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Deputy

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JOHN J IMPELLIZZERI GEORGE H SMITH

v.

AMERICAN AUTOMOBILE INSURANCE COMPANY GENA LOPRESTO SLUGA

MINUTE ENTRY ORDER
FINDINGS OF FACT and CONCLUSIONS OF LAW

After evidentiary hearing the Court took the matter of the reasonable settlement value of a stipulated judgment between John Impellizzeri (herein "Impellizzeri") and Kenneth Sloniger (herein "Sloniger") under advisement. The Court has considered the evidence, all legal memoranda, counsels' statements to the Court and the relevant law. The Court has made findings of fact and conclusions of law as set forth below.

The Court must determine the maximum extent that the stipulated judgment in the underlying lawsuit is reasonable and enforce that amount. United Servs. Auto Ass'n v. Morris, 154 Ariz. 113, 741 P.2d 246 (1987) and Himes v. Safeway Ins. Co., 205 Ariz. 31, 66 P.3d 74 (Ct. App. 2003)

> The 'reasonably prudent person' referenced in this test means a person who has a stake in the outcome. It means a person who is making decisions as though the money that pays the settlement comes from his or her own pocket. This is not a test of what a reasonably prudent person would settle the case for with someone else's funds. It is what a "reasonably prudent person" would pay from his or her own resources, assuming they are sufficient, 'on the merits' of the case. . . . For purposes of determining reasonableness in a Damron/Morris agreement, a 'reasonably prudent person' is defined as a person who (1) has the ability to pay a reasonable settlement amount from his or her own funds and (2) makes a settlement decision as though the settlement amount came from those personal funds.

Himes, 205 Ariz. at 39, 66 P.3d at 82 (footnote omitted).

The following factors should be taken into consideration in determining the reasonableness of the stipulated judgment:

> [T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; *the risks and expenses of continued litigation* [on the merits]; ... any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released.

Himes, 205 Ariz. at 42, 66 P.3d at 85.

It is only those costs, expenses and risks that relate to the merits of the underlying case that should be considered" in determining reasonableness, and not any costs or expenses in connection with any subsequent coverage litigation. Id., 205 Ariz. 42, 66 P.3d at 343.

The underlying litigation was a claim against multiple tortfeasors, and non-parties at fault. The Uniform Contribution Among Tortfeasor's Act (UCATA) applied to the underlying litigation. The liability of each defendant would have been several only, and not joint and several. Had the underlying case gone to trial, a jury would have been asked to assess degrees of fault to: Nationwide, Wallace, Sherriffs, Lashlee, Sloniger, Chick, Strass, and to Impellizzeri himself.

1. John Impellizzeri was the Plaintiff, and Kenneth Sloniger was a Defendant, in the matter of Impellizzeri v. Wallace, et al., Maricopa County Superior Court Cause No. CV99-008168 (the "underlying lawsuit"). (See Exhibit 1.)

2. The underlying lawsuit arose, in part, from Sloniger's sale of a tax shelter known as "Future Flex" to Impellizzeri and from Sloniger's sales of universal life insurance policies to Impellizzeri for Impellizzeri, his wife and his daughter (the "universal life insurance policies"). (See Exhibit 1; Exhibit 12 at p. 4; Exhibit 25 at p.78, line 10 through p. 79, line 19.)

3. Defendant American Automobile Insurance Company defended Sloniger in the underlying lawsuit subject to a reservation of rights. (See, e.g., the trial testimony of Charles Callahan.)

4. Pursuant to its reservation of rights, Defendant could have withdrawn its defense of Sloniger at any time. (See id.)

5. Pursuant to its reservation of rights, Defendant reserved its right to seek reimbursement from Sloniger for defense costs related to uncovered claims. (See id.)

6. In an Amended Complaint filed in the underlying lawsuit, Impellizzeri asserted claims against Sloniger for:

A. Violation of A.R.S. § 20-443, in connection with the sale of universal life insurance policies;

B. Negligent misrepresentation in connection with the sale of the Future Flex program and the universal life insurance policies;

C. Negligence in the sale of the Future Flex program and the universal life insurance policies; and

D. Impellizzeri's attorney's fees incurred in the underlying lawsuit.

(See, e.g., Exhibit 1.)

7. In the underlying lawsuit, Impellizzeri alleged, among other things, that Sloniger misrepresented that the Future Flex program would lawfully allow Impellizzeri to save $10,000.00 to $12,000.00 per year in F.I.C.A. and self-employment taxes. (See, e.g., the trial testimony of John Impellizzeri; Exhibit 1; Exhibit 12; Exhibit 18(2); Exhibit 18(2)(A); Exhibit 25.)

8. Sloniger and Jerome Chick delivered the Future Flex documents on April 19, 1994 to Impellizzeri, and on April 19, 1994, Impellizzeri executed the documents establishing the trust that was central to the Future Flex program. (See, e.g., the trial testimony of John Impellizzeri; Exhibit 18(2) at ¶¶ 4-6; Exhibit 63.)

9. During the April 19, 1994 meeting, Sloniger again misrepresented that the Future Flex program would lawfully allow Impellizzeri to save $10,000.00 to $12,000.00 per year in F.I.C.A. and self-employment taxes. (See, e.g., the trial testimony of John Impellizzeri; Exhibit 18(2) at ¶¶ 4-6.)

10. During the April 19, 1994 meeting, Sloniger also misrepresented to Impellizzeri that:

A. That he needed to have a universal life insurance policy as part of the Future Flex program; and

B. That he could pay the premiums for the universal life insurance policy with the tax savings from the Future Flex program.

(See, e.g., the trial testimony of John Impellizzeri.)

11. Impellizzeri would not have established the Future Flex trust and would not have gone through with the program had Sloniger not repeated his misrepresentations at the April 19, 1994 meeting. (See id.).

12. In the underlying lawsuit, Impellizzeri alleged, among other things, that Sloniger misrepresented to Impellizzeri that he was required to purchase a universal life insurance policy as a part of the Future Flex program. (See the trial testimony of John Impellizzeri; Exhibit 12 at pp. 2-3.)

13. In March 1994, Impellizzeri purchased a universal life insurance policy, issued by United Presidential Life Insurance Company ("United"), through Sloniger and Nationwide Small Business Financial Consultants, LLC. (See Exhibit 12 at p. 2.)

14. The United policy, however, was cancelled by Sloniger within a matter of weeks.

(See id.)

15. Thereafter, on or about March 31, 1994, Impellizzeri applied for a universal life insurance policy through The Mutual Group ("TMG"). (See, e.g., the trial testimony of John Impellizzeri; Exhibit 70.)

16. At the time, Impellizzeri had a term life insurance policy that cost him $277.00 per year. (See the trial testimony of John Impellizzeri.)

17. The TMG policy was not delivered by Sloniger until April 27, 1994. (See the trial testimony of John Impellizzeri; Exhibit 16(9); Exhibit 133.)

18. During the April 27, 1994 meeting between Sloniger and Impellizzeri, Sloniger again misrepresented to Impellizzeri:

A. That he needed to have a universal life insurance policy as part of the Future Flex program; and

B. That he could pay the premiums for the universal life insurance policy with the tax savings from the Future Flex program.

(See id.)

19. Impellizzeri had to sign an Amended Application for the TMG policy before it became effective. (See the trial testimony of John Impellizzeri; Exhibit 133.)

20. Impellizzeri signed the Amended Application on April 27, 1994, and the policy became effective that date. (See the trial testimony of John Impellizzeri; Exhibit 16(9); Exhibit 133.)

21. Impellizzeri would not have signed the Amended Application and purchased the TMG life insurance policy had Sloniger not misrepresented, during the April 27, 1994 meeting, the need for the policy and the tax savings Impellizzeri could expect from the Future Flex program. (See the trial testimony of John Impellizzeri.)

22. On or about June 2, 1994, Impellizzeri sent TMG a letter requesting that it cancel the Universal Life Insurance Policy. (See, e.g., the trial testimony of John Impellizzeri; Exhibit

16(8).) Although the 20-day period of time in which Impellizzeri could have cancelled his policy without penalty had lapsed before June 2, 1994, he could still have cancelled the policy (Testimony of Impellizzeri).

23. Shortly after Impellizzeri sent the cancellation letter to TMG, he was contacted by Sloniger who again misrepresented to Impellizzeri that the Universal Life Insurance Policy was a requirement of the Future Flex Plan and that Impellizzeri could pay for the policy with the tax savings from the Future Flex program. (See, e.g., the trial testimony of John Impellizzeri; Exhibit 18(2) at ¶¶ 19-20.)

24. Impellizzeri relied upon Sloniger's misrepresentations, which convinced Impellizzeri not to cancel the TMG policy in June 1994. (See, e.g., the trial testimony of John Impellizzeri; Exhibit 18(2) at ¶¶ 19-20.)

Impellizzeri would have cancelled the policy, and would not have kept the policy, but for Sloniger's June 1994 misrepresentations. (See, e.g., the trial testimony of John Impellizzeri; Exhibit 18(2) at ¶¶ 19-20.)

25. Impellizzeri's claimed insurance damages for premiums paid after June 2, 1994, were based on Sloniger's June 1994 misrepresentations.

26. In his deposition in the underlying lawsuit, Sloniger testified that he knew Impellizzeri did not have a life insurance background and that he knew that Impellizzeri was relying on him, as a life insurance agent, for advice about the purchase of the universal life insurance policies. (See Exhibit 26 at Volume II, p. 188, line 9 through p. 19, line 14.)

27. Sloniger earned approximately $16,000.00 in commissions from the policy (See Exhibit 26 at Volume II, p. 216, lines 3 through 11 and p. 218, line 20 through p. 219, line 2.)

28. The IRS audited Impellizzeri for the tax years 1994, 1995 and 1996. (See, e.g., the trial testimony of John Impellizzeri; the trial testimony of Charles Callahan; Exhibit 12.)

29. As a result of the audit, the IRS declared the Future Flex program illegal and a sham. (See, e.g., the trial testimony of John Impellizzeri; the trial testimony of Charles Callahan;

Exhibit 12.)

30. As a result of the audit, Impellizzeri was found to owe back taxes, penalties and interest for the years 1994, 1995 and 1996 to the IRS and the Arizona Department of Revenue. (See, e.g., the trial testimony of John Impellizzeri; the trial testimony of Charles Callahan; Exhibit 12.)

31. In 1999, Impellizzeri first learned that he was not, in fact, required to purchase a universal life insurance policy as part of the Future Flex program. (See Exhibit 18(2) at ¶¶ 21 - 22.)

32. In the underlying lawsuit, Impellizzeri's counsel served Sloniger's counsel with a document entitled "Plaintiff's Tenth Supplemental Disclosure of Information Pursuant to Rule 26.1" which disclosed the following damages claimed from Sloniger:

A. $35,274.00 for back taxes and interest owed to the IRS;

B. $10,226.93 for back taxes and interest owed to the Arizona Department of Revenue;

C. Premiums of $1,015.00 per month paid for the universal life insurance policies beginning in April 1994 and accruing each month thereafter;

D. $1,125.00 for fees paid to accountant, Sally Lattimer, in connection with Impellizzeri's tax audits.

(See Exhibit 12 at p. 4.)

33. In the underlying lawsuit, Impellizzeri testified that he purchased universal life insurance policies for his wife and daughter based upon misrepresentations by Sloniger about the tax savings he could expect from the Future Flex program. (See Exhibit 25 at p. 78, line 11 through p. 79, line 19.)

34. On August 14, 2000, Sloniger's attorney, Charles Callahan, filed a Motion for Partial Summary Judgment in the underlying lawsuit. (See, e.g., the trial testimony of Charles Callahan; Exhibit 15.)

35. In the Motion for Partial Summary Judgment, Callahan argued:

A. That Impellizzeri's claim for violation of A.R.S. § 20-443 was barred by the one-year statute of limitation contained in A.R.S. § 12-541(3);

B. That the insurance premiums paid by Impellizzeri for the universal life insurance policies were not a cognizable item of damages; and

C. That the taxes assessed against Impellizzeri were not a cognizable element of damages.

(See, e.g., the trial testimony of Charles Callahan; Exhibit 15.)

36. On October 2, 2000, Judge Fields denied Sloniger's Motion for Partial Summary Judgment. (See, e.g., the trial testimony of Charles Callahan; Exhibit 21.)

37. Prior to the *Morris* Agreement, Sloniger's counsel filed a Motion for Partial Summary Judgment on Impellizzeri's Attorneys' Fees Claim. (See, e.g., the trial testimony of Charles Callahan.)

38. As of the time of the *Morris* Agreement, the Court had not ruled upon the Motion for Partial Summary Judgment regarding the attorneys' fees. (See id.)

39. After the *Morris* Agreement, Sloniger's counsel withdrew the Motion for Partial Summary Judgment on the attorneys' fees claim. (See Exhibit 24.)

40. Impellizzeri's substantive claims in the underlying lawsuit would have been tried to a jury. (See, e.g., the trial testimony of Charles Callahan.)

41. All of Impellizzeri's claims for damages and attorneys' fees, against Sloniger, were intact at the time of the *Morris* Agreement but subject to a pending Motion for Summary Judgment. (See, e.g., the trial testimony of Charles Callahan.)

42. The *Morris* Agreement in this case was entered into on or about June 18, 2001. (See Exhibit 30.)

43. At the time of the *Morris* Agreement, defense counsel for Sloniger was not aware of any claims made by Impellizzeri in connection with the bankruptcies of James Sherriffs and

Elizabeth Sherriffs. (See the trial testimony of Charles Callahan.)

44. At the time of the *Morris* Agreement, defense counsel for Sloniger was aware that Impellizzeri's claims for attorneys' fees were in the neighborhood of $100,000.00. (See, e.g., the trial testimony of Charles Callahan; Exhibit 40; Exhibit 47.)

45. At the time of the *Morris* Agreement, defense counsel knew that Impellizzeri was claiming insurance damages of $1,015.00 per month from April 1994. (See, e.g., the trial testimony of Charles Callahan; Exhibit 4 at p. 2; Exhibit 12 at p. 4.)

46. As of the date of the *Morris* Agreement, Impellizzeri's claimed insurance damages totaled $86,290.00 ($1,015.00 per month for the 86 months from April 1994 through May 2001).

47. Impellizzeri claimed pre-judgment interest as an element of his damages in the underlying lawsuit. (See Exhibit 1 at p. 12.)

48. The pre-judgment interest on the claimed insurance damages is in the neighborhood of $31,000.00. (See the trial testimony of John Westover.)

49. As of the date of the *Morris* Agreement, Sloniger's defense counsel was aware that Impellizzeri was claiming damages of approximately $35,000.00 for back taxes, interest and penalties owed to the IRS. (See, e.g., the trial testimony of Charles Callahan; Exhibit 12 at p. 4.)

50. As of the date of the *Morris* Agreement, Sloniger's defense counsel was aware that Impellizzeri was alleging, in the alternative, that he could have saved approximately $22,000.00 in taxes had Sloniger advised him to form an S corporation rather than advising him to purchase the Future Flex. (See, e.g., the trial testimony of Charles Callahan; Exhibit 18(15).

51. A risk to Sloniger included the fact that, according to his own defense counsel, the jury was likely to believe he lied during his deposition about selling the Future Flex program to Impellizzeri. (See Exhibit 38 at p. 2 - 4.)

52. Specifically, Sloniger's counsel reported to Lancer Claims Services ("Lancer") that Sloniger testified steadfastly that he had not sold the Future Flex program to Impellizzeri.

(See Exhibit 38.)

53. However, as Sloniger's counsel reported to the carrier, Sloniger's testimony was contradicted by, among other things, Impellizzeri's testimony, James Wallace's testimony, Jerome Chick's testimony and a 1099 issued to Sloniger by Nationwide. (See id.)

54. In addition, as Sloniger's counsel reported to Lancer, Sloniger testified that he had not sold a Future Flex program to David Montgomery, an independent witness without any stake in the underlying lawsuit. (See id.)

55. David Montgomery, however, contradicted Sloniger's testimony in an affidavit in which he stated that Sloniger had sold him both the Future Flex and life insurance. (See Exhibit 38; Exhibit 18(16).)

56. Sloniger's counsel concluded, among other things, that:

> ". . . the circumstances with respect to Montgomery's purchase of the Future Flex program are so similar to the circumstances regarding [Impellizzeri's] purchase of the program that I believe a jury is going to find that these similarities go beyond mere coincidence. This, coupled with the fact that the other witnesses have all testified that Sloniger sold the Future Flex program to [Impellizzeri], will probably lead a jury to conclude that Sloniger did, in fact, sell the Future Flex program to [Impellizzeri]."

(Exhibit 38 at p. 4.)

57. Sloniger's counsel further reported to Lancer that Sloniger did not make a very good witness. (See id.)

58. Specifically, Sloniger's counsel reported:

> ". . . In both of his depositions, Sloniger would give long explanations to fairly direct questions on discreet issues. Most of Sloniger's answers would go into matters that were largely irrelevant and inconsequential. Sloniger persisted in this method of answering questions despite the fact that both Holloway and myself would instruct him to just answer the questions directly. In my view, this testimony is not going to play well to a jury. I believe that a jury is going to view Sloniger as trying to explain away too much, and attempting to avoid answering the questions directly. As you know, a jury's perception and feelings toward a particular witness can influence the outcome of a case as much, if not more, than the actual substance of the testimony and evidence. In this respect, I believe that we are at somewhat of a disadvantage."

(Id.)

59. Sloniger's counsel prepared a September 14, 2000 "Attorney's Evaluation Report" for Lancer. (See, e.g., Exhibit 44.)

60. The evaluation report was prepared after discovery had been largely or completely finished. (See, e.g., the trial testimony of Charles Callahan.)

61. In the evaluation report, Charles Callahan stated that he believed there would be a Plaintiff's verdict against Sloniger on the Future Flex claim and there was a 40% to 50% chance of a Plaintiff's verdict against Sloniger on the insurance claims. (See id., at p. 2.)

62. The counts alleged by Impellizzeri against defendant Nationwide included: Breach of Contract; Common Law Fraud; Negligent Misrepresentations; and Attorneys' Fees. (Exhibit 100, Complaint).

63. The principal shareholders of Nationwide, James Wallace and Jerome Chick, also intended to sell insurance products through the Future Flex program. (Exhibit 30, Deposition of Jerome Chick, p. 30, ll. 19-23.)

64. Plaintiff Impellizzeri asserted the following counts against defendant Wallace: Common Law Fraud, Negligent Misrepresentation, and Punitive Damages. (Exhibit 102, Amended Complaint).

65. Wallace was the President of Nationwide and was alleged to be the person responsible for hosting and speaking at seminars to market the Future Flex program. (Exhibit 118, August 8, 2000 Deposition of James Wallace, p. 44, ll. 8-18.) He allegedly was responsible for creating, marketing and selling the Future Flex program, and allegedly made numerous written material misrepresentations to Impellizzeri regarding the legality and effectiveness of the program. (Exhibit 100, paragraphs 20-22.)

66. Plaintiff Impellizzeri had alleged that defendant Wallace knew the "hallmarks of poorly designed trust" and knew that all of those hallmarks were present in the JDI Management

Trust created for Impellizzeri as part of the Future Flex program. (Exhibit 100, Complaint at paragraph 20).

67. Plaintiff Impellizzeri had asserted the following claims against defendant Jacob Lashlee: Negligence. (Exhibit 102, Amended Complaint).

68. Plaintiff Impellizzeri alleged that Jacob Lashlee created all of the trust documents associated with the Future Flex program. (Exhibit 100, Complaint at paragraph 23.)

69. Lashlee had held himself out to the parties to the underlying litigation to be an expert on the law of trusts. (Exhibit 124, Deposition of Bernard Strass, p. 29, l. 23 – p. 30, l. 1.)

70. Plaintiff Impellizzeri asserted the following claims against defendant James Sherriffs: Breach of Contract; Common Law Fraud; Professional Negligence – Accountant Liability; Breach of Fiduciary Duties and Breach of Trust; Negligent Misrepresentations; and Attorneys' Fees. (Exhibit 102, Amended Complaint).

71. Impellizzeri had alleged in the underlying lawsuit that James Sherriffs was a party in convincing Impellizzeri to purchase the Future Flex program. Once Impellizzeri had completed his review of the written materials regarding future Flex, including the endorsement letter written by Sherriffs, Impellizzeri asked Sloniger for a chance to talk to Jim Sherriffs. (Exhibit 25, Deposition of John Impellizzeri, p. 103, l. 24 – p. 105, l. 8).

72. Sherriffs had represented himself to be a certified public accountant; Sherriffs was not, in fact, a CPA. (Exhibit 100, Complaint at paragraph 30).

73. Sherriffs repeatedly told Impellizzeri to "trust me" and to rest assured that the Future Flex plan would substantially reduce or eliminate his self-employment tax, income tax and estate tax. (Exhibit 100, Complaint at paragraph 33.)

74. Impellizzeri relied upon defendant Sherriffs' purported expertise, both in the purchase of the Future Flex program and in the three years following the purchase of Future

Flex, during which time Sherriffs completed Impellizzeri's tax returns. (Exhibit 100, Complaint at paragraph 32).

75. Impellizzeri also relied upon Sherriffs in making the decision not to cancel his universal life insurance policy in June 1994. (Exhibit 25, Deposition of John Impellizzeri, p. 62, l. 7 – p. 63, l. 2.)

76. In his underlying complaint, Impellizzeri alleged that Sherriffs knew that the Future Flex program would not deliver the tax savings that he had been promised. (Exhibit 100, Complaint at paragraph 106).

77. At the time of his deposition in the underlying matter, James Sherriffs was being investigated by the federal government for fraudulent schemes involving misrepresentations about his status as a CPA. (Exhibit 119, July 22, 1998, Deposition of James Sherriffs, p. 76, l. 5 – p. 77, l. 11.)

78. Defendant Sherriffs did not undertake any independent review of the Future Flex program before drafting his endorsement letters. He relied exclusively upon Wallace's representations regarding alleged "attorney" involvement. He did not verify whether Jacob Lashlee was, in fact, an attorney. (Exhibit 120, June 13, 2000 Deposition of James D. Sherriffs p. 32, l. 24 – p. 34, l. 17.)

79. Sherriffs had told Impellizzeri that he had reviewed the program with the IRS, and that the IRS approved the plan. (Exhibit 120, June 13, 2000 Deposition of James D. Sherriffs, p. 63, l. 20 – p. 64, l. 9; p. 65, l. 5 – p. 66, l. 9.) However, he had never even seen a copy of the trust for which he allegedly received approval. (Id., p. 96, l. 20 – p. 97, l. 2.) He didn't show any Future Flex documents to the IRS. (Exhibit 121, August 11, 2000 Sherriffs Deposition, p. 23, ll. 15-19; p. 24, ll. 7-10.) He didn't tell the IRS how the income was going to

be characterized under the Future Flex scheme. (Exhibit 121, August 11, 2000 Sherriffs Deposition, p. 47, l. 21 – p. 48, l. 2.)

80. Sherriffs admitted deposition that many aspects of the plan were patently flawed and even "scary". (Exhibit 120, June 13, 2000 Deposition of James D. Sherriffs, p. 169, l. 20 – p. 170, l. 10; p. 171, ll. 2-16; p. 172, ll. 6-24; p. 173, ll. 10-25; p. 176, l. 17 – p. 177, l. 16; p. 178, ll. 2-13; p. 182, ll. 2-17; p. 205, ll. 4-14.)

81. Not long after Impellizzeri filed the underlying lawsuit, James Sherriffs filed for bankruptcy protection. (Exhibit 102, Amended Complaint).

82. Plaintiff Impellizzeri had asserted that defendants Nationwide, Wallace, Sherriffs and Lashlee all knew or had reason to know that the Future Flex plan would not deliver the promised tax savings to Impellizzeri. (Exhibit 102, Amended Complaint).

83. The defendants in the underlying litigation had served notice upon plaintiff Impellizzeri of two non-parties at fault: Gerald Chick and Bernard Strass, Esq. Gerald Chick was a shareholder in Nationwide Small Business Financial Consultants, LLC, and was the person responsible for the production of all written marketing materials regarding Future Flex. In addition, Gerald Chick was the person who delivered Impellizzeri's "Future Flex" package to him on April 19, 1994 and explained the program to him during that meeting. (Exhibit 51, Notice of Non-Party at Fault; and Exhibit 52, Supplement to Notice of Non-Party at Fault.)

84. Non-party at fault Bernard Strass was the attorney for Nationwide. He had created a document entitled "Certificate of Attorney Review and Authorization" and also participated in the formation of other marketing materials regarding Future Flex. (Exhibit 58). Strass' Certificate of Attorney Review was included in the promotional materials regarding Future Flex, but had been received by defendant Sloniger and plaintiff Impellizzeri. Both

Impellizzeri and Sloniger allegedly relied upon his expertise as an attorney regarding the validity of Future Flex. (Exhibit 52, Supplement to Notice of Non-Party at Fault.)

85. The defendants to the underlying litigation also had asserted affirmative defenses of comparative fault regarding Impellizzeri's own liability for causing certain of his damages. In addition, a jury could have apportioned some percentage of fault to Impellizzeri himself. (Exhibit 103, Defendant Sloniger's Answer to Amended Complaint).

86. The issue of Impellizzeri's claim for attorneys' fees against defendant Sloniger was pending ruling by Judge Fields. The only basis for the fees claim asserted in the underlying litigation was A.R.S. § 12-341.01, which provides that a prevailing party in a matter arising out of contract may seek fees; however, Impellizzeri's claims against defendant Sloniger did not "arise out of contract."

The Court finds that based on the state of the existing law on attorney fees, the risk to Sloniger was minimal. No reasonable defendant, as that term is defined in *Morris*, would have paid to settle the attorney fee claim in the underlying matter with his own funds.

The damages potentially caused by the Future Flex program included the cost of Future Flex ($895), amounts paid to attorneys or accountants to represent Impellizzeri in the IRS audit ($1,125) and any penalties assessed by the IRS following the audit. The IRS, however, evidently waived all penalties.

The court finds minimal risk to Sloniger of a reasonable jury award on reimbursement to Impellizzeri for the taxes he sought to avoid through Future Flex. Moreover, even if a jury were to award these sums to Impellizzeri, the evidence demonstrates that the amounts ultimately owed had been reduced from approximately $45,000 to $9,600. A reasonable defendant would not have paid more than a maximum of $9,600 to settle this claim.

Impellizzeri's claim for reimbursement of life insurance premiums was a claim for the difference between the premiums he had paid on his previously held term life policy, and the premiums he was paying on the more expensive universal life policy. Impellizzeri testified that he had been paying approximately $277 annually on his term life premiums, and paid $670 per month on his universal life premiums for himself a $1,015.00 total monthly.

The Court finds that there was a substantial risk that a jury, in the underlying litigation, might have awarded Impellizzeri the difference in those premiums. If successful, he might have been awarded up to $86,290.00 on this claim, with the risk of a possible allocation to Sloniger of 100% of this item.

The Court finds that a reasonable defendant, in deciding the value of the underlying litigation and assessing what amount should be offered to settle the underlying litigation, would have realized that Impellizzeri's attorney fee claim was not well taken.

A reasonable defendant in defendant Sloniger's position would have realized that his risk was that he could have been found liable for approximately between 10% to 50% of the legally cognizable damages in the underlying case, other than a possible 100% on the insurance premium claim.

Thus, the Court finds that the reasonable settlement value of the underlying claims against defendant Sloniger was $21,321 (50% of $42,620), and 100% of $86,290. This totals $107,611.

This Court had previously ruled that Sloniger's insurance policy only provides coverage for damages caused by acts after April 8, 1994.

Impellizzeri first learned of the Future Flex concept as early as September 1993. Defendant Sloniger first began marketing the Future Flex program to plaintiff Impellizzeri in January 1994. He continued to discuss the program with plaintiff Impellizzeri through March, 1994, when Impellizzeri purchased the Future Flex program, created the family trust associated

with the Future Flex program, and purchased the life insurance policy that had been marketed to him along with the Future Flex program.

Impellizzeri's claimed damages were not only caused by misrepresentations made by Sloniger before April 8, 1994 but also caused by Sloniger's misrepresentations made again after April 8, 1994, including, but not limited to:

A. The misrepresentations made by Sloniger during the April 19, 1994 meeting;

B. The misrepresentations made by Sloniger during the April 27, 1994 meeting; and

C. The misrepresentations made by Sloniger during the June 1994 meeting.

Therefore, the Court finds that the entire judgment in this matter is covered under the subject "Life Insurance Agents Errors and Omissions" liability insurance policy issued by Defendant and covering Sloniger.

In summary, the Court finds that the reasonable settlement value is $107,611.00 calculated by totaling the reasonable maximum risk exposure of: $86,290 for insurance premiums, $31,000 pre-judgment interest, $1,125 costs of accountant, $9,600 taxes and $895 for Future Flex cost, and nothing for attorney fees. This assumes the reasonable risk of up to 50% allocation to Sloniger on all items except insurance premiums; and, up to 100% on insurance premiums.