

BAD FAITH INSTRUCTIONS

Introduction

These instructions are not materially changed from RAJI (CIVIL) 5TH.

The duty of good faith and fair dealing is implied in every contract. *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986). In *Rawlings*, the court first considered the types of contractual relationships in which a breach of the duty of good faith and fair dealing would give rise to a cause of action in tort. *Id.* at 158-61, 726 P.2d 572-75. Since *Rawlings*, various appellate courts have analyzed whether tort damages are available for the breach of the duty of good faith and fair dealing in specific contexts. In *Oldenburger v. Del Webb Dev. Co.*, 159 Ariz. 129, 765 P.2d 531 (App. 1988), the court concluded that tort damages are not available for a breach of the duty of good faith and fair dealing arising out of a real estate contract. In *Dodge v. Fidelity & Deposit Co. of Maryland*, 161 Ariz. 344, 778 P.2d 1240 (1989), the court concluded that tort damages are available in a bad faith action against a surety on a contractor's performance bond. In *Burkons v. Ticor Title Ins. Co.*, 168 Ariz. 345, 813 P.2d 710 (1991), the court affirmed the dismissal of a bad faith case against an escrow agent, but declined to decide whether tort damages might be available in other bad faith cases against escrow agents. In *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 888 P.2d 1375 (App. 1994), the court held that tort damages are not available in a bad faith action by an employee against an employer.

The RAJI (CIVIL) 6TH Bad Faith instructions are drafted for use in insurance cases only. In noninsurance cases involving breach of the duty of good faith and fair dealing, other instructions may be necessary. *See, e.g.*, RAJI (CIVIL) 6TH Contract Instruction 16, and Employment Law Instruction 3.

The Bad Faith instructions are divided into two sections: first-party bad faith and third-party bad faith. The differences between these kinds of claims are stated in *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 164 Ariz. 256, 258, 792 P.2d 719, 721 (1990):

“First-party coverage arises when the insurer contracts to pay benefits directly to the insured. Examples of first-party coverage include health and accident, life, disability, homeowner's fire, title, and property damage insurance. In contrast, third-party coverage arises when the insurer contracts to indemnify the insured against liability to third parties The type of claim is not determined by the identity of the party bringing the bad faith action against the insured. For example, a third-party action might be brought by the *insured* in the event that he is subjected to excess liability by reason of the insurer's bad faith refusal to settle. In that event, the standards applicable to third-party claims would govern the action, although it was brought by the insured, rather than a third-party assignee.”

BAD FAITH 1 (FIRST-PARTY)

Duty of Good Faith and Fair Dealing

There is an implied duty of good faith and fair dealing in every insurance policy. [*Name of plaintiff*] claims that [*name of defendant*] breached this duty.

To prove that [*name of defendant*] breached the duty of good faith and fair dealing, [*name of plaintiff*] must prove:

1. [*Name of defendant*] intentionally¹ [denied the claim] [failed to pay the claim] [delayed payment of the claim]² without a reasonable basis for such action; and
2. [*Name of defendant*] knew that it acted without a reasonable basis, or [*name of defendant*] failed to perform an investigation or evaluation adequate to determine whether its action was supported by a reasonable basis.

SOURCE: *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 854 P.2d 1134 (1993); *Noble v. Nat'l American Life Ins. Co.*, 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981); *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986).

USE NOTE: Introductory Use Note for First-Party Cases: It is anticipated that RAJI (CIVIL) 5th Bad Faith 1, 4, 5, and 6 will be given in all first-party bad faith cases. RAJI (CIVIL) 6TH Bad Faith 2, 3, and 7 should be used when appropriate given the facts of the case.

¹ In most cases the “intent” element will not be an issue, and the word “intentionally” could be omitted from the instruction. *See* Use Note to Bad Faith 3.

² Use the bracketed words applicable to the facts of the case. These brackets are only applicable to cases involving allegations of improper handling of claims. Other language will need to be fashioned for cases with allegations of other improper conduct of the insurer. *See Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986) (insurance company held liable for bad faith for improper withholding of investigative report); *Spindle v. Travelers Ins. Co.*, 136 Cal. Rptr. 404 (App. 1977) (wrongful cancellation of malpractice insurance policy may violate duty of good faith and fair dealing).

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BAD FAITH INSTRUCTIONS

BAD FAITH 1 (FIRST-PARTY) Duty of Good Faith and Fair Dealing

Continued

COMMENT: 1. Reckless Disregard: Some of the appellate cases state that a cause of action for first-party bad faith have two elements: (1) the lack of a reasonable basis for the insurer's decision, and (2) knowledge or reckless disregard of the lack of a reasonable basis. *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 164 Ariz. 256, 792 P.2d 719 (1990); *Farr v. Transamerica Occidental Life Ins. Co.*, 145 Ariz. 1, 699 P.2d 376 (App. 1984); *Trus Joist Corp. v. Safeco Ins. Co.*, 153 Ariz. 95, 104, 735 P.2d 125, 134 (App. 1986). *Rawlings*, 151 Ariz. at 160, expresses the "reckless disregard" element in the following way: ". . . or failed to perform an investigation adequate to determine whether its position was tenable." The Committee preferred the *Rawlings* formulation because it seemed more likely to be of guidance to a jury than would the phrase "reckless disregard." For clarity and consistency, however, the Committee recast the "tenable position" language used by *Rawlings* into the "reasonable basis" language used in the rest of the instruction—they mean the same thing.

2. Fairly Debatable: Many of the cases discussing first-party bad faith use the term "fairly debatable." Although the supreme court has indicated that this concept is appropriate for an instruction in a first-party bad faith case, the court has also held that the failure to give an instruction containing the phrase "fairly debatable" in a first-party bad faith case is not error. Compare *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 164 Ariz. 256, 792 P.2d 719 (1990) with *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 538, 647 P.2d 1127, 1136 (1982). The Committee decided not to include the words "fairly debatable" in these instructions, reasoning that the phrase was susceptible to misconstruction, and the concept was adequately and more clearly covered by the "reasonable basis" language.

3. Insured's Duty of Good Faith: The duty of good faith and fair dealing applies to both the insurer and the insured. *Rawlings v. Apodaca*, 151 Ariz. at 153. There is no Arizona case defining the effect and application of a breach of the duty of good faith and fair dealing by the insured. It is currently unknown whether the insured's bad faith would act as a complete bar, a comparative defense, or merely as evidence that the jury may consider on the issue of causation. Accordingly, the Committee has not attempted to draft any instructions regarding the effect and application of bad faith by the insured.

BAD FAITH 2 (FIRST-PARTY)

Adequacy of Investigation

In all aspects of investigating or evaluating a claim, [*name of defendant*] is required to give as much consideration to [*name of plaintiff*]'s interests as it does to its own interests.

SOURCE: *Rawlings v. Apodaca*, 151 Ariz. 149, 157, 726 P.2d 565, 573 (1986).

COMMENT: *Rawlings* cites *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133 (Wash. 1986), for the proposition that an insurer must deal fairly with an insured, giving equal consideration in all matters to the insured's interests. Although this instruction addresses only the issues of investigation and evaluation, it can be modified to include other specifics if other specifics are at issue in the case.

BAD FAITH INSTRUCTIONS

BAD FAITH 3 (FIRST-PARTY)

Definition of Intentional¹

To prove that [name of defendant] acted intentionally [on the bad faith claim], [name of plaintiff] must prove that [name of defendant] intended its conduct, but [name of plaintiff] does not need to prove that [name of defendant] intended to cause injury.

[Name of defendant]'s conduct is not intentional if it is inadvertent or due to a good faith mistake.

SOURCE: *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 995 P.2d 276 (2000); *Rawlings v. Apodaca*, 151 Ariz. 149, 160, 726 P.2d 565, 576 (1986); *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 20 P.3d 1158 (App. 2001); *Deese v. State Farm Mut. Auto. Ins. Co.*, 168 Ariz. 337, 813 P.2d 318 (App. 1991).

USE NOTE: Use the bracketed phrase if the case includes claims in addition to the bad faith claim.

¹ In *Rawlings*, the supreme court defined the intent requirement in first-party bad faith cases as “the intent to do the act.” 151 Ariz. at 160. This was distinguished from “inadvertence, loss of papers, misfiling of documents and like mischance.” *Id.* at n. 5. In most cases, this “intent” element will not be at issue. Where the issue of intentional conduct is not at issue, the instruction should not be given.

COMMENT: The intent element of a bad faith claim is the general intent to do the act. Many bad faith cases will also include a punitive damages claim. The intent element stated in a punitive damages claim is the specific intent to cause injury. *See* Element (1) of RAJI (CIVIL) 6TH Personal Injury Damages 4. This Bad Faith 3 general intent instruction, when given with RAJI (CIVIL) 6TH Personal Injury Damages 4, makes clear the difference between the intent elements of a bad faith claim and a punitive damages claim. The Bad Faith 3 general intent instruction should not be used in anything but bad faith cases.

For a statutory definition of “intentionally,” see A.R.S. § 13-105(6)(a).

BAD FAITH 4 (FIRST-PARTY)

Causation

Before you can find [*name of defendant*] liable [on the bad faith claim], you must find that [*name of defendant*]'s breach of the duty of good faith and fair dealing was a cause of [*name of plaintiff*]'s damages.

A breach of duty is a cause of damages if it helps produce the damages, and if the damages would not have occurred without the breach.

SOURCE: RAJI (CIVIL) 4TH Bad Faith 4; RAJI (CIVIL) 5TH Fault 2.

USE NOTE: Use the bracketed phrase if the case includes claims in addition to the bad faith claim.

BAD FAITH INSTRUCTIONS

BAD FAITH 5 (FIRST-PARTY)
Plaintiff's Burden of Proof (Bad Faith)

[On the bad faith claim,] [*name of plaintiff*] must prove:

1. [*name of defendant*] breached the duty of good faith and fair dealing;¹
2. [*name of defendant*]'s breach was a cause of [*name of plaintiff*]'s damages; and
3. The amount of [*name of plaintiff*]'s damages.

SOURCE: *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986).

USE NOTE: Use the bracketed phrase if the case includes claims in addition to the bad faith claim.

¹ Bad Faith 1 instructs on the elements for proving breach of the duty of good faith and fair dealing. Bad Faith 1 is necessary in any case in which Bad Faith 5 is given.

COMMENT: Breach of Contract Issues: A claim for breach of the duty of good faith and fair dealing is a tort claim that arises out of contract. Many bad faith cases will also have breach of contract issues. However, there may be bad faith cases in which no breach of contract issues are submitted to the jury. These cases may involve a delay in payment of benefits, *Borland v. Safeco Ins. Co. of America*, 147 Ariz. 195, 709 P.2d 552 (App. 1985), or other tortious conduct by the insurer. *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986) (insurer liable for bad faith refusal to supply investigative report to insured).

Contract case instructions are found in the RAJI (CIVIL) 6TH Contract Section. Additional instructions may be necessary in insurance contract cases. For example, an insurer has the burden of proving that an exclusionary provision applies. *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 354, 723 P. 2d 703 (App. 1985), *rev'd on other grounds*, 150 Ariz. 326, 723 P.2d 675 (1986).

BAD FAITH 6 (FIRST-PARTY)

Statement of Liability Issues

If you find that [*name of defendant*] did not breach the duty of good faith and fair dealing, then your verdict [on the bad faith claim] must be for [*name of defendant*], even if you find that [*name of defendant*] incorrectly [denied] [failed to pay] [delayed payment of]¹ [*name of plaintiff*]'s claim for benefits.

If you find that [*name of defendant*] did breach the duty of good faith and fair dealing and that [*name of defendant*]'s breach was a cause of [*name of plaintiff*]'s damages, then your verdict [on the bad faith claim] must be for [*name of plaintiff*], even if you find that [*name of defendant*] correctly [denied] [failed to pay] [delayed payment of] [*name of plaintiff*]'s claim for benefits.

SOURCE: RAJI (CIVIL) 5th Fault 4; *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 995 P.2d 276 (2000); *Deese v. State Farm Mut. Auto. Ins. Co.*, 172 Ariz. 504, 838 P.2d 1265 (1992); *Rawlings v. Apodaca*, 151 Ariz. 149, 157, 726 P.2d 565, 573 (1986).

USE NOTE: ¹ Use the bracketed option consistent with that used in RAJI (CIVIL) 6TH Bad Faith 1.

BAD FAITH INSTRUCTIONS

BAD FAITH 7 (FIRST-PARTY)

Measure of Damages

If you find that [*name of defendant*] is liable to [*name of plaintiff*] [on the bad faith claim], you must then decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for each of the following elements of damage proved by the evidence to have resulted from [*name of defendant*]'s breach of the duty of good faith and fair dealing:

1. The unpaid benefits of the policy;
2. Monetary loss or damage to credit reputation experienced and reasonably probable to be experienced in the future; and
3. Emotional distress, humiliation, inconvenience, and anxiety experienced, and reasonably probable to be experienced in the future.

SOURCE: *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986); *Farr v. Transamerica Occidental Life Ins. Co.*, 145 Ariz. 1, 7, 699 P.2d 376, 382 (App. 1984).

USE NOTE: Use the bracketed phrase if the case includes claims in addition to the bad faith claim.

Elements of Damages: Instruct only on those elements of damages for which there is proof. If plaintiff has suffered physical injury as a result of defendant's bad faith, consider using an appropriately modified version of RAJI (CIVIL) 6TH Personal Injury Damages 1.

COMMENT: Interest: Plaintiff may be entitled to interest on the unpaid benefits of the policy. If there is no dispute about the amount of unpaid benefits the court can, after the verdict, simply add in the interest at the legal rate. If there is a dispute about the amount of the unpaid benefits, special interrogatories to the jury may be necessary.

BAD FAITH 8 (THIRD-PARTY)

Third-Party Standard

There is an implied duty of good faith and fair dealing in every insurance contract. [name of plaintiff] claims that [name of defendant] breached this duty. The duty of good faith and fair dealing requires an insurance company to give the same consideration to its insured's interests as it gives to its own when it considers a settlement offer.¹

The test for evaluating whether an insurance company has given equal consideration to the interests of its insured is whether a prudent insurer without policy limits would have accepted the settlement offer.

SOURCE: *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 164 Ariz. 256, 792 P.2d 719 (1990); *General Accident Fire & Life Assur. Corp. v. Little*, 103 Ariz. 435, 443 P.2d 690 (1968); *Farmers Ins. Exchange v. Henderson*, 82 Ariz. 335, 313 P.2d 404 (1957).

USE NOTE: Introductory Use Note for Third-Party Cases: Ordinarily, third-party bad faith cases will be brought by the person who was injured by the insured and who has obtained a judgment against the insured. In those cases, the plaintiff (judgment-creditor) will need an assignment from the insured in order to bring the action. *See, e.g., General Accident Fire & Assur. Corp. v. Little*, 103 Ariz. 435, 443 P.2d 690 (1968). In third-party bad faith cases in which plaintiff is the injured judgment-creditor, use RAJI (CIVIL) 6TH Bad Faith 8 and 9.

There may be third-party bad faith cases in which the plaintiff is the tortfeasor-insured against whom an excess verdict has been rendered. In these cases, the plaintiff may be entitled to consequential tort damages that would not be available in a case brought by the injured judgment-creditor pursuant to an assignment. Accordingly, in third-party bad faith cases in which the insured is the plaintiff, use Bad Faith 8, 10, 11, and 12.

There may also be third-party cases in which both the injured judgment-creditor and the tortfeasor-insured are plaintiffs. In such cases, modify the instructions so that it is clear which of the plaintiffs is entitled to each of the elements of damage.

In *United States Auto. Ass'n v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987), the court discussed a third-party bad faith case in which the injured person had entered into a settlement agreement with the insured. In those fact situations, the trial court may be faced with a factual dispute regarding the reasonableness of such a settlement agreement. For *Morris*-type cases, see Bad Faith 13.

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BAD FAITH INSTRUCTIONS

BAD FAITH 8 (THIRD-PARTY)

Third-Party Standard

Continued

¹ In *Miel v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz. 104, 912 P.2d 1333 (1995), the court held that in a third-party bad faith case in which the insurer failed to consider a policy limit demand due to its inadvertence or neglect, Bad Faith Instruction No. 8 alone was insufficient to properly instruct the jury. The court stated:

[Bad Faith Instruction No. 8] is geared more to a case in which the issue is the insurer's considered decision not to pay a claim than it is to a case like this one, in which the insurer admits that its negligence resulted in an untimely acceptance of a settlement offer. Thus, the instruction was incomplete and not specific to the facts of this case.

Miel, 185 Ariz. at 110, 912 P.2d at 1339. In third-party bad faith cases involving facts similar to those in *Miel*, supplemental instructions in addition to Bad Faith No. 8 may need to be given.

This instruction is drafted for cases in which a settlement demand was made to the insured or his insurer. In some cases, a liability insurer may be subject to bad faith liability even in the absence of such a demand. See *Fulton v. Woodford*, 26 Ariz. App. 17, 22, 545 P.2d 979, 984 (1976). In cases in which no demand was made, the instruction will need to be modified.

Factors to Be Considered: Several cases list “factors” that may be considered by the trier-of-fact in determining third-party bad faith, see e.g., *Clearwater, supra*; and *Little, supra*. But, the jury is not limited to a consideration of specific factors. In fact, one of the factors on any list is: “*Any other factors* tending to establish or negate bad faith. . . .” (Emphasis supplied.) The Committee decided to make the Bad Faith 8 Instruction consistent with the Fault Instructions; that is, the instruction provides a general statement of law and leaves the details for evidence and argument. However, if the trial court does decide to list specific factors in the instruction, the following language could be used, modified to delete any factors not relevant to the case. (The factors listed below are from *Clearwater*, 164 Ariz. at 259): “In determining whether defendant breached its duty of good faith and fair dealing, you may consider the following:

1. The strength of the injured claimant's case on the issues of liability and damages;
2. Whether the insurer attempted to induce its insured to contribute to a settlement;
3. Whether the insurer failed to properly investigate the circumstances of the claim in order to ascertain the evidence against its insured;

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BAD FAITH 8 (THIRD-PARTY)

Third-Party Standard

Continued

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4. Whether the insurer rejected the advice of its attorneys or other agents;
 5. Whether the insurer failed to inform its insured of a compromise offer;
 6. The amount of financial risk to which each party would be exposed in the event of a refusal to settle;
 7. Whether the insured was at fault in inducing the insurer's rejection of the compromise offer by misleading the insurer about the facts; and
 8. Any other factors tending to establish or eliminate bad faith on the part of the insurer.”

BAD FAITH INSTRUCTIONS

BAD FAITH 9 (THIRD-PARTY)

**Plaintiff's Burden of Proof; Statement of Liability Issues
(Assignee-Plaintiff)**

[*Name of plaintiff*] must prove that [*name of defendant*] breached the duty of good faith and fair dealing.

If you find that [*name of defendant*] did not breach the duty of good faith and fair dealing, then your verdict [on the bad faith claim] must be for [*name of defendant*].

If you find that [*name of defendant*] did breach the duty of good faith and fair dealing, then [*name of plaintiff*] is entitled to the full amount of the judgment that was entered against the insured.

SOURCE: *Farmers Ins. Exchange v. Henderson*, 82 Ariz. 335, 313 P.2d 404 (1957).

USE NOTE: In a third-party bad faith case, once the plaintiff establishes that the defendant failed to give equal consideration to the insured's interest (*i.e.*, that it breached the duty of good faith and fair dealing), the defendant is liable for the full amount of the judgment entered against the insured. *Farmers Ins. Exchange*, 82 Ariz. at 341. There is no need for an additional causation instruction in such cases.

BAD FAITH 10 (THIRD-PARTY)

Plaintiff's Burden of Proof; Statement of Liability Issues (Insured-Plaintiff)

[*Name of plaintiff*] must prove that [*name of defendant*] breached the duty of good faith and fair dealing.

If you find that [*name of defendant*] did not breach the duty of good faith and fair dealing, then your verdict [on the bad faith claim] must be for [*name of defendant*].

If you find that [*name of defendant*] did breach the duty of good faith and fair dealing, then [*name of plaintiff*] is entitled to the full amount of the judgment that was entered against [*name of plaintiff*], and you may also consider [*name of plaintiff*]'s claim for other damages.

With respect to [*name of plaintiff*]'s claim for other damages, [*name of plaintiff*] must prove:

1. [*Name of defendant*]'s breach of duty was a cause of [*name of plaintiff*]'s damages; and
2. [*Name of plaintiff*]'s damages.

SOURCE: *Farmers Ins. Exchange v. Henderson*, 82 Ariz. 335, 313 P.2d 404 (1957); *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986); *Farr v. Transamerica Occidental Life Ins. Co.*, 145 Ariz. 1, 699 P.2d 376 (App. 1984).

USE NOTE: In a third-party bad faith case, once the plaintiff establishes that the defendant failed to give equal consideration to the insured's interest (*i.e.*, that it breached the duty of good faith and fair dealing), then the defendant is liable for the full amount of the judgment entered against the insured. *Farmers Ins. Exchange*, 82 Ariz. at 341.

If the plaintiff in the bad faith case is the insured-tortfeasor, then the plaintiff may be entitled to consequential damages that have resulted from the defendant's breach. With respect to a claim of consequential damages, the plaintiff must establish both the nature and extent of the damages as well as the fact that such damages were caused by the defendant's breach. Such consequential damages are personal to the insured and may not be assigned to the injured tort-creditor. *Harleysville Mut. Ins. Co. v. Lea*, 2 Ariz. App. 538, 410 P. 2d 495 (1966); *State Farm Mut. Ins. Co. v. St. Joseph's Hosp.*, 107 Ariz. 498, 489 P.2d 837 (1971). These damages may only be awarded if the bad faith case is brought by the insured. RAJI (CIVIL) 5th Bad Faith 10, 11, and 12 are designed for use in cases where consequential damages are at issue.

BAD FAITH INSTRUCTIONS

BAD FAITH 11 (THIRD-PARTY)

Causation (Insured-Plaintiff)

Before you can find [*name of defendant*] liable [on the bad faith claim], you must find that [*name of defendant*]'s breach of the duty of good faith and fair dealing was a cause of [*name of plaintiff*]'s damages.

A breach of duty is a cause of damages if it helps produce the damages, and if the damages would not have occurred without the breach.

SOURCE: RAJI (CIVIL) 4th Bad Faith 11; RAJI (CIVIL) 5th Fault 2.

USE NOTE: Use the bracketed phrase if the case includes claims in addition to the bad faith claim.

Use this instruction only if consequential damages are at issue; the instruction is unnecessary if they are not. *See* Use Note to RAJI (CIVIL) 5th Bad Faith 9 and 10.

BAD FAITH 12 (THIRD-PARTY)

Measure of Damages (Insured-Plaintiff)

If you find that [*name of defendant*] breached the duty of good faith and fair dealing, and you find that [*name of plaintiff*] suffered other damages in addition to the judgment that was entered against him, you must then decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for each of the following elements of damage proved by the evidence to have resulted from [*name of defendant*]'s breach of the duty of good faith and fair dealing:

1. Monetary loss or damage to credit reputation experienced and reasonably probable to be experienced in the future; and
2. Emotional distress, humiliation, inconvenience, and anxiety experienced and reasonably probable to be experienced in the future.

SOURCE: *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P. 2d 565 (1986); *Farr v. Transamerica Occidental Life Ins. Co.*, 145 Ariz. 1, 699 P.2d 376 (App. 1984).

USE NOTE: 1. Elements of Damage: Instruct only on those elements of damage for which there is proof. If plaintiff has suffered physical injury as a result of defendant's bad faith, consider using an appropriately modified version of RAJI (CIVIL) 5th Personal Injury Damages 1.

2. Verdict Form: In third-party bad faith cases in which plaintiff seeks damages in addition to the amount of the judgment rendered against him, the plaintiff's verdict form could read:

We, the jury, etc., . . . do find plaintiff's damages to be:

1. The full amount of the judgment entered against plaintiff in [insert caption and cause number of the underlying action]; and
2. Additional damages in the amount of \$_____.

BAD FAITH INSTRUCTIONS

BAD FAITH 13 (MORRIS CASES)

Burden of Proof¹

[Name of plaintiff] claims that [name of defendant] is liable for the amount of the [settlement between [name of plaintiff] and [name of defendant]'s insured] [judgment against its insured].²

On this claim, [name of plaintiff] must prove:

1. The [settlement] [judgment] was neither fraudulent nor collusive and]³
2. The amount of the [settlement] [judgment], or a portion of it, was fair and reasonable under the circumstances.

The test for whether the [settlement] [judgment], or any portion of it, was fair and reasonable is what a reasonably prudent person in the insured's position would have settled for on the merits of [name of plaintiff]'s case against [name of defendant]'s insured. In making this determination, you may consider the facts bearing on the liability and damage aspects of the [name of plaintiff]'s case against the insured as well as the risks of going to trial.

If you find that [the [settlement] [judgment] was not fraudulent or collusive and that]³ the amount of the [settlement] [judgment] was reasonable under the circumstances, then your verdict must be for the [name of plaintiff] for the full amount of the [settlement] [judgment]. If you find that only a portion of the [settlement] [judgment] was reasonable under the circumstances, you should then enter a verdict in favor of the [name of plaintiff] for that amount. If you find that no portion of the [settlement] [judgment] was reasonable under the circumstances, then your verdict must be for the [name of defendant].

SOURCE: *United Services Auto. Ass'n v. Morris*, 154 Ariz. 113, 120-21, 741 P.2d 246, 253-54 (1987).

USE NOTE: ¹ The issue of whether an insurance company is liable for an amount in excess of the policy limits requires an analysis of the law of third party bad faith. Cases involving claims of extracontractual liability will require additional instructions. See Bad Faith Instructions 8-12.

² A *Morris* type hearing is held in cases in which the underlying case between the tort victim and the insured is resolved by a settlement or "stipulated judgment" as occurred in the *Morris* case. An insurer may not be entitled to contest the amount of the insured's liability if the underlying case goes to judgment based on evidentiary or legal rulings and the insurer had adequate notice of the proceedings. Under the doctrine of collateral estoppel, "[an insurer] is precluded from relitigating those issues determined in the action against the [insured] as to which there was no conflict of interest between the [insurer] and the [insured]." *Farmers Ins. Co. v. Vagnozzi*, 138 Ariz. 443, 448, 675 P.2d 703, 708 (1983) quoting RESTATEMENT (SECOND) OF JUDGMENTS § 58; see also *Gilbreath v. St. Paul Fire & Marine Ins. Co.*, 141 Ariz. 92, 685 P.2d 729 (1984) (insurer may not collaterally attack valid judgment rendered against its insured); *State Farm Mut. Auto. Ins. Co. v. Paynter*, 122 Ariz. 198, 201, 593 P.2d 948, 915 (App. 1979) (absent fraud and collusion, insurer may not raise defenses that were not raised by insured in the underlying case).

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BAD FAITH 13 (MORRIS CASES)

Burden of Proof

Continued

³ In the *Morris* case, the supreme court stated a two-part burden of proof. In cases where the issue of fraud or collusion is not raised, this element may be excluded.