STATE OF ARIZONA
FILED

AUG 31 1994

DEPARTMENT OF INSURANCE
By

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STATE OF ARIZONA

DEPARTMENT OF INSURANCE

In the Matter of: GAYLE DeFELICE, dba DeFELICE INSURANCE PLUS, fka DeJONGE INSURANCE AGENCY, and THOMAS DeFELICE, Respondents.	No. 8220 **CONSENT ORDER**

A Notice of Hearing was issued by the Director of the Arizona Department of Insurance ("Department") on November 4, 1993, wherein the Department made certain allegations of violations of A.R.S. Title 20 committed by Respondents. Respondents have received a copy of the Notice of Hearing and have been advised of their rights to a hearing in this matter, which they waive.

Without admitting or denying, Respondents consent to the entry of the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Respondent Gayle DeFelice, dba DeFelice Insurance Plus, fka DeJonge Insurance ("Gayle DeFelice") is currently licensed as a life and disability agent in the State of Arizona. (License No. 701929).

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2. Respondent Tom DeFelice is presently, and was at all material times, the office manager of DeFelice Insurance Plus, fka DeJonge Insurance ("Agency"). At all material times, Tom DeFelice was not licensed as an insurance agent in the State of Arizona.

3. At all material times, Henry DeJonge ("DeJonge") was the agent of record for the Agency and held a disability, life, broker (P & C), and property and casualty insurance license in the State of Arizona. (License No. 29670). DeJonge's license was revoked by Order of the Director on June 17, 1992.

4. At all material times, Gayle DeFelice and Tom DeFelice ("the DeFelices") were owners of the Agency.

5. On or about December 31, 1990, the DeFelices purchased the Agency from Henry and Evelyn DeJonge ("the DeJonges"). After the purchase, and at all material times, DeJonge continued to work in the Agency.

6. The DeJonges sued the DeFelices for breach of the contract to purchase the Agency in Mohave Superior Court, DeJonge v. DeFelice, No. 92-CV-111 ("DeJonge Lawsuit"). After a bench trial, presiding Judge Steven F. Conn issued a voluminous minute order, attached as Exhibit A and portions of which shall be incorporated by reference ("MO"). Judge Conn determined the DeJonges breached the purchase agreement and the DeFelices were the prevailing party on the DeJonges' complaint and the DeFelices' counterclaim. (MO, p. 21).

. . .

7. The Court in the DeJonge Lawsuit determined that:

a. From January 1, 1991, to October 15, 1991, various problems, disagreements, and misunderstandings between DeJonge and the DeFelices arose over what exactly were the respective responsibilities of the parties under the agreement to purchase the Agency. (MO, p. 4)

b. In October 1991, DeJonge received a letter from First National Life terminating his contract. The DeJonges blamed the DeFelices and were convinced the DeFelices had breached the purchase contract. The DeJonges overreacted and "recognized a financial hardship to themselves and wrongfully assigned responsibility for their problems to the DeFelices and simply decided that they would perform no further under the contract." (MO, p. 9).

c. DeJonge admitted, within a month of the amendment (signed on October 15, 1991), he was depositing commission payments into his personal account rather than the Agency account. (MO, p. 8).

8. At all material times set forth herein, DeJonge oversaw and supervised the operations of the Agency. Also, DeJonge was engaged in training Tom DeFelice to manage the Agency. Mr. DeFelice relied upon DeJonge's instructions and the procedures DeJonge implemented.

9. Since DeJonge's departure from the Agency, the DeFelices do not engage in any sales of property and casualty insurance products. All sales are referred to agents who have obtained property and casualty licenses from the Department.

COUNT I

10. On or about October 10, 1991, the Agency received a check in the amount of $381.00 from Kenneth and Zilla Pringle

(the "Pringles") for a mobile homeowner's insurance policy through Old Hickory Insurance Company ("Old Hickory") which was processed through American Pathfinders, the managing general agent for Old Hickory.

11. On or about October 16, 1991, Old Hickory was declared insolvent. American Pathfinders placed the Pringles' mobile homeowner's insurance with Bankers and Shippers Insurance Company.

12. The premium payment for the Bankers and Shippers policy was $310.00, $71.00 less than the premium the Pringles paid to Respondents for the Old Hickory policy.

13. On or about April 3, 1992, after issuance of the policy, American Pathfinders returned the Pringles' $71.00 premium to the Agency to be forwarded to the Pringles. Mrs. Pringle mailed a letter to the Department complaining about the delay in receiving her refund on April 23, 1992, just 20 days following the Agency's receipt of the refund check.

14. On or about July 27, 1992, Tom DeFelice issued the Pringles a personal check in the amount of $71.00 for the premium return. That check was returned by the bank for insufficient funds.

15. On or about July 31, 1992, the Agency issued the Pringles a $71.00 check from its business account. The refund of $71.00 was not timely and the Pringles claim they had to demand payment from the Agency. The Pringles ultimately received their refund.

COUNT II

16. On or about November 21, 1991, the Agency received a $209.00 premium payment from the Pringles for a boat renewal policy through Jefferson Insurance Group ("Jefferson") which was processed by Transwestern General Agency ("Transwestern"), the managing general agent for Jefferson.

17. The policy was not renewed, causing its expiration, because the $209.00 check was not forwarded to Jefferson or Transwestern.

18. On or about July 6, 1992, a new application was completed and forwarded to Transwestern. The application purports to be signed by Zilla Pringle and countersigned by agent Steve Cleverley, as the producer's agent.

19. Mrs. Pringle and Mr. Cleverley claim that they do not recall signing the application.

20. On or about August 14, 1992, the Pringles cancelled the policy and received the return of their $209.00 premium payment.

Count III

21. On or about June 21, 1991, the Agency received a premium payment from Lester and Laurie Deterts Diamond (the "Diamonds") for an automobile insurance policy through Viking Insurance Company ("Viking").

22. On that same date, the Agency issued an insurance identification card to the Diamonds for the period of June 21,

. . .

1991 through August 21, 1991, which indicated Viking was the insurer.

23. The Agency failed to forward the Diamonds' premium payment to any insurer.

24. On or about September 20, 1991, the Diamonds went to the Agency to make a payment on the Viking policy and to inquire as to its whereabouts.

25. On that same date, the Diamonds signed a blank Viking insurance application at the request of Tom DeFelice.

26. On or about September 20, 1991, Tom DeFelice completed and initialled the Diamonds' application and forwarded it to Viking.

27. On or about October 16, 1991, the Diamonds received a cancellation notice from Viking stating that unless a $65.00 premium payment was made their automobile insurance policy would be cancelled.

28. The Diamonds contacted the Agency and were told the Agency had forwarded the premium to Viking and the cancellation notice and payment must have crossed in the mail.

29. From September of 1991 through January of 1992, the Diamonds made premium payments totalling $134.00 to the Agency, but never received a policy from Viking.

30. In January 1992, the Diamonds learned their Viking policy had been cancelled and that, even though they paid their premiums since September 1991, the funds were not forwarded to Viking.

31. From September of 1991 through January of 1992, the Agency never forwarded the Diamonds' premium payments to Viking.

32. The Agency has paid $134.00 to the Diamonds.

CONCLUSIONS OF LAW

1. The Director has jurisdiction over this matter.

ORDER

NOW, THEREFORE, IT IS ORDERED:

1. Respondents shall pay a civil penalty to the Department in the sum of $500.00 upon the entry of this Consent Order.

DATED in Phoenix, Arizona this 31st day of August, 1994.

CHRIS HERSTAM, Director
Arizona Department of Insurance

CONSENT TO ORDER

1. The undersigned acknowledge that they have read the foregoing Findings of Fact, Conclusions of Law and Order and are aware of their rights to an administrative hearing in this matter and have waived same.

2. The undersigned admit the jurisdiction of the Department and neither admit nor deny the foregoing Findings of Fact but agrees to the resolution of this matter by consenting to the entry of the foregoing Findings of Fact, Conclusions of Law, and Order.

3. The undersigned state that no promises were made to induce them to enter into this Consent Order and declare they have entered into this Consent Order voluntarily.

4. The undersigned acknowledge acceptance of this Consent Order is for the purpose of settling this litigation and does not preclude the Department, or any other agency or officer of this State, or subdivision thereof, from instituting other civil or criminal proceedings as may be appropriate now or in the future.

5. The undersigned waive all rights to challenge such Findings of Fact, Conclusions of Law, and Order on appeal or otherwise, to the Director or any court or other tribunal and agree to be bound by the foregoing Order.

Date: 8-15-94

Gayle DeFelice
GAYLE DeFELICE, Respondent

Date: 8-15-94

Thomas F. DeFelice
THOMAS DeFELICE, Respondent

COPY of the foregoing
mailed this 1st day of
September, 1994 to:

Felecia Rotellini
Assistant Attorney General
Consumer Protection & Antitrust Section
Attorney General's Office
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. . .

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Lake Havasu City, Arizona 86403

First National Life Insurance Company
7 Clayton Street
Montgomery, Albama 36104-4089

Bankers and Shippers Insurance Company
3060 South Church Street
Burlington, North Carolina 27215

Viking Insurance Company of Wisconsin
8501 Excelsior Drive
Madison, Wisconsin 53717

Union Pacific Insurance Company
4201 Springs Valley, Suite 1200
Dallas, Texas 75244

Transwestern General Agency
P.O. Box 1196
Salt Lake City, Utah

Jefferson Insurance Company of New York
30 Vesey Street
New York, New York 10007

American Pathfinders Insurance Agency
1350 East McKellips
Mesa, Arizona 85203

. . .

Ms. Zilla E. Pringle
1758 Lear Bay
Lake Havasu City, Arizona 86403

Chris Crawford

4227c

EXHIBIT A

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COPY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

HONORABLE STEVEN F. CONN, JUDGE
DIVISION III
DATE: MAR. 21, 1994

LINDA SEAPY, CLERK
SC*

MINUTE ORDER

HENRY DEJONGE and EVELYN DEJONGE, husband and wife,
Plaintiffs,

vs.

THOMAS DEFELICE and GAYLE DEFELICE, husband and wife,
Defendant.

MAR 28 1994

No. 92-CV-111

The Court has reviewed the entire file in this matter, including the Complaint, the Counterclaim, all other responsive pleadings thereto, any affidavits filed in conjunction with the previous motion for summary judgment, any joint pre-trial statement and/or disclosure statement, and the testimony and exhibits presented at the trial on January 24 and 25, 1994. The Court has read any cases cited by counsel.

The first issue which the Court addresses is liability. Both sides agree that at some point they stopped performing under the contract. One option suggested by counsel was for the Court to simply throw up its hands, note that both parties had breached the contract, and allow the parties to go on their merry ways without any further judicial intervention. As attractive as this option might be to the Court, it ignores certain basic principles of contract law.

There is no dispute that a contract was entered into by the parties. The fact that neither party was performing under the

contract at some readily identifiable time after the contract was entered into is not dispositive. The Court must determine from the evidenc which was the first party to materially breach the contract. Since a material breach by one party to a contract excuses the performance by the other party to the contract, it is imperative that the Court determine who was the first to materially breach the contract.

A material breach is a failure to perform in a manner which substantially defeats the purpose of the contract. Circumstances to be considered in determining whether a material breach has occurred include 1) the extent to which the injured party will be deprived of the benefit reasonably expected, 2) the extent to which the injured party can be adequately compensated for the part of the benefit which will be deprived, 3) the extent to which the party failing to perform or to offer to perform will suffer forfeiture, 4) the likelihood that the party failing to perform or to offer to perform will cure the failure, taking account of all the circumstances including any reasonable assurances, and 5) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealings.

Both parties presented a lot of evidence dealing with the conduct of the parties between December 31, 1990, and October 15, 1991, in an effort to show which parties were first to materially breach the contract and which were entitled to stop performance because of the others' material breach. For reasons which the Court will discuss below, the Court finds very little of that evidence to be

relevant. All parties described a relationship between them during this time period in which various problems, disagreements and misunderstandings arose over what exactly were the respective responsibilities of the parties under the first contract entered into on December 31, 1990. In an apparent effort to resolve these disputes and clarify some of the rights and obligations under the contract, the parties entered into an amended contract on October 15, 1991.

Whether the entry into the amended contract has any legal significance depends on the specific facts of this case. The law generally favors the resolution of controversies through compromise or settlement rather than by litigation. A compromise or settlement is simply an agreement to terminate, by means of mutual concessions, a claim which is disputed in good faith. The claim which may be terminated thereby includes the assertion of the right to maintain a cause of action and obtain judicial relief as well as the assertion of the right to raise a valid defense. Courts as a rule will support agreements which have for their object the amicable settlement of doubtful rights by parties. Voluntary settlements of differences between parties having legal capacity to contract in respect of their rights will be judicially enforced if intended by the parties to be final. This is so even if the settlement made might not be that which the Court would have ordered if the controversy had been brought before it for decision.

Compromise agreements are governed by the legal principles applicable to contracts in general. A compromise must be supported by consideration, meaning that it is based upon a disputed claim and the

parties make or promise mutual concessions as a means of terminating their dispute. A valid compromise will not be found if it was arrived at through fraud or undue influence. A compromise, however, settles only such matters and differences as appear clearly to be comprehended in them by the intention of the parties and the necessary consequences thereof. A compromise does not extend to matters which the parties never intended to include therein although existing at the time. A compromise agreement concludes all matters which could have been resolved at a trial on the issues but, absent affirmative agreement of the parties, does not conclude matters which would not have been part of any cause of action which could have been filed as a result of the dispute.

Without going into detail about the specifics, it is safe to say that by October, 1991, both parties were dissatisfied with various aspects of the other parties' performance or non-performance under the original contract. In an effort to resolve their differences, there took place several meetings with the parties and their respective attorneys. The result of these meetings and the accompanying negotiations was the amended contract which was signed by the parties on October 15, 1991.

The amended contract admittedly does not address every grievance then existing between the parties. It does address most of them, and certainly the most significant of the disputes were attempted to be resolved through the amendment. The new agreement starts out by reciting the existence of the earlier Purchase Agreement, noting that dispute and differences had arisen between the parties, and that the

parties desired the amendment to resolve the pending disputes and to clarify any ambiguities and differences in interpretation which had arisen under the earlier contract.

The testimony of each of the 4 parties to the amended agreement was almost identical in describing the process leading up to the signing of the amendment and the intent of agreeing to the amendment. Each party described a series of meetings leading up to the amendment, a process during which the parties were represented by and receiving advice from attorneys. Each party admitted to signing the amendment with reservations about certain provisions contained therein. Several parties testified to being unhappy with some of the new terms. Mr. DeJonge in particular indicated that he signed the amendment only upon the advice of his attorney, which advice he felt was wrong. Each of the parties expressed as a summarization that all parties had compromised to some extent in entering into the new contract but that it was meant by all of them to resolve all the disputes which had arisen up until then.

One possible attack on the validity of this compromise was made at least obliquely by Mr. DeJonge. He suggested that Ms. DeFelice entered into the agreement knowing that First National Life was about to terminate his right to receive commissions or, even worse, that she was in some way responsible for First National Life taking some action. If in fact this were true it would be relevant, because a compromise or settlement which is obtained through fraud or undue influence is not likely to be sanctioned by the court.

Although perhaps stopping short of an outright accusation, the

DeJonges made it clear to the Court that they felt the DeFelices were responsible, either directly or indirectly, for the termination by First National Life, a company which accounted for the vast majority of the agency's income. If the Court understands, the argument seems to be that Ms. DeFelice sought the termination to trigger the provision in the amendment reducing the monthly payments, or else that she sought this provision in the amendment because she was privy to inside information that such a termination would be forthcoming. This argument overlooks the fact that not only would the purchase price be reduced but the income flowing to the agency would be commensurately decreased, although admittedly Mr. DeFelice might have been psychic enough to know that the commission payments would start being paid to her after a year.

Regardless of whether it would have made sense for Ms. DeFelice to attempt to sabotage the agreement, the Court is simply not convinced that Mr. DeJonge has presented any evidence that she did so. She has denied initiating any investigation into Mr. DeJonge's practices by either First National Life or by any administrative agency. She did apparently cooperate with those investigations when requested to do so. Ms. DeFelice has identified the person who did turn in Mr. DeJonge. Although Mr. DeJonge assumed that such person was employed by Ms. DeFelice at the time in question, she stated categorically that he was not. In short, the Court finds no evidence that Ms. DeFelice bears any responsibility for Mr. DeJonge's problems with First National Life and that this is not a factor in assessing the enforcibility of the compromise agreement.

For all the above reasons, the Court determines that the Amendment to Purchase Agreement executed by the parties on October 15, 1991, had the legal effect of settling all disputes or claims which could have been raised before such time. The Court will enforce the intent of the parties as clearly evidenced by the amended agreement. The Court will therefore take the position that the parties started over again with a clean slate as of October 15, 1991, will ignore any breaches of the contract which may have occurred prior to such date, and will determine which parties were first to materially breach the agreement and which parties were justified in ceasing performance because of the others' material breach after such date.

Mr. DeJonge testified that the DeFelices were the first to breach the amended agreement, but he was unable to specify a date on which this occurred. His testimony at times was self-contradictory. He said that he thought that no payments were made on his health insurance after October 15, 1991, but the checks admitted in evidence indicated a payment on November 12, 1991. He did not recall if a car payment was made after the amendment, but the checks again included a car payment made on October 16, 1991. After that the car was given back to him and he was made responsible for the payments, an option that was contemplated by the parties in their agreement. Mr. DeJonge stated at different times that he was not allowed access to the office, that he was not denied access to the office, and that he was never evicted from the office. It was not clear to the Court whether Mr. DeJonge was alleging that the DeFelices never made an installment payment after the amended agreement was entered. The checks in

evidence do include a check dated October 16, 1991, payable to Evelyn DeJonge for $3000.00 and marked "Purchase Payment." The Court has already discussed earlier that there was no evidence that Ms. DeFelice was responsible for his termination by First National Life, so that cannot be the basis for him rightfully concluding that she had breached the contract. Mr. DeJonge did say that the DeFelices breached the contract by not seeking arbitration of their disputes but there was no indication that he sought arbitration either. In any event, how the parties could have potentially addressed a material breach of the contract would not change the fact of such breach having occurred.

Although Mr. DeJonge was not very successful in pinpointing the material breach by the DeFelices, he did provide some insight into his own performance after the amendment was signed. He said that he processed an application outside agency channels the day after the compromise agreement was reached. He admitted that he was depositing commission payments into his personal account rather than the agency account within a month after the amendment. He indicated that he did not take steps to see that mail was re-directed from him to the agency.

The testimony of Evelyn DeJonge was less extensive than that of her husband, but she also testified that she was unable to identify any specific date on which the DeFelices breached the amended contract. She acknowledged that an installment payment on the purchase agreement was made the day after the amendment was signed and that a car payment was also made after that date. She was questioned

about an incident in which she allegedly found 2 commission checks in her husband's dresser drawer and took them to the DeFelices or wrote a check to cover them because she knew Henry was wrong and she wanted to correct the situation. Her denial of this happening was hesitant and she admitted with very little prodding that the event might very well have occurred.

The Court felt the most telling testimony from Ms. DeJonge concerned the receipt of the letter from First National Bank a few days after October 15, 1991. She indicated that after the letter came she and her husband knew what the DeFelices were up to and were convinced that they had breached the contract. It is hard, from her testimony, for the Court to avoid the conclusion that the DeJonges over-reacted to the termination letter from First National life, recognized a financial hardship to themselves and wrongfully assigned responsibility for their problems to the DeFelices, and simply decided that they would perform no further under the contract.

The testimony of Gayle DeFelice, in general terms, was that she did everything required of her under the amended contract and that the DeJonges did nothing required of them. She confirmed that an installment payment on the purchase price was made the day after the amendment was signed. She acknowledged that the automobile was surrendered to the DeJonges as was allowed under the amendment. She testified that she did not prevent Henry DeJonge from physically coming back to the office and that he did not want to return.

On the other hand, Ms. DeFelice indicated that Mr. DeJonge never took the steps that were required to re-direct income received by him

back to the agency. She also clarified that neither she nor her husband turned in Mr. DeJonge to the state insurance agency and pointed out that it was not to her advantage to do so because the agency would lose income if Mr. DeJonge was no longer earning income. She testified that First National Life terminated Mr. DeJonge right around the signing of the amendment, that she knew he was having problems with them, and that she insisted on the contract clause for the prorated reduction of the purchase price to protect herself if he were unable to resolve those problems.

Tom DeFelice in most respects simply corroborated the testimony of his wife. He did testify specifically that after the amendment they made all payments required of them, including the purchase payment, the car payment and the life insurance payment. He also indicated that Mr. DeJonge did come to the office on October 16, 1992 and was allowed access thereto, at which time he picked up a file and left, explaining that he would work at home because he would feel uncomfortable working at the office. He also testified that Mr. DeJonge immediately breached the amendment by processing an application other than through the agency channels.

In summary, both parties accused the others of breaching the amended agreement almost immediately. The DeJonges had difficulty specifying what constituted a breach and several attempts to identify non-performance by the DeFelices were directly contradicted by exhibits. The testimony of the DeJonges by itself was probably sufficient to show a material breach on their part. The DeFelices' testimony was clear and unimpeached that they performed under the

amendment and that Mr. DeJonge breached in pretty much the same manner as he and his wife had themselves suggested. Based upon all the above, the Court determines that the DeJonges were the first to materially breach the agreement between the parties as it existed on October 15, 1991, thus allowing the DeFelices to cease performance under the agreement.

Having determined that the Defendants will prevail on their Counterclaim rather than the Plaintiffs prevailing on their Complaint, the Court must now determine what relief, if any, they are entitled to. Both counsel at trial argued their respective positions as if money damages were all they were seeking. Both the Complaint and the Counterclaim had "specific performance" aspects to the relief requested, but neither counsel seemed inclined to advance that as a possible remedy at trial. The Court has considered the possibility of simply reinstating the contract between the parties, ordering all parties to comply with their respective obligations under the agreement, and awarding damages to whoever might have suffered from this brief departure from performance under the contract.

Based upon the Court's perception of the historical relationship between the parties up to this point and the personalities of the individuals involved, the Court is less than optimistic that it could succeed where at least 4 lawyers, one revision to the contract and the entire trial process have failed. On a more personal note, this Court has no desire or inclination to assume the responsibility of running the day to day operations of an insurance agency. The Court is convinced that any attempt on its part to order the parties to set

aside their differences and proceed in accordance with the dictates of a court order, however specifically crafted it might be, would result in a barrage of contacts by disgruntled parties seeking the Court's intervention to correct the misdeeds of the opposing parties. The Court feels that closure of the relationship between the parties is the desirable result to be achieved through this lawsuit and it therefore will not consider ordering specific performance of the contract.

Having ruled out specific performance as a remedy, the Court must determine what award of damages is appropriate. The Court must determine the full amount of money that will reasonably and fairly compensate the DeFelices for the damages provied by the evidence to have resulted naturally and directly from the breach of contract. The damages awarded for the breach of contract must be the amount of money that will place them in the position they would have been in had the contract been performed. In determining those damages, the Court may consider the profit which the DeFelices would have received had the contract been performed and also whether by not having to perform their part of the contract they avoided any cost or loss which should be deducted from their damages.

The above legal principles are essentially those set forth in Recommended Arizona Jury Instructions (Civil), Second Edition, Contract 13. Although not disagreeing with that analysis, the Court feels that there is a more straightforward way of stating the measure of damages in this particular case. The Court determines that the proper measure of damages in this case should be the difference

between the profit which the DeFelices could reasonably have expected to make if the parties had performed under the contract and the profit which they could reasonably expect to make now that the contract is no longer in effect. The Court feels that this approach more appropriately allows the Court to place the DeFelices in the position they would have occupied had the contract been performed. This approach also allows the Court to more openly acknowledge that the DeFelices, despite being the "wronged party" in this case, also stand to reap some significant benefits by getting out from under the terms of the contract.

Before getting to the specifics of the number-crunching, there is one other mixed question of fact and law which must be addressed by the Court. Under the amended agreement, if Mr. DeJonge had the right to receive commissions revoked by a given company, then the purchase price and monthly payments thereon was to be reduced according to the ratio of commissions on an annual basis lost thereby to the annual income for the 12 months preceeding such revocation. It is clear from this provision what happens upon revocation by any particular company. What is not clear is what happens if the revocation is vacated or rescinded at some point or if the flow of income to the agency in the form of commissions resumes at some point in the future. The DeFelices' position appears to be that the revocation, once it occurs, has the effect of essentially re-writing the terms of the agreement no matter what may happen later. The DeJonges appear to advance the position that the reduction of the purchase price should remain effective only while the revocation remains effective and that the

resumption of commission income to the agency should trigger a return to the original purchase price.

Although this issue was addressed only in passing, the Court feels it is essential to any meaningful analysis of damages in this case. The testimony was that the agency went for a year without receiving the commission income it would have received from First National Life. This was the result of Mr. DeJonge having his right to receive commissions from such company revoked. There can be no dispute that the purchase price had to be proportionally reduced for that time period. The testimony was clear that after a year First National Life resumed making the payments to the agency. Ms. DeFelice made it clear that she did not necessarily expect the resumption of this income and was delighted to begin receiving it again. Whether it was reasonably foreseeable by the parties or not, the fact is that the DeFelices appear to now be receiving the same income from First National Life that they were before the revocation, at least insofar as the Court considers the revocation as opposed to diversion of commission payments as a factor affecting the total income. To allow the DeFelices to continue receiving the same income save for a one year hiatus but to receive a permanent reduction in the purchase payment for another 8 to 9 years would confer upon them an enormous windfall. Aside from any breaches of the contract, if the parties had all been performing fully when the income was resumed, the Court cannot imagine that the DeFelices' interpretation of this contract provision would have prevailed. The Court determines that the operative effect of this term of the contract was that the purchase

price was to be reduced only during the time that the income was lost to the agency and that the purchase price returned to its original level upon the income returning to its original level.

Aside from the above, the parties appear to be remarkably close in their numbers. The Court will set forth below the numbers it has used to attempt to calculate the damages in this case. Where appropriate the Court will indicate the process it went through to arrive at the various figures. To a minor extent the figures finally reached by the Court reflect a weighing of the credibility of the various parties and an examination of the exhibits.

The Court starts with examining what the DeFelices would have received had the contract been performed. All parties agree that a reasonable expectation was for the DeFelices to take in $100,000 per year, or $1,000,000 over the course of 10 years. This figure has to be reduced by the loss of First National Life income for a period of one year. Although various percentages were suggested, the Court determines that 87% is the proper figure to reflect the proportion of the agency's income that was attributable to First National Life. The total income therefore has to be reduced by $87,000, representing 87% of the $100,000 income for one year. This reduces the expected income to $913,000.

Under the contract the DeFelices would have continued making the purchase payments for 10 years. The yearly amount of payments would be $36,000. For the one year when no First National Life income was being received, the yearly payment would be reduced by 87%, to $4680. For 9 years at $36,000 per year plus one year at $4680, the total

purchase price would have come to $328,680. Subtracting this figure from the expected income of $913,000 comes to $584,320. Both parties have used the figure of $8000 for what would have been paid by the DeFelices for Mr. DeJonge's health insurance. Subtracting this figure reduces the above subtotal to $576,320.

The amount of money the DeFelices would have had to pay to Mr. DeJonge in commissions during the 10 years covered by the contract is not readily ascertainable. Both counsel in their "damage charts" used the figure $40,000. This seems somewhat contradicted by other testimony about how much the DeJonges actually made in the period of time after October, 1991, and up until the time of trial. However, the Court had the impression from the testimony that Mr. DeJonge's initial intent under the purchase agreement was to phase out his involvement in selling insurance and reduce his active participation in the business but that it was only because of the disputes which arose and the financial instability which accompanied them that he made more of an effort to earn money than he would have otherwise. The Court, therefore, determines that the DeFelices could reasonably have expected to pay Mr. DeJonge a total of $40,000 over the 10 year period and that the amount of $576,320 should be further reduced by that amount, for a total of $536,320.

The Court, therefor, arrives at the above figure, $536,320, as the profit the DeFelices could have expected to make under the contract had all parties performed as required. This figure does not, of course, represent a true profit figure as might be determined for accounting purposes. The Court is aware that there are various other

overhead type of expenses which would have been incurred by the DeFelices which would have reduced their actual profit below the above figure. However, these expenses would probably have been pretty much the same whether the parties were or were not performing under the contract. The Court has sought to identify and to factor into this calculation only those expenses or incomes which would have varied according to whether the parties did or did not perform under the contract. This is in keeping with the Court's approach which attaches significance for damage purposes not to the raw numbers under the two scenarios but to the ultimate difference between the two numbers.

The Court next examines what the DeFelices are likely to receive now that the contract is not being performed. The Court again starts with the figure of $1,000,000 and reduces that amount by 87% to represent the one year loss of First National Life income, to arrive at $913,000. The Court next reduces this amount by the monies already paid to the DeJonges. The testimony and exhibits confirm that approximately $43,000 was paid by the DeFelices to the DeJonges. The dispute at trial was whether this figure represented purchase payments, salaries, other payments, or some combination thereof. The Court attaches little significance to those distinctions for purposes of this calculation and thus subtracts $43,000, for a subtotal of $870,000.

The next figure which the Court deducts is the amount of money over a period of 10 years which would have been received as income by the agency but was instead diverted to the DeJonges. Attempts to quantify the diverted funds were made by at least 3 of the parties at

trial. Mr. DeJonge testified at one point that he was receiving $14,000 per year which would have gone to the agency. At another point he tetsified that he and his wife made $1500 per month now on renewals and new comissions, which would be $18,000 per year. Ms. DeJonge testified from her records that their income in 1993 was approximately $15,200. Ms. DeFelice testified that she believed the DeJonges were now making $1450 per month, which would be $17,400 per year. The Court is aware that the "damage chart" prepared for the DeFelices added $300 to the $1450 figure, but the Court has to confess that it cannot determine from its notes or the exhibits where that extra $300 comes from. The Court determines that the DeJonges would have diverted from the agency to themselves $18,000 per year or $180,000 over a ten year period. The Court thus subtracts $180,000 from $870,000 and arrives at $690,000.

Although not really suggested by either of the parties or their counsel, the Court feels another deduction is called for. Ms. DeFelice testified that the total purchase price of $360,000 was to represent 3 times the annual income, a total of $300,000, plus $60,000 for the DeJonge name on the agency. The Court feels that Ms. DeFelice never will get what she was to pay $60,000 for. The Court appreciates the difficulty of assigning a dollar figure to something as intangible as the value of the name of an individual on a business where that name has presumably come to be recognized in the community and itself attracts some amount of business. The Court need not be concerned with this difficulty because the parties themselves, in reaching their sale agreement, apparently agreed that the value of Mr. DeJonge's name

on the agency was $60,000. The Court subtracts $60,000 from $690,000 and reaches a total of $630,000.

The Court, therefore, arrives at the above figure, $630,000, as the profit the DeFelices can still expect to make now that the contract is not being performed. This is $93,680 more than the profit the Court calculated had the contract been performed. By the Court's calculation the DeFelices have actually come out ahead by virtue of the DeJonges materially breaching the contract. This is primarily due to the purchase price payments which they will no longer have to make. The Court concedes that the above calculations are imperfect and may not yield the exact figure representing the extent to which the DeFelices have been financially damaged. The Court has considered several other factors about which there was testimony, some of which would tend to favor one party and some the other. These factors include payments made by the DeJonges for business expenses which were to be paid by the DeFelices, the possibility that Mr. DeJonge will never regain his license to sell insurance from the State of Arizona, the possibility that First National Life might cease making payments to the agency in part or in full, the possibility that either party might change their attitude in the next 10 years about how hard they wanted to work selling insurance, and several individual dealings or transactions which were alleged to have taken place outside the boundaries of the contractual arrangement. The Court feels that most of the above factors are not readily susceptible to being reduced to monetary figures but that even if they were they would still not change the fact that the DeFelices in the long run are not going to

lose because of the breach by the DeJonges. The Court determines, therefore, that the DeFelices are not entitled to an award of money to compensate them for damages resulting naturally and directly from the breach.

The DeFelices in this Counterclaim also requested an award of punitive damages. The party seeking an award of punitive or exemplary damages has the burden of proving by clear and convincing evidence that he is entitled thereto. Punitive damages are awarded in excess of full compensation to the victim in order to punish the wrongdoer and to deter others from emulating his conduct. In determining whether punitive damages are awardable, the focus should be upon the wrongdoer's mental state. Punitive damages may be found when the wrongdoer should be consciously aware of the evil of his actions, of the spitefulness of his motives or that his conduct is so outrageous, oppressive or intolerable in that it creates a substantial risk of tremendous harm to others. Only this showing is sufficient to establish the evil mind required for the imposition of punitive damages.

The mere fact that the DeJonges have been found to have been the first to commit a material breach of the contract does not mean that they did so with the requisite evil mind. It would be ironic for the Court to deem their conduct worthy of deterence because of the great harm that it could potentially cause when the Court has just finished explaining why it feels that their conduct did not in fact cause any compensible harm in this case. The DeFelices are not entitled to punitive damages under the circumstances of this case.

The DeFelices have also requested attorneys fees and costs. A.R.S. 12-341.01(A) provides that in any contested action arising out of a contract, the court may award the successful party reasonable attorneys fees. Aside from the above statute, the language of which is permissive, the parties agreed in the amended purchase agreement that in the event of a breach of the agreement, the breaching party agreed to pay to the prevailing party a reasonable sum as and for attorneys fees. This language is mandatory. The Court has determined that the DeJonges are the breaching party in this case. Even though the Court has not awarded them damages, the DeFelices are the prevailing party and are entitled to attorneys fees.

IT IS ORDERED that the Plaintiffs DeJonge take nothing on their Complaint.

IT IS ORDERED that the Defendants DeFelice are the prevailing party both on the Plaintiffs' Complaint and on the Defendants' Counterclaim but that they take nothing on their Counterclaim because no damages have been proven.

IT IS ORDERED that the Defendants are not entitled to an award of punitive damages.

IT IS ORDERED that the Defendants are entitled to an award for their costs and for their reasonable attorneys fees in defending and prosecuting this lawsuit.

IT IS ORDERED directing counsel for the Defendants to file the appropriate Affidavit setting forth costs and attorneys fees.

STEVEN F. CONN

JUDGE OF THE SUPERIOR COURT

21 3/21/94

cc:

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Honorable Steven F. Conn
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