986). The "something more" is an "evil mind." *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578; *Linthicum*, 150 Ariz. at 330, 723 P.2d at 679. To prove an "evil mind" the plaintiff must adduce sufficient facts showing (1) that the defendant actually intended to injure the plaintiff; (2) that the defendant's conduct was actually motivated by spite or ill will; or (3) that the defendant acted to serve his own interests, having reason to know but consciously disregarding a substantial risk that his conduct might significantly injure the rights of others. *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 422, 758 P.2d 1313, 1324 (1988). In *Rawlings*, the Arizona Supreme Court described the required wrongful conduct as "conduct involving some element of outrage similar to that usually found in crime." 151 Ariz. at 162, 726 P.2d at 578 (citation omitted). In *Linthicum*, the Court described this conduct as knowing conduct "so outrageous, oppressive or intolerable . . . that it creates a substantial risk of tremendous harm to others . . .." 150 Ariz. at 330, 723 P.2d at 679. The plaintiff must make this showing through clear and convincing evidence. *Id*. at 331-32, 723 P.2d at 680-81. There is no evidence that American Family did anything related to this case with an "evil mind."

The Court is of the opinion that Plaintiff has failed to carry his burden of proving that American Family acted in bad faith in adjusting his contents and structural claims. It appears to the Court based on the testimony as well as the Court's review of the entire claim file (Exhibit 112) that American Family's position regarding the contents claim was not dictated by the rumors of arson, but by Mr. Rifley's inability to provide any type of substantiating evidence – receipts,

photos, location of sellers, statements by friends or relatives – for what the parties have referred to as the "high ticket" items. American Family paid some $90,000.00 on the contents claim and questioned approximately $130,000.00 of the claim because of the lack of any support for the claim other than Mr. Rifley's word. This Court has resolved the personal property issue in Mr. Rifley's favor by applying the law and finding the testimony of Mr. Rifley and Ms. Schirripa about the contents and values credible. However, American Family's position was fairly debatable, reasonable, taken after a reasonable investigation and, in this Court's opinion, not taken in bad faith.

Regarding the structure claim, it was simply a difficult claim to adjust. American Family was dealing with a 100-year-old house that had been extensively remodeled. Contrary to Plaintiff's contentions, the Court finds that American Family after receipt of the Rader-Starling report did not proceed on the basis of repairing the structure. The claim file reflects that American Family decided early on to raze the structure and reconstruct it anew. Although American Family had gotten two estimates from MKA and Seymore in relatively the same range, its insured was stating that the estimates were too low but he did not provide any information to support his position. Like the contents claim, Mr. Rifley could provide little in the way of documentation or information about the remodeling that he had done on the house before the fire. Mr. Rifley did not get a contractor involved until after Mr. O'Toole was hired and did not present a different scope of work even though he and Mr. Moody were told early on that that was an option open to them. Mr. Rifley having complained about both MKA's and Seymore's estimates, American Family did the reasonable thing – it started the process from scratch. American Family retained Kowalski Construction which had new plans drawn and a new scope of work prepared. The Court finds that there was nothing unreasonable in that approach.

After Mr. O'Toole became involved, the exchange of information between the parties became even more strained,

largely because of Mr. O'Toole's confrontational, "in your face" style. Based on the Court's review of both the claims file and Mr. O'Toole's file (Exhibits 113 and 112), it does not appear that Mr. O'Toole really assisted in resolution of the claim. His style was confrontational and adversarial, not resolution oriented. It appears that his main objective was trying to set American Family up for a bad faith claim rather than working constructively to resolve the claims. Until he presented the proof of loss supported by Mr. Edwards' estimate, the insured had presented little, if anything, to support his contentions that the estimates American Family had received were not sufficient to rebuild the house to pre-loss condition. The Edwards' estimate, almost $1 million more than any of the estimates American Family received, did nothing to resolve the claim other than to get the parties into the appraisal process. Under the circumstances, rejection of the proof of loss by American Family was not unreasonable and its position was fairly debatable.

There is simply no evidence of bid rigging or low-balling. There is no evidence that Mr. Seymore's status as a "preferred contractor" had any influence on the amount of his bid. Each side tries to support its position on the low-balling and bid rigging allegations by comparing its estimates with the ultimate appraisal award. The estimates American Family received were approximately $400,000.00 below the appraisal award while Mr. Rifley's contractor, Edwards & Edwards, was more than $600,000.00 too high. Which side's estimate was more accurate we will never know because the house was not reconstructed to its pre-loss condition. As noted above, based on the opulence of the new structure which cost $1.2 million, a reasonable inference that can be drawn is that the estimates American Family received were closer to the mark. One can only imagine how much grander the new house would have been if the appraisal award had been $1.6 million.

The Court rejects Plaintiff's contention that American Family acted in bad faith by allegedly trying to influence the

appraisal process. It is true that American Family met with Mr. Fowler after his selection as its appraiser. Mr. Fowler denied that American Family compromised his independence and Plaintiff has failed to present any credible evidence to the contrary. It also appears that Mr. O'Toole was doing essentially the same thing with Mr. Rifley's appraiser. If the Court is interpreting Mr. O'Toole's file correctly, it appears that Mr. Hall submitted a draft of his appraisal report to Mr. O'Toole for review and comment before he formally submitted it in the appraisal process. The Court sees nothing in the records or the testimony that supports Plaintiff's contention that Mr. Fowler was any less independent or disinterested than Mr. Hall.

Turning to the arbitration issue, the Court has no doubt that American Family favored arbitration because it was more favorable to the company than appraisal. However, whether arbitration is substantially equivalent to appraisal is fairly debatable as can be seen just from the rulings of the various Arizona judges that have addressed the issue. Arizona law allows an insurer to apply to ADOI for approval of a policy provision different than in the Arizona Standard Policy. That is exactly what American Family did. It applied for a change, set forth the change and ADOI approved it. Judge Albrecht ruled that the arbitration provision was consistent with Arizona law. Until ADOI reversed itself, the Court is of the opinion that American Family did not act in bad faith by asserting its arbitration provision because the change in 1994 was presumptively valid, absent a clear showing of fraud in obtaining this change. Plaintiff has failed to present evidence rebutting this presumption.

The Court has found that it is likely that American Family's adjuster, Mr. Bowen, told Mr. Rifley that arbitration was the only method open to Mr. Rifley to resolve any dispute over the structure claim. However, the Court is of the opinion that Plaintiff has failed to prove that this or the arbitration clause, even if it did amount to bad faith conduct, damaged Plaintiff in anyway. There is simply no credible evidence that

Mr. Rifley would have been able to or would have chosen to navigate the appraisal process without professional assistance from someone like either Mr. Moody or Mr. O'Toole. The record is riddled with testimony about Mr. Rifley's lack of reading ability, organizational skills and his habit of hiring people to do even fairly basic clerical tasks. The evidence shows that Mr. Rifley was not even capable of proofreading a loan application to assure its accuracy. It is highly improbable that Mr. Rifley could have competently engaged in the appraisal process by himself.

There is also no credible evidence that Mr. Bowen's statement delayed the appraisal process. Mr. O'Toole was retained in late March 1998 and notified American Family of his involvement in early April 1998. Prior to that time, Mr. Rifley had shown no indication that he was actually having any contractor prepare an estimate for presentation to American Family. Although Mr. Rifley and Mr. Moody complained about the estimates received from MKA and Mr. Seymore, they did not have a contractor prepare a scope of work or estimate. After he was retained, Mr. O'Toole almost immediately had Mr. Edwards begin preparing an estimate on the structure. The estimate was not completed until early June 1998, and not submitted to American Family until late August 1998. Even if one were to accept Mr. O'Toole's testimony that he could have had Mr. Edwards' estimate in three weeks if appraisal had been an option in April 1998, the Edwards' estimate would still have come in very close in time to when American Family's Arizona operation had been directed to offer appraisal rather than arbitration. There is simply no credible evidence that American Family's prior insistence on arbitration delayed the appraisal in this case. Mr. O'Toole's testimony that American Family's offer of appraisal in the Feavel and Brammer claims did not mean that American Family would offer appraisal in the Rifley claim is ludicrous and only illustrates the unreasonableness of Mr. O'Toole's approach in dealing with American Family.

The most troubling part about American Family's claims handling in this Court's opinion is American Family's handling of the fire investigation. What American Family did was pretty bad and, in this Court's opinion, constitutes bad faith. American Family chose not to further investigate the cause of the fire following Mr. Dimond's investigation and agreed to advise Mr. Moody if at some later time it was going to give any weight to the arson allegations in the claims process. Because neither Mr. Moody, Mr. Rifley nor any of Mr. Rifley's subsequent representatives were ever so advised prior to American Family raising the arson allegation late in this litigation, Plaintiff was justifiably lulled into a sense of security that arson was off the table. The structure and all the evidence relating to the cause and origin of the fire were demolished. Then, after the litigation was well under way, American Family claimed that Mr. Rifley started the fire. American Family then attempted to conduct the investigation that should have been done years ago. American Family retained an outside fire expert who, after all the parties had incurred substantial costs and attorneys' fees on the issue, withdrew his initial opinion that the fire was incendiary in nature.

In addition to not doing a thorough investigation within a reasonable time following the fire, American Family stonewalled information that would have been useful to Mr. Rifley in learning the source or sources of the rumors that were circulating in his neighborhood. American Family refused to provide its insured with a copy of the first anonymous letter it received claiming "work product of claim file." No legal authority in the hundreds of paragraphs of proposed findings of fact and conclusions of law has been cited for that proposition and it escapes this Court as to how a letter prepared by someone not employed or retained by American Family could be deemed American Family's work product. American Family's expert, Mr. David Smith, testified that American Family had a duty to do an adequate fire investigation. He also testified that it would have been "fair and reasonable" for American Family to have allowed its insured to listen to a portion of the tape.

Instead, American Family intentionally hid the fact that it had recorded one of the anonymous calls and failed to provide a copy of the tape to Mr. Rifley or his representatives at any time during the claims process. It was not until during Posey Moore Nash's deposition that the tape was first revealed to Mr. Brandriet.

There is no reasonable or debatable basis for American Family's failure to conduct an adequate investigation of the fire and stonewalling information.[5] As noted above though, it does not appear that the arson allegations impacted in any significant way American Family's handling of the claims. It was Mr. Rifley's inability to document in anyway his claims that seems to have been the overriding concern of American Family. However, the payment of the claim and fair debatability do not relieve the insurer of bad faith liability. In *Zilisch*, *supra*, at ¶ 20, pp. 237-238, our Supreme Court wrote:

> The tort of bad faith arises when the insurer "intentionally denies, fails to process or pay a claim without a reasonable basis." *Noble v. National Am. Life Ins. Co.,* 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981). While an insurer may challenge claims which are fairly debatable, *id.,* its belief in fair debatability "is a question of fact to be determined by the jury." *Sparks v. Republic Nat'l Life Ins. Co.,* 132 Ariz. 529, 539, 647 P.2d 1127, 1137 (1982). An insurance contract is not an ordinary commercial bargain; "implicit in the contract and the relationship is the insurer's obligation to play fairly with its insured." *Rawlings v. Apodoca,* 151 Ariz. 149, 154, 726 P.2d 565, 570 (1986). The insurer

[5] During closing arguments, American Family's attorney subtly suggested that perhaps American Family's fire investigation was adequate. The Court has found otherwise based, in part, on the testimony of Mr. Smith. In addition, if one were to accept that argument, American Family's arson defense would necessarily have to have been taken without a good faith basis in violation of Rule 11, Arizona Rules of Civil Procedure.

> has "some duties of a fiduciary nature," including "[e]qual consideration, fairness and honesty." *Id.* At 155, 726 P.2d at 571. Thus, "an insurer may be held liable in a first-party case when it seeks to gain unfair financial advantage of its insured through conduct that invades the insured's right to honest and fair treatment," and because of that, "the insurer's eventual performance of the express covenant--by paying the claim--does not release it from liability for 'bad faith.' " *Id.* at 156, 726 P.2d at 572. And in *Deese,* 172 Ariz. At 508, 838 P.2d at 1269, we noted that an insurance contract provides more than just security from financial loss to the insured. We said, "the insured also is entitled to receive the additional security of knowing that she will be dealt with fairly and in good faith." *Id.* Thus, if an insurer acts unreasonably in the manner in which it processes a claim, it will be held liable for bad faith "without regard to its ultimate merits." *Id.* At 509, 838 P.2d at 1270.

It seems to this Court that American Family's conduct regarding the fire investigation and hiding of information did just that – it violated Mr. Rifley's security of knowing that he would be dealt with fairly, honestly and in good faith.

Reason and common sense tell this Court that having people call you an arsonist or "Mr. Burn It" would be hurtful and upsetting. Reason and common sense tell this Court that Mr. Rifley's testimony about the emotional pain and humiliation the rumors and comments caused him is real and credible. That emotional pain and humiliation were casually related to American Family's failure to do an adequate investigation of the fire and stonewalling information. In *Rawlins v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (S.Ct. 1986) the court wrote:

> Review of Arizona first-party and third-party cases demonstrates that the implied covenant of good faith

> and fair dealing can be breached even though the company performs its express covenants under the insurance contract. The implied covenant is breached, whether the carrier pays the claim or not, when its conduct damages the very protection or security which the insured sought to gain by buying insurance. *Noble, supra,* at 189, 624 P.2d at 868 (insured has an interest in receiving "protection against calamity."). While the obligation of good faith does not require the insurer to relieve the insured of all possible harm that may come from his choice of policy limits, it does obligate the insurer not to take advantage of the unequal positions in order to become a second source of injury to the insured. *Little,* 103 Ariz. at 442, 443 P.2d at 697.

In the Court's opinion, American Family's conduct regarding the fire investigation and withholding of information did cause American Family to be a second source of injury to Mr. Rifley. By the very nature of these anonymous communications, American Family knew that Mr. Rifley was being accused of arson. American Family did not give equal consideration to Mr. Rifley's interests when American Family suppressed the information. During closing arguments, American Family contended that its conduct did not impact Mr. Rifley. The Court, as the trier of fact, disagrees. A reasonable inference based on the evidence is that a thorough investigation into the cause of the fire independent of Mr. Rifley (in other words, by an investigator not hired by Mr. Rifley, but by American Family) and done promptly after the fire, would have done wonders in quelling the neighborhood gossip about Mr. Rifley. The intentional suppression and withholding of information by American Family deprived Mr. Rifley of the opportunity to stop the source or sources of the rumors. As a result, the rumors continue seemingly unabated as confirmed by the testimony of Mr. Rifley, Ms. Thimmesch and Mr. Butts.

Alternatively, the evidence supports Plaintiff's claim for intentional infliction of emotional distress. The Court finds and concludes that the elements as set forth in *Ford v. Revlon, Inc*., 153 Ariz. 38, 43, 734 P.2d 580 (S.Ct. 1987) have been satisfied.

The issue then becomes the amount of damages that will fairly and reasonably compensate Plaintiff for the pain, humiliation, inconvenience and pecuniary losses he has sustained as a result of American Family's conduct. The Court is of the opinion that $300,000.00 will fairly and reasonably compensate Mr. Rifley for his damages.

The Court has found that Mr. Rifley did not start the fire. In addition, the Court is of the opinion that the conduct of American Family supports a conclusion that American Family should be estopped from asserting arson as a defense. In *Carondelet Health Services v. Arizona Health Care Cost Containment System Admin.*,187 Ariz. 467, 930 P.2d 544 (App1996), the Court wrote:

> "A claim for estoppel arises when one by his acts, representations or admissions intentionally or through culpable negligence induces another to believe and have confidence in certain material facts and the other justifiably relies and acts on such belief causing him injury or prejudice." *St. Joseph's Hosp. & Med. Ctr. v. Reserve Life Ins. Co.,* 154 Ariz. 307, 317, 742 P.2d 808, 818 (1987); *see also Heltzel v. Mecham Pontiac,* 152 Ariz. 58, 61, 730 P.2d 235, 238 (1986).

See also *Sahlin v. American Cas. Co. of Reading, Pa.,*103 Ariz. 57, 436 P.2d 606 (S.Ct. 1968) (The elements of equitable estoppel are these: '* * * conduct by which one * * * induces another to believe and have confidence in certain material facts, which inducement results in acts in reliance thereon, * *

* which cause injury to the party thus relying.' Builders Supply Corp. v. Marshall, 88 Ariz. 89, 94, 352 P.2d 982, 985.)

The facts support application of equitable estoppel. American Family did not do a thorough investigation of the fire, failed to advise its insured of any concerns about arson thus leading its insured to not have his cause and origin expert do any further investigation and then allowed the structure and all evidence relating to the cause of the fire to be demolished. Then, two years later, American Family sought to void the policy based on the allegation that its insured started the fire. Under the circumstances, this Court is of the opinion that it would be grossly inequitable to allow the defense.

For the reasons stated above,

IT IS HEREBY ORDERED granting judgment in favor of Plaintiff, Daniel Rifley, and against Defendant, American Family Insurance Group, in the principal amount of $104,350.39 ($97,706.36 plus sales tax in the amount of $6,644.03) on the contents claim, plus interest on the principal amount at the rate of 10% per annum from May 1, 1998 until the judgment is paid in full.[6]

IT IS FURTHER ORDERED granting judgment in favor of Plaintiff, Daniel Rifley, and against Defendant, American Family Insurance Group, in the principal amount of $300,000.00 on the bad faith claim and/or intentional infliction of emotional distress claim, plus interest on the principal at the rate of 10% per annum from the date of judgment until the judgment is paid.

IT IS FURTHER ORDERED granting judgment in favor of Plaintiff, Daniel Rifley, and against Defendant, American Family

[6] The amount of Plaintiff's contents claim was "liquidated" at the time the inventory was submitted on February 5, 1998. Because of the number of items on the inventory, the Court has allowed a reasonable time for confirmation of the inventory before starting accrual of interest.

Insurance Group, on Defendant's counterclaim, with Defendant to take nothing thereby.

IT IS FURTHER ORDERED pursuant to ARS § 12-341.01, awarding Plaintiff his taxable court costs and reasonable attorneys' fees against Defendant, American Family Insurance Group, said sums to be determined after submission of a statement of costs and an application for attorneys' fee in accordance with Rule 54(g), Arizona Rules of Civil Procedure.

IT IS FURTHER ORDERED granting judgment in favor of Defendant, John Young, and against Plaintiff, Daniel Rifley, on Plaintiff's Complaint, with Plaintiff to take nothing thereby against Defendant, John Young.

IT IS FURTHER ORDERED that Plaintiff's statement of costs and application for attorneys' fee shall be submitted on or before **October 21, 2002**, that Defendant's objections shall be filed on or before **November 8, 2002**, and that Plaintiff's reply be filed on or before **November 21, 2002.**

FILED: Exhibit Worksheet