

# DIGEST OF INSURANCE LAW

## ARIZONA

Courtesy of  
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### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

Justice Courts. A.R.S. §22-201. Have exclusive original jurisdiction in civil actions where demand is \$10,000 or less. Have concurrent jurisdiction with Superior Court in cases of forcible entry and detainer when amount involved is \$10,000 or less. Have jurisdiction to try the right of possession of real property so long as title or ownership is not in question.

Small Claims Division. A.R.S. §22-503 *et seq.* Small Claims Division of Justice Court has concurrent original jurisdiction with Justice Courts in civil actions where demand is not greater than \$2500. Small Claims Division does not have jurisdiction in actions claiming or involving defamation, forcible entry and detainer, specific performance, class actions, prejudgment remedies, injunctive relief, traffic violations and other criminal matters or actions against the state. Actions may be transferred to Justice Court by request of any party at least 10 days before hearing.

Superior Courts. A.R.S. §12-123. Superior Courts have original jurisdiction in all other matters. Superior Courts also have concurrent jurisdiction with justices of the peace for misdemeanors where the penalty does not exceed a fine of \$1,000 or imprisonment for six months.

#### Appellate Courts

Superior Courts. A.R.S. §12-124. Superior Courts have appellate jurisdiction in all actions appealed from Justice Courts, inferior courts, boards and officers from which appeals may be taken.

Court of Appeals. A.R.S. §12-120, §12-120.01, §12-120.21. Has jurisdiction to issue injunctions and writs necessary to exercise appellate jurisdiction, and appellate jurisdiction in all actions and proceedings appealed from Superior Court except criminal actions involving crimes for which sentence of death has actually been imposed. Two divisions: Division One has sixteen judges, comprised of presiding judge and five departments of three judges each; Division Two has six judges,

comprised of two departments of three judges each. Judges serve for a term of six years.

Supreme Court. Ariz. Const. Art. 6 §5. A.R.S. §§12-101, 12-120.21 and 12-120.24. Appellate jurisdiction is discretionary in all civil and criminal cases except when life sentence or death is imposed. The Supreme Court consists of five justices, each serving a six-year term.

### LAW

#### Abbreviations

A.R.S. – Arizona Revised Statutes.  
Ariz. – Arizona Reports.  
Ariz. Adv. Rep. – Arizona Advance Reports.  
Ariz. App. – Arizona Appeals Reports.  
F. – Federal Reporter, First Series.  
F. Supp. – Federal Supplement.  
F.2d – Federal Reporter, Second Series.  
F.3d – Federal Reporter, Third Series.  
P. – Pacific Reporter.  
P.2d – Pacific Reporter, Second Series.  
P.3d – Pacific Reporter, Third Series.

### ACCIDENT AND HEALTH INSURANCE

Accidental bodily injury within health and accident policy implies some degree of physical force, no matter how slight. Heart attack suffered by insured was “accidental bodily injury” within health and accident policy, rather than disease, when caused by insured’s exertion in connection with his job. *Central Nat’l Life v. Peterson*, 23 Ariz. App. 4, 529 P.2d 1213 (1975).

Accidental Means. Arizona does not distinguish between accidental means and accidental results. *Knight v. Metropolitan Life*, 103 Ariz. 100, 437 P.2d 416 (1986). Where neither alcohol nor barbiturates alone would have been fatal, and insured did not intend self-injury or know or have reason to know of danger, injury was accidental within accident policy. *Malanga v. Royal Indem.*, 101 Ariz. 588, 422 P.2d 704 (1967). Experienced diver who



dove from high dam died “accidentally” within accident policy. *Knight, Supra*. Death from alcohol and drugs is injury from external, violent and accidental means. *United Am. Life v. Beadel*, 13 Ariz. App. 196, 475 P.2d 288 (1970). Death of insured under life insurance policy was not accidental when insured created situation causing his death by raping woman who killed him in self-defense. *Valley Dental v. Great-West Life*, 173 Ariz. 327, 842 P.2d 1340 (1992).

**Cancellation.** Insurance contract can only be cancelled pursuant to its terms or by mutual consent and “substitution” standing alone does not effect cancellation of original policy contract. Though mutual consent to cancel may be expressed or implied from circumstances, and may include fact of substitution, such presupposes some communication from insured to mind of insurer. *Northern Ins. v. Mabry*, 4 Ariz. App. 217, 419 P.2d 347 (1966).

**Disease.** Recovery permitted where accident caused diseased condition, *Dickerson v. Hartford Acc. & Indem.*, 56 Ariz. 70, 105 P.2d 517 (1940), or when disease has no causal connection with death. *Greber v. New York Life*, 61 Ariz. 341, 149 P.2d 671 (1944).

**Exclusion** may deny recovery even if disease is only indirect cause and not proximate cause. *Huff v. Aetna Life*, 120 Ariz. 548, 587 P.2d 267 (App. 1978).

When insured suffered from heart condition and, except for such condition, fatal heart attack would not have occurred when he engaged in strenuous activity, death was “directly or indirectly caused or contributed to by disease or natural causes” within exclusion of accident policy, and insurer was not liable upon death of insured. *Watkins v. Underwriters at Lloyds*, 107 Ariz. 56, 481 P.2d 849 (1971). *But see Central Nat’l Life v. Peterson*, 23 Ariz. App. 4, 529 P.2d 1213 (1975).

**Notice and Proof of Loss.** Insurance policy limitation clause, notice of loss clause, proof of loss clause and cooperation clause, will be enforceable despite their adhesive nature unless it is inequitable to enforce them; where conditions do no more than provide trap for unwary, insurer will be estopped to raise them. *Zuckerman v. Transamerica*, 133 Ariz. 139, 650 P.2d 441 (1982). Prejudice determines whether insurer may assert limitations period in policy or is estopped from asserting it. *Nangle v. Farmers Ins. Co. of Ariz.*, 205 Ariz. 517, 73 P.3d 1252 (App. 2003).

## ACCIDENTAL MEANS

See “ACCIDENT AND HEALTH INSURANCE.”

## ADJUSTERS

**Adjuster.** Any person who holds oneself out to perform, or for compensation, fee or commission, adjusts, investigates or negotiates settlement of claims arising under insurance contracts. Excludes lawyers licensed in Arizona, salaried employee of insurer or managing general agent, licensed insurance producer who adjusts or assists on policies procured through agent’s principal or broker, employee of political subdivision who adjusts or assists on losses arising under policies covering political subdivision, and independent contractor for sole purpose of providing technical assistance in connection with claim. A.R.S. §20-321.

**License and Regulation.** License applicant must be 18 or more years and resident of Arizona or of other state permitting Arizona residents to act as adjuster in that state. Must pass exam testing knowledge of insurance and legal responsibilities of adjuster. Must maintain office in Arizona. Firm or corporation may obtain license if each person so acting in firm is qualified for individual license. Out-of-state licensee may be sent into Arizona by insurer to handle single loss, or series of losses arising from common catastrophe. A.R.S. §20-321.01.

## AGE

See “ADJUSTERS”; “AGENTS AND BROKERS”; “AUTOMOBILES”; “LIABILITY INSURANCE”; “NEG-LIGENCE.”

**Age of majority** as used in reference to age of persons means the age of eighteen years or more. A.R.S. §1-215 (19). Minor means a person under the age of eighteen years. A.R.S. §1-215 (22). A minor not less than fifteen years of age shall, notwithstanding his minority, be deemed competent to exercise all rights and powers with respect to any contract of life or disability insurance on his own life or body, for his own benefit or for benefit of parent, spouse, child, sibling or grandparent. A.R.S. §20-1106 (B). If person entitled to bring action is, at time cause of action accrues, under eighteen years of age, period of such minority shall not be deemed a portion of period limited for commencement of action. A.R.S. §12-502, §12-528.

Misrepresentation of applicant’s true age does not prevent recovery unless insurer shows: 1) fraudulence; 2) material to acceptance of risk or to hazard assumed by insurer; and 3) insurer would not have issued policy, or would have insured in a lesser amount, or would have excluded hazard resulting in loss. A.R.S. §20-1109.

## AGENTS AND BROKERS

Effective January 1, 2002, statutory definitions for agents, brokers, managing general agents and service representatives (A.R.S. §20-281, *et seq.*) were extensively rewritten. See Insurance Producer Licensing Act, 2001 Ariz. Legis. Serv. 205 (West). Agents and brokers are now designated as "Insurance Producers." Some service representatives are exempt from licensing requirements.

**Insurance Producer Defined.** Individual, or business entity, required by law to be licensed under A.R.S. §20-281, to sell, solicit applications, or to negotiate insurance. Insurance producer may qualify for license in one or more lines of authority, including: Life, Accident and Health, Property, Casualty, Valuable Life/Annuity, Personal Lines, or Credit.

To be eligible for license as Insurance Producer under A.R.S. §20-285 (B), individual shall: 1) Be at least eighteen years of age; 2) Have not committed any act that is grounds for denial, suspension or revocation prescribed in §20-295; 3) Pay fees prescribed in §20-167; 4) Pass examinations for lines of authority for which individual has applied.

Under A.R.S. §20-295, Insurance Provider's license is subject to denial, suspension or revocation for any of the following: 1) Providing incorrect, misleading, incomplete or materially untrue information in license application; 2) Violating any provision of this title or any rule, subpoena or order of director; 3) Obtaining or attempting to obtain license through misrepresentation or fraud; 4) Improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business; 5) Intentionally misrepresenting terms of actual or proposed insurance contract or application for insurance; 6) Having been convicted of a felony; 7) Having admitted or been found to have committed any insurance unfair trade practice or fraud; 8) Using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial responsibility in conduct of business in this state or elsewhere; 9) Having insurance producer license or its equivalent, denied, suspended or revoked in any other state, province, district or territory; 10) Forging another's name to any document related to insurance transaction; 11) Aiding or assisting any person in unauthorized transaction of insurance business; 12) Violating §41-624, subsection B or C; 13) Violating §6-1410, 6-1412 or 6-1413; 14) Using the license principally to procure insurance that covers the life, property or insurable interests, other than an interest that is being sold under a contract or that is securing a loan, of any of the following: (a) individual; (b) members of individual's family or relatives to the second degree; (c) individual's employer;

(d) individual's employees; (e) a firm, corporation, or its employees, in which individual owns a substantial interest.

**Managing General Agent Defined.** Any person, firm, association or corporation that negotiates and binds ceding reinsurance contracts on behalf of insurer or manages insurance business of insurer, that acts as insurance producer for insurer and that produces and underwrites amount of gross direct written premium at least five percent of policyholder surplus, and that either engages in adjustment or payment of claims or negotiates reinsurance on behalf of insurer. Managing general agent does not include employees of insurer, or U.S. Manager of U.S. branch of alien insurer. Attorneys, underwriting managers and reinsurance intermediary brokers/managers (as defined in A.R.S. §20-486) are exempted in specified situations. A.R.S. §20-311.

Insurance agent owes duty to insured to exercise reasonable care, skill, and diligence in carrying out agent's duties in procuring insurance. *Darner Motor Sales v. Universal Underwriters*, 140 Ariz. 383, 682 P.2d 388 (1984). This may include duty to offer or recommend specific coverage if doing so is standard of profession. *Southwest Auto Painting v. Binsfeld*, 183 Ariz. 444, 904 P.2d 1268 (App. 1995). Negligence claims against insurance agent are assignable. *Webb v. Gittlen*, 217 Ariz. 363, 174 P.3d 275 (2008).

**Limitations on Agency.** Insured is entitled to rely upon representations of agent, and limitations on agent's authority are ineffective unless agent or insurer discloses them. *USF&G v. Stewart's Downtown Motors*, 336 F.2d 549 (9<sup>th</sup> Cir. 1964). Absent evidence insured was induced, insured's unfounded belief that alleged agent was insurer's agent is insufficient to bind insurer. *Gulf v. Grisham*, 126 Ariz. 123, 613 P.2d 283 (1980).

**Conflict of interest between indemnitor and indemnitee** does not invalidate the latter's tender of defense. *Bridgestone/Firestone N.A. Tire, L.L.C. v. A.P.S. Rent-A-Car & Leasing, Inc.*, 207 Ariz. 502, 88 P.3d 572 (App. 2004).

**Unauthorized Acts of Agent.** Insurance company's liability for agent's tortious conduct depends upon whether insurer had right to direct agent concerning his conduct at time of tort and whether agent was acting within scope of actual or apparent authority or employment. *A.I.D. Ins. Svcs. v. Riley*, 25 Ariz. App. 132, 541 P.2d 595 (1975).

Even if independent insurance broker committed unauthorized act, insurance company ratified his conduct by accepting application for insurance. *Sparks v. Republic Nat'l Life*, 132 Ariz. 529, 647 P.2d 1127 (1982).



Liabilities. Contract of agent to provide insurance gives rise to liability for breach of contract damages if he fails to do so. *Oney v. Barnes*, 5 Ariz. App. 460, 428 P.2d 124 (1967).

Knowledge of, and notice to, agents imputed to insurer. *Chicago Fire & Marine v. Sharpsteen*, 37 Ariz. 132, 289 P. 985 (1930).

Insurer is bound by incorrect answer entered in application for policy by or at direction of its agent or pursuant to agent's suggestion, advice, or interpretation of question following disclosure of true facts by applicant who acts in good faith. *Central Nat'l Life v. Peterson*, 23 Ariz. App. 4, 529 P.2d 1213 (1975). Insurance agent did not owe non-client taxicab passenger any duty that was breached when agent allegedly failed to procure mandatory uninsured motorist (UM) insurance on cab for cab owner. *Napier v. Bertram*, 191 Ariz. 238, 954 P.2d 1389 (1998).

Parol Evidence. When application for life insurance was made and application stated that insurance took effect only if and when application was approved and first premium was paid while proposed insured was in good health, insurance agent could not vary terms of written application by oral representations that coverage would be in effect as of date proposed insured passed physical examination. *Pawelczyk v. Allied Life*, 120 Ariz. 48, 583 P.2d 1368 (App. 1978). Parol evidence is admissible to show reasonable expectations of insured, particularly regarding standardized non-negotiated terms. *Darner Motor Sales v. Universal Underwriters*, 140 Ariz. 383, 682 P.2d 388 (1984).

## ARBITRATION

Uniform Arbitration Act adopted at A.R.S. §§12-1501 to 12-1518.

Generally. Written agreement to submit any existing controversy to arbitration or provision in written contract to submit to arbitration is valid, enforceable, and irrevocable, A.R.S. §12-1501, except where agreement to arbitrate, not contract, was fraudulently induced. *Smith v. Logan*, 166 Ariz. 1, 799 P.2d 1378 (App. 1990). Enforceability of arbitration agreements is determined by principles of general contract law. *Broemmer v. Abortion Svcs.*, 173 Ariz. 148, 840 P.2d 1013 (1992). An arbitration clause in a commercial contract is not procedurally unconscionable, nor does its presence violate the reasonable expectation test. *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 119 P.3d 1044 (App. 2005) (arbitration clause in same font and size as other contractual provisions held to be valid). Public policy of Arizona favors arbitration; arbitration clauses are construed liberally and any doubts as to whether matter is subject to

arbitration is resolved in favor of arbitration. *City of Cottonwood v. Fann Contracting*, 179 Ariz. 185, 877 P.2d 284 (App. 1994).

Proceedings. On application of party showing agreement to arbitrate, court shall so order unless other party denies agreement, in which case court shall proceed summarily to determination of issue raised. A.R.S. §12-1502 (A). Parties may object on basis of unreasonable delay causing prejudice, *City of Cottonwood v. Fann Contracting*, 179 Ariz. 185, 877 P.2d 284 (App. 1994); waiver, *Matter of Noel R. Shahan Irrevocable and Inter Vivos Trust*, 188 Ariz. 74, 932 P.2d 1345 (App. 1996); or fraudulent inducement. *Smith v. Logan*, 166 Ariz. 1, 799 P.2d 1378 (App. 1990). Parties may make distinction in arbitration agreement between issues subject to arbitration and issues for court to decide. *Id.*

For tort claim to be characterized as "arising out of or related to subject matter of parties' contract," such that it is subject to contractual arbitration provision, claim must raise some issue requiring reference to or construction of some portion of contract itself; relationship between claim and contract not satisfied simply because claim would not have arisen absent existence of contract, but is satisfied if contract places parties in unique relationship that creates new duties not otherwise imposed by law. *Dusold v. Porta-John Corp.*, 167 Ariz. 358, 807 P.2d 526 (App. 1990).

Stay of Arbitration. On application, court may stay arbitration proceeding commenced or threatened on showing that there is no agreement to arbitrate. A.R.S. §12-1502 (B).

Stay of Court Proceeding. Any action or proceeding involving issue subject to arbitration shall be stayed if application for arbitration made or order for arbitration issued. A.R.S. §12-1502 (D). Where action involved multiple inseparable claims, only some of which were arbitrable, court action had to be stayed pending arbitration; court could not refuse to enforce arbitration agreement. *Hallmark v. First Systech*, 203 Ariz. 243, 52 P.3d 812 (App. 2002).

Attorneys' Fees. Prevailing party in arbitration of contract dispute may recover attorneys' fees only if specifically provided for in parties' agreement. *Canon Sch. Dist. v. W.E.S. Constr.*, 180 Ariz. 148, 882 P.2d 1274 (1994). Courts may award attorney's fees in confirmation action. *Id.*

Compulsory Arbitration. Each county is required to establish its own jurisdictional limits not to exceed sixty-five thousand dollars (\$65,000). Non-binding arbitration is required in all cases in which court concludes, or parties agree, that amount in controversy does not exceed limit. Limit in Maricopa County is fifty thousand dollars



(\$50,000). Limit in Pima County was raised from thirty thousand dollars (\$30,000) to fifty thousand dollars (\$50,000) for cases filed after January 1, 2002. Court may waive requirement on showing of good cause if all parties file written stipulation of waiver. Arbitration award is appealable to Superior Court, by filing demand for trial de novo on law and fact. Upon appeal, at the time of filing the demand for trial de novo, and as a condition of filing, the appellant shall deposit a sum equal to the total compensation of the arbitrators, but not exceeding ten percent of the amount in controversy, which sum shall be deposited with the county. The deposit shall be refunded to the appellant if the judgment on the trial de novo is at least twenty-three percent more favorable than the monetary relief or other type of relief granted by the arbitration award. If the judgment on trial de novo is not at least twenty-three percent more favorable than the monetary relief or other type of relief granted by the arbitration award, the court shall order that the deposit be used to pay the county, the appellee for attorney's fees, or expert witness fees. A.R.S. §12-133.

### ASSIGNMENT

Generally. Action must be brought in name of assignee, who is "real party in interest." *Cruz v. Lusk Collection*, 119 Ariz. 356, 580 P.2d 1210 (App. 1978).

Necessity of Consent. Policy is, in its nature, personal agreement insuring not property but owner, and hence cannot be changed after issuance by substituting one who later purchases property for insured named in policy, except upon insurer's consent. *National Union Fire v. Epstein*, 48 Ariz. 345, 61 P.2d 1010 (1936).

Transferability. Holder of insurance policy may assign to another money to become due under terms of insurance contract, whether by dividend or otherwise. *Commercial Life v. Wright*, 64 Ariz. 129, 166 P.2d 943 (1946). However, an agreement to share any insurance benefits relating to death violates the rule against assignment of wrongful death claims and is unenforceable. *Lingel v. Olbin*, 198 Ariz. 249, 8 P.3d 1163 (App. 2000).

Claim by insured against his insurer for failure to defend is assignable to injured party. *Damron v. Sledge*, 105 Ariz. 151, 460 P.2d 997 (1969).

Breach of duty to defend permits insured to settle with claimant, without breaching cooperation clause. *Damron v. Sledge*, 105 Ariz. 151, 460 P.2d 997 (1969). A *Damron* agreement is a settlement agreement in which an insured defendant, in response to her insurer's refusal to defend her, admits to liability and assigns to the plaintiff her rights against the insurer, including actions for bad faith, in exchange for a promise by the plaintiff not to execute the judgment against the insured. *Safeway*

*Ins. Co. v. Guerrero*, 210 Ariz. 5, 106 P.3d 1020 (2005). Insured being defended under reservation of rights may settle with claimant; insurer may contest liability only on issues as to which there was conflict between insurer and insured. Insurer may contest coverage, whether settlement was fraudulent or collusive, and whether settlement was "reasonable and prudent." *United Service v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987). A *Morris* agreement is a settlement agreement in which the insured admits to liability and assigns to a plaintiff her rights against her insurer, including actions for bad faith, in exchange for a promise by the plaintiff not to execute the judgment against the insured. *Safeway, supra. Morris* agreements are designed to reconcile the conflicting interests of the insured and the insurer where an insurer defends the insured but reserves the right to dispute whether the claim is covered under the policy. *Id.* Insurer entitled to contest damages for reasonableness, and insured or claimant must prove damages to be reasonable amount by preponderance of evidence. *Himes v. Safeway*, 205 Ariz. 31, 66 P.3d 74 (App. 2003). Insurer of driver was entitled to reasonableness hearing concerning default agreement, between driver and injured passengers, and resulting judgment against driver, even if insurer had breached its duty to treat settlement offers with equal consideration. *Waddell v. Titan Ins. Co., Inc.*, 207 Ariz. 529, 88 P.3d 1141 (App. 2004).

When evaluating *Morris* settlement for reasonableness, superior court should apply same criteria that must be applied by insurer under its implied contractual covenant of good faith and fair dealing when evaluating settlement proposal in absence of reservation of right, including facts bearing on liability and damages aspects of claimant's case, as well as risks of going to trial. *Parking Concepts, Inc. v. Tenney*, 207 Ariz. 19, 83 P.3d 19 (2004). Courts should evaluate reasonableness of *Morris* settlements without regard to potential uninsured consequences of judgment to insured; insured has burden to prove reasonableness. *Id.* When settling parties have utilized a default agreement and insurer is entitled to test reasonableness of the settlement, the *Morris* test of reasonableness is to be applied to resulting judgment, not simply the default itself. *Waddell v. Titan Ins. Co., Inc.*, 207 Ariz. 529, 88 P.3d 1141 (App. 2004). Insurers are not liable for any part of an unreasonable *Morris* agreement. *Safeway Ins. Co., Inc. v. Guerrero*, 210 Ariz. 5, 106 P.3d 1020 (2005). It is within discretion of trial court to try damages and reasonableness of those damages under *Morris* together. *Waddell, supra.* If bad faith is not established, the *Morris* agreement will be a breach of cooperation clause and insurer will be excused from any duty to pay stipulated judgment, no matter how reasonable the amount. *Safeway, supra.*

Policy not sole property of wife when originally purchased by husband and transferred to wife for tax purposes; policy considered community property with wife being one half owner. *Moser v. Moser*, 117 Ariz. 312, 572 P.2d 446 (App. 1977).

Absent assignment of claims judgment-creditor may not bring direct action against judgment-debtor's liability insurer for bad faith refusal to settle personal injury claim. *Page v. Allstate*, 126 Ariz. 258, 614 P.2d 339 (App. 1980).

## ATTORNEYS

Appointment and Authority. Attorney-client relationship does not require payment of fee, but may be implied from parties' conduct; relationship is proved by showing parties sought and received advice and assistance from attorney in matters pertinent to legal profession. *Matter of Petrie*, 154 Ariz. 295, 742 P.2d 796 (1987). Express agreement is not prerequisite to formation of attorney-client relationship. *Paradigm v. Langerman*, 200 Ariz. 146, 24 P.3d 593 (2001).

Attorney is not client's general agent and has no authority merely by virtue of retention in litigation to impair client's substantial rights or cause of action without client's consent. *Hays v. Fischer*, 161 Ariz. 159, 777 P.2d 222 (App. 1989).

Common-law agency principles hold that attorney, by virtue of attorney-client relationship, has implied authority to perform acts incident or necessary to purpose for which attorney was retained, including day-to-day tactical decisions involved in litigation process. *Wyatt v. Wehmuller*, 167 Ariz. 281, 806 P.2d 870 (1991).

However, client is not bound by lawyer's unauthorized actions when actions impair and affect substantial rights. *Garn v. Garn*, 155 Ariz. 156, 745 P.2d 604 (App. 1987).

Attorneys must appear in court on behalf of corporation. *Ramada v. Lane & Bird Advertising*, 102 Ariz. 127, 426 P.2d 395 (1967). If corporation appears without a lawyer, its action is not automatically a nullity, and reasonable opportunity to cure must be given. *Id.*; *Boydston v. Strole*, 193 Ariz. 47, 969 P.2d 653 (1998).

Legal Malpractice. Actions for legal malpractice are tort claims subject to two-year statute of limitations for personal injuries. *Long v. Buckley*, 129 Ariz. 141, 629 P.2d 557 (App. 1981). Cause of action for legal malpractice accrues when plaintiff knew or reasonably should have known of defendant's negligent conduct and when plaintiff sustained damages. Legal malpractice injury not ascertainable until appellate process is complete or is waived by failure to appeal. *Amfac v. Miller*,

138 Ariz. 152, 673 P.2d 792 (1983). *But see Arizona Mgmt. v. Kallof*, 142 Ariz. 64, 688 P.2d 710 (App. 1984). Legal malpractice cause of action cannot be assigned. *Kiley v. Jennings*, 187 Ariz. 136, 927 P.2d 796 (App. 1996). Cause of action usually consists of both tort and breach of contract. *Towns v. Frey*, 149 Ariz. 599, 721 P.2d 147 (App. 1986). Breach of contract claim limited to nonperformance of specific promise contained in parties' agreement. *Collins v. Miller & Miller*, 189 Ariz. 387, 943 P.2d 747 (1996). Legal malpractice claim accrues when plaintiff knows or reasonably should know of attorney's negligent conduct, and plaintiff's damages are ascertainable, and not speculative or contingent. When legal malpractice action arises in non-litigation context, cause of action accrues when plaintiff knew or should have known that attorney had provided negligent legal advice, and that attorney's negligence was direct cause of harm to plaintiff, notwithstanding fact that plaintiff's damages may not have been fully ascertainable at that time; harm is irremediable or irrevocable at that point and will not be avoided by future appeal or other court proceeding. *Glaze v. Larsen*, 207 Ariz. 26, 83 P.3d 26 (2004).

Conflict of Interest. Attorney who represents insured owes him undeviating allegiance and cannot act as agent of insurance company by supplying information detrimental to insured. *Farmers v. Vagnozzi*, 138 Ariz. 443, 675 P.2d 703 (1983).

When insurer assigns attorney to represent insured, attorney has duty to insurer arising from understanding that attorney's services are ordinarily intended to benefit both insurer and insured. *Paradigm v. Langerman*, 200 Ariz. 146, 24 P.3d 593 (2001).

Attorneys Fees. Action involving insurer's bad faith failure to pay valid claim is action "arising out of contract" within meaning of A.R.S. §12-341.01, statute authorizing court in its discretion, to award prevailing party reasonable attorneys' fees in any contested action arising out of contract. *Sparks v. Republic Nat'l Life*, 132 Ariz. 529, 647 P.2d 1127 (1982). Computerized legal research costs may be recovered as element of statutory attorneys fees award. *AME v. Azstar*, 189 Ariz. 27, 938 P.2d 76 (App. 1996).

## AUTOMOBILES

See Law Digest Tables. See also "NEGLIGENCE."

Age. No person under 18 shall be issued driver's license except department may issue: a) restricted instruction permit for Class D or G license to a person who is at least fifteen years of age; b) instruction permit for a Class D, G or M license, as provided by statute, to a person who is at least fifteen years and six months of age; c)



Class G or M license as provided by this chapter to person who is at least sixteen years of age. A.R.S. §28-3153. Parent or guardian of applicant under the age of eighteen must sign and verify application for instruction permit, Class G or M driver's license or endorsement to Class G or M driver's license. Person who signs application is jointly and severally liable with minor for damage caused by minor's negligence or willful misconduct. A.R.S. §28-3160.

Licensed passenger has duty to supervise driver with learner's permit. *Boomer v. Frank*, 196 Ariz. 55, 993 P.2d 456 (App. 1999).

Comparative Negligence. Arizona has adopted, with limited changes, Uniform Contribution Among Tortfeasors Act. A.R.S. §§12-2501 to 12-2509. Act recognizes right to contribution between two or more persons who are jointly or severally liable in tort for same injury or wrongful death. A.R.S. §12-2501. Relative degrees of fault of claimant and all defendants and non-parties shall be determined and apportioned as a whole at one time by trier of fact. A.R.S. §12-2506.

Contributory Negligence. Defense of contributory negligence or assumption of risk is always fact question for jury. If either defense applied, claimant's action is not barred, but damages are reduced in proportion to relative degree of claimant's fault. There is no right to comparative negligence in favor of any claimant who has intentionally, wilfully or wantonly caused or contributed to the injury or wrongful death. A.R.S. §12-2505.

Compulsory Insurance Coverage. Every motor vehicle operated in Arizona shall be covered by either: 1) liability policy; 2) alternate method of coverage (i.e. certificate of insurance, or certificate of deposit or cash); or 3) certificate of self-insurance. A.R.S. §28-4135. Minimum liability policy for single accident is as follows: Injury to one person, \$15,000; Injury to two or more persons, \$30,000; Property Damage, \$10,000. A.R.S. §28-4009.

A person in Arizona has the right to choose any repair facility for repair of motor vehicle loss. A.R.S. §20-468. Unless otherwise prescribed by contract, a person in Arizona has the right to choose any glass repair facility for repair of motor vehicle glass. A.R.S. §20-469.

Alcohol. A.R.S. §28-1381 provides that it is unlawful and punishable for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle, or to have blood alcohol content of 0.08 percent or more within two hours of driving or having actual physical control of vehicle. Person is driving under the influence of intoxicants if person's control of vehicle is impaired to the slightest degree.

Under the influence is presumed if 0.08 percent or more by weight of alcohol in defendant's blood.

Extreme Driving under the Influence. It is unlawful for person to drive or be in actual physical control of vehicle in Arizona if person has alcohol concentration of 0.15 or more, within two hours of driving or being in actual physical control of vehicle. A.R.S. §28-1382.

On application pursuant to A.R.S. §28-1401, the department may issue a special ignition interlock restricted driver license that only allows a person whose class D or class G license has been suspended or revoked for a first offense of driving under the influence to operate a motor vehicle that is equipped with a functioning certified ignition interlock device and only to the person's place of employment, place of education, probation officer, a certified ignition interlock device service facility, or health center. A.R.S. §28-1402.

Damages. Proper measure of damages is to compensate plaintiff for losses incurred and to place injured person as nearly as possible in condition he would have occupied had wrong not occurred. When defendant's negligence causes injury to plaintiff, defendant is liable for resulting damage even though plaintiff had pre-existing condition making him more susceptible to injury or making consequences more severe. *Jordan v. Atchison, Topeka & Santa Fe Ry. Co.*, 934 F.2d 225 (9<sup>th</sup> Cir. 1991).

Punitive damages are permitted for purpose of punishing conduct which occurred or deterring similar conduct in future. *Cassel v. Schacht*, 140 Ariz. 495, 683 P.2d 294 (1984). Auto insurer and insured may expressly exclude coverage for punitive damages. *Id.*

When passenger exited vehicle and was standing two or three feet from rear of vehicle waiting to help driver put tire chains on rear tire, she was upon vehicle within meaning of policy provision and was covered. *Manning v. Summit Home*, 128 Ariz. 79, 623 P.2d 1235 (App. 1980); *Tobel v. Travelers*, 195 Ariz. 363, 988 P.2d 148 (App. 1999) (employee covered although removing barricades several feet away from vehicle).

Family Purpose Doctrine. Family purpose doctrine is exception to general principal that one who permits another to use his automobile does not thereby become liable for person's negligence in absence of agency or employment relationship. *Brown v. Stogsdill*, 140 Ariz. 485, 682 P.2d 1152 (App. 1984). Doctrine imposes liability on head of family where vehicle is used by family member for family purposes. *Country Mut. Ins. v. Hartley*, 204 Ariz. 596, 65 P.3d 977 (App. 2003). A.R.S. §28-3160, the statute stating that negligence of minor's operation of automobile cannot be imputed to minor's parent or guardian if proof of financial responsibility is

maintained, does not abrogate or limit liability arising under family purpose doctrine. *Id.*

For doctrine to apply, there must be a family unit, injury-causing motor vehicle must have been furnished by head of family to member of family, and vehicle must have been used on occasion by member with consent of head of family for family purpose. *Platt v. Gould*, 26 Ariz. App. 315, 548 P.2d 28 (1976). Punitive damages are not recoverable against parental providers of family car under family purpose doctrine. *Jacobson v. Superior Ct.*, 154 Ariz. 430, 743 P.2d 410 (App. 1987).

Guest. Arizona has no guest statute. *Gordon v. Kramer*, 124 Ariz. 442, 604 P.2d 1153 (App. 1979). Evidence warranted verdict for defendant motorist sued by injured passenger. *Yoo Thun Lim v. Crespin*, 100 Ariz. 80, 411 P.2d 809 (1966).

Imputed Contributory Negligence. Doctrine of imputed contributory negligence is abandoned in automobile negligence actions. Mere presence of owner in his automobile while driven by another person creates no presumption of master-servant relationship or joint enterprise. Thus, owner/passenger is not precluded by driver's negligence from suing any party at fault. *Reed v. Hinderland*, 135 Ariz. 213, 660 P.2d 464 (1983). Doctrine of imputed spousal negligence has been abolished. *Gibson v. Boyle*, 139 Ariz. 512, 679 P.2d 535 (App. 1983). Negligence of agent or other representative, however, is imputable to principal, such as master/servant. *Reed v. Hinderland*, 135 Ariz. 213, 660 P.2d 464 (1983).

Last Clear Chance. Last clear chance doctrine was effectively abrogated by passage of Uniform Contribution Among Tortfeasors Act. *Dykeman v. Engelbrecht*, 166 Ariz. 398, 803 P.2d 119 (App. 1990).

Negligent Entrustment. There is no liability for negligent entrustment when employee's use of employer's vehicle at time of accident was unauthorized. *Davis v. Vumore Cable Co.*, 14 Ariz. App. 411, 484 P.2d 23 (1971). When automobile owner loans vehicle to another who owner knows to be incompetent to drive, owner is jointly liable for negligence if driver negligently injures another. *Powell v. Langford*, 58 Ariz. 281, 119 P.2d 230 (1941).

Mopeds are covered by A.R.S. §28-2513. No certificate of title is required; may be operated by any person with valid driver's license; and are restricted from areas designated for use by non-motorized bicycles.

Seat Belts. Each front seat occupant of vehicle manufactured after 1972 must wear lap or combination lap and shoulder belt while vehicle in motion. Operator of a motor vehicle shall require each passenger under sixteen years of age to wear lap or combination lap and

shoulder belt while vehicle is in motion. A.R.S. §28-909. Any occupant may be found comparatively negligent if defendant shows injuries avoided or lessened if available seat belt had been worn. *Law v. Superior Ct.*, 157 Ariz. 142, 755 P.2d 1130 (App. 1986).

Service of Process on Nonresident Motorists. Nonresident's acceptance of rights and privileges generally afforded resident is deemed to constitute appointment of assistant director of motor vehicle division as nonresident's attorney for receipt of process. A.R.S. §28-2326.

Municipal Liability. City has duty to keep its streets reasonably safe for travel. *City of Phoenix v. Clem*, 28 Ariz. 315, 237 P. 168 (1925). This duty extends to removing obstructions and hazards. *Coburn v. City of Tucson*, 143 Ariz. 50, 691 P.2d 1078 (1984). However, as matter of law, city did not breach duty by failing to maintain unobstructed visibility at intersection. *Id.* Driving not discretionary governmental function that must be shielded by immunity for government to function effectively. *Chamberlain v. Mathis*, 151 Ariz. 551, 729 P.2d 905 (1986).

Ownership/Title. Certificate of title itself is not notice to purchasers and creditors of status of title to automobile, in view of comprehensive system to title and register motor vehicles. *Wallace Imports v. Howe*, 138 Ariz. 217, 673 P.2d 961 (App. 1983). A.R.S. §28-2051 *et seq.*

Pedestrians. Pedestrian's right to be in crosswalk at intersection was superior to motorist's rights, and pedestrian could not have been negligent in placing herself there. *Brooks v. De La Cruz*, 12 Ariz. App. 591, 473 P.2d 793 (1970). Motorist is entitled to assume that pedestrian, standing in place of comparative safety and apparently seeing approaching automobile, will remain in place of safety and will not suddenly step into path of automobile. *Sheehy v. Murphy*, 93 Ariz. 297, 380 P.2d 152 (1963).

Uninsured/Underinsured Motorist Coverage. Statute requires insurers writing motor vehicle liability policies to make available to insured, uninsured or underinsured motorist coverage. Coverage, however, is optional. Insurer is obligated to offer underinsured coverage; failure to make offer results in imputation of coverage to policy as a matter of law. A.R.S. §20-259.01. Explanation of coverage not required. *Tallent v. National Gen. Ins.*, 185 Ariz. 266, 915 P.2d 665 (1996).

Underinsured Motorist (UIM) provisions in A.R.S. §20-259.01 reflect public policy that victims of negligent, inadequately insured drivers are entitled to recover damages from own UIM carriers. *State Farm v. Wilson*, 162 Ariz. 251, 782 P.2d 727 (App. 1989). Only entitled to recover difference between total damages and those



paid by tortfeasor. *State Farm v. Arrington*, 192 Ariz. 255, 963 P.2d 334 (App. 1998).

When there was no applicable liability policy in effect because of bar in policy against intra-family liability, insured's father's vehicle, involved in accident where insured was injured, was uninsured motor vehicle. *State Farm v. Herron*, 123 Ariz. 315, 599 P.2d 768 (1979). Unidentified accident-causing motorist is "owner or operator of an uninsured motor vehicle" within meaning of Uninsured Motorist Act even if no contact occurred between that motorist and insured, and that statute requires every automobile liability policy delivered or issued for delivery in Arizona to provide coverage for bodily injury caused by such motorist. *Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 859 P.2d 724 (1993).

Stacking. Stacking is the practice by which insureds may seek indemnification from same coverage under two or more policies. *State Farm v. Lindsey*, 182 Ariz. 329, 897 P.2d 631 (1995). Stacking of UIM coverages from separate policies purchased by insured from same insurer prohibited. A.R.S. §20-259.01 (H). Stacking of uninsured motorist coverage denied. *State Farm v. Williams*, 123 Ariz. 455, 600 P.2d 759 (App. 1979). Insured permitted to collect underinsured motorist (UIM) benefits after collecting portion of liability coverage under same policy is not stacking coverages in violation of statutory anti-stacking provision; that provision applies only when multiple vehicles are insured by multiple policies or coverages. *Taylor v. Travelers Indem. Co. of Am.*, 198 Ariz. 310, 9 P.3d 1049 (2000). Public policy does not require that insureds who paid for UIM coverage under five policies be entitled to collect UIM benefits under each policy if resort to more than one policy was not necessary to compensate insureds for their remaining damages after payment by tort-feasor's liability insurer. *State Farm v. Arrington*, 192 Ariz. 255, 963 P.2d 334 (App. 1998).

Speed Limit. Speed restrictions are governed by A.R.S. §28-701 *et seq.* No provision of the statute shall relieve plaintiff in civil action, other than civil action to impose civil penalty, from burden of proving defendant's negligence was proximate cause of accident. A.R.S. §28-707 (B).

Trailers. Persons shall not drive vehicle towing trailer at speed that causes trailer to sway laterally from line of traffic. A.R.S. §28-896.

Weight limits. Vehicle size, weight, and load restrictions are governed by A.R.S. §28-1091 *et seq.*

## AVIATION

General rules of negligence and rules of law for torts on land apply. A.R.S. §28-8274; *APS v. Brittain*, 107 Ariz. 278, 486 P.2d 176 (1971).

Contractual or other legal relations entered into while in flight have same effect as if entered into on land or water beneath. A.R.S. §28-8209.

Each pilot (and if agent, then both pilot and principal) is responsible for damage to person or property caused by negligence of pilot. A.R.S. §28-8273.

Person who rents aircraft shall deliver to renter written notice stating nature and extent of insurance coverage provided, or face civil penalty up to \$1,000. A.R.S. §28-8275.

If insurer of aircraft determines aircraft is total loss, insurer shall provide aeronautics division with affidavit stating that total loss occurred. A.R.S. §28-8343.

## BAD FAITH

Arizona recognizes tort of breach of duty of good faith, or bad faith. To show bad faith, plaintiff must show lack of reasonable basis for benefit denial and defendant's knowledge or reckless disregard of lack of reasonable basis for claim denial. *Noble v. National American Life*, 128 Ariz. 188, 624 P.2d 866 (1981).

The appropriate inquiry in bad faith claim is whether there is sufficient evidence from which reasonable jurors could conclude that in investigation, evaluation and processing of claim, insurer acted unreasonably and either knew or was conscious of fact that its conduct was unreasonable. *Zilisch v. State Farm Mut. Auto Ins. Co.*, 196 Ariz. 234, 995 P.2d 276 (2000); *Twin City Fire Ins. v. Burke*, 204 Ariz. 251, 63 P.3d 282 (2003).

Breach of express covenant in insurance contract by insurer is not prerequisite for insured to bring bad faith claim. *Deese v. State Farm*, 172 Ariz. 504, 838 P.2d 1265 (1992).

Bad faith claim may be based on unprivileged conduct by insurers in coverage action. *Tucson Airport v. Certain Underwriters at Lloyd's*, 186 Ariz. 45, 918 P.2d 1063 (App. 1996).

Mere negligence or inadvertence on part of insurer is not sufficient to establish bad faith. *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986). Where insurer reasonably denies coverage in owner's policy under valid "other vehicle" exclusion, no bad faith. *Farmers v. Young*, 195 Ariz. 22, 985 P.2d 507 (App. 1998).

Under Arizona law, an insurer may commit bad faith not only by intentionally and unreasonably denying



a claim, but also by intentionally processing, evaluating, or paying a claim in an unreasonable manner. *James River v. Herbert Schenk*, 523 F.3d 915 (9<sup>th</sup> Cir. 2008).

When tort damages are recoverable for insurer's bad faith, plaintiff is not limited to economic damages within contemplation of parties; plaintiff may recover all damages caused by defendant's conduct, including damages for pain, humiliation, and inconvenience as well as for pecuniary losses. *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986).

Damages for emotional distress are recoverable in bad faith claim. *Linthicum v. Nationwide Life*, 150 Ariz. 354, 723 P.2d 703 (App. 1985), *rev. on other grounds*, 150 Ariz. 326, 723 P.2d 675 (1986). To recover emotional distress damages for insurer's bad faith, insured must demonstrate that bad faith resulted in invasion of property right. *Filasky v. Preferred Risk Mut.*, 152 Ariz. 591, 734 P.2d 76 (1987).

Damages for pain, humiliation, or inconvenience, as well as attorney's fees, trigger invasion of property rights and are compensable in emotional distress action caused by insurer's bad faith. *Filasky v. Preferred Risk Mut.*, 152 Ariz. 591, 734 P.2d 76 (1987); *Voland v. Farmers*, 189 Ariz. 448, 943 P.2d 808 (App. 1997).

## BROKERS

See "AGENTS AND BROKERS."

## BURGLARY INSURANCE

A person commits theft if, without lawful authority, such person knowingly: 1) Controls property of another with intent to deprive him of such property; 2) Converts for unauthorized term or use services or property of another entrusted to defendant or placed in defendant's possession for limited, authorized term or use; 3) Obtains property or services of another by means of any material misrepresentation with intent to deprive him of such property or services; 4) Comes into control of lost, mislaid, or misdelivered property of another under circumstances providing means of inquiry as to true owner and appropriates such property to his own or another's use without reasonable efforts to notify true owner; 5) Controls property of another knowing or having reason to know that property was stolen; or 6) Obtains services known to defendant to be available only for compensation without paying or agreement to pay such compensation or diverts another's services to his own or another's benefit without authority to do so. A.R.S. §13-1802 (A).

Obvious purpose in enacting omnibus theft statute, A.R.S. §13-1802, was to eliminate technical distinctions between various types of stealing and to deal with all forms in single statute, thus simplifying prosecution for

unlawful acquisition of property belonging to others. *State v. Tramble*, 144 Ariz. 48, 695 P.2d 737 (1985).

Where terms theft or larceny are used in the grant of coverage in automobile insurance policy, but are not clearly defined or limited, they are ambiguous and should be interpreted broadly to include loss caused by any unlawful or wrongful taking of insured vehicle with criminal intent, whether or not such taking technically qualifies as embezzlement, theft, or larceny at common law. *Almadova v. State Farm*, 133 Ariz. 81, 649 P.2d 284 (1982). Construing together extension of coverage for theft and larceny and exclusion of coverage for transfers of possession due to any sales agreement, intent of policy was to provide coverage to insured for any loss resulting from initial wrongful taking or transfer of possession achieved by preconceived, fraudulent device or criminal intent, but not to losses that occur when transferee takes lawful possession but later forms dishonest, criminal intent. *Id.*

## CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE; LIABILITY INSURANCE; FIRE INSURANCE."

A.R.S. §20-1651 *et seq.* provide notice requirements governing cancellation of all insurance policies other than motor vehicle insurance and workmen's compensation insurance. A.R.S. §20-1631 sets forth such requirements for motor vehicle insurance. Cancellation for non-payment of premium effective on date of mailing. A.R.S. §20-1632.01. Notice given with option to reinstate by payment before date certain is effective as of latter date. *Norman v. State Farm*, 201 Ariz. 196, 33 P.3d 350 (2001).

After policy other than motor vehicle or worker's compensation is in effect for 60 days, or policy is renewal effective immediately, no notice of cancellation is effective unless it is based upon grounds set out in A.R.S. §20-1652.

Notice requirements contained in statutes governing minimum content of cancellation notice to be given by insurers must be strictly complied with and failure to comply will render cancellation invalid. *Civil Serv. Employees Ins. v. Rodriguez*, 25 Ariz. App. 534, 544 P.2d 1135 (1976). Notice canceling coverage under automobile policy must be clear and unequivocal; insurance company's expression of intent to cancel policy must be apparent to ordinary person. *Norman v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 196, 33 P.3d 530 (App. 2001).

Policy is effectively canceled when notice of cancellation is given as required by standard cancellation provision of policy, even through insureds did not re-

ceive such notice. *Gov't Employees Ins. v. Superior Ct.*, 27 Ariz. App. 219, 553 P.2d 672 (1976).

Authority of Agent. When insurance agent knew that spouses were joint owners of policy and knew that husband had not consented to cancellation, insurance agent's attempted cancellation was ineffective as to husband and insurer remained liable to husband on original policy. *State Farm v. Long*, 16 Ariz. App. 222, 492 P.2d 718 (1972).

Insurer, having chosen particular notice of cancellation route, could not retreat from that position to its insured's prejudice by asserting that policy had automatically terminated. *Mid-Century v. Samaniego*, 140 Ariz. 324, 681 P.2d 476 (App. 1984).

On direct inquiry, applicant not protected by ex-pungement from disclosure of prior conviction. Insurer justified in rescinding policy. *Russell v. Royal Macca-bees*, 193 Ariz. 464, 974 P.2d 443 (App. 1998).

### CHATTEL MORTGAGE

See "FIRE INSURANCE."

### CONSTRUCTION OF POLICY

See also "LIABILITY INSURANCE."

A.R.S. §20-1119 provides that every insurance contract shall be construed according to entirety of terms and conditions, together with riders, endorsements, and applications attached and made part of policy.

Court must construe insurance contract as whole to give effect to all provisions. *Industrial Indem. v. Goettl*, 138 Ariz. 315, 674 P.2d 869 (App. 1983).

Ambiguities. In determining whether ambiguity exists, language of policy must be considered from standpoint of one who is not trained in law or insurance. *National Bank of Ariz. v. St. Paul Fire & Marine Ins. Co.*, 193 Ariz. 581, 975 P.2d 711 (App. 1999).

Where various jurisdictions have reached more than one conclusion as to meaning, intent, and effect of language of insurance contract, there exists, strong indication of ambiguity is established. *Fire Ins. Exchange v. Berray*, 143 Ariz. 429, 694 P.2d 259 (App. 1983), *approved as modified*, 143 Ariz. 361, 694 P.2d 191 (1984). Ambiguity exists when language of insurance policy is unclear and could be construed in more than one sense. *Roberts v. State Farm*, 146 Ariz. 284, 705 P.2d 1335 (1985). Where contract language has acquired, by judicial construction, clear and definite meaning, or when provisions are plain and unambiguous, there is no ambiguity. *USF&G v. California-Arizona Constr.*, 21 Ariz. 172, 186 P. 502 (1920), *overruled on other grounds*,

*Schwartz v. Schwerin*, 85 Ariz. 242, 336 P.2d 144 (1959).

Conditional Receipt of Application. If insurance company seeks to avoid temporary coverage, it may do so by not accepting initial premium or by including clear and unequivocal language in conditional receipt stating its intention to condition liability upon subsequent approval of application for insurance. *Cain v. Aetna*, 135 Ariz. 189, 659 P.2d 1334 (App. 1983). Insurer who accepts advance premiums and issues written receipt for health insurance coverage effective immediately, conditioned upon later issuance of policy of insurance, cannot defeat interim coverage by refusing to issue policy after loss occurs. *Anderson v. Country Life*, 180 Ariz. 625, 886 P.2d 1381 (App. 1994). Conditional life insurance receipt that clearly limited liability to \$100,000 during approval period was not enforceable if applicant had reasonable expectation of greater coverage based on oral representations of sales agent. *Services Holding v. Transamerica*, 180 Ariz. 198, 883 P.2d 435 (App. 1994).

Favoring Insured. Courts are not compelled in every case of apparent ambiguity to blindly follow interpretation least favorable to insurer. *State Farm v. Wilson*, 162 Ariz. 251, 782 P.2d 727 (1989). Only after considerations of policy language, legislative history and public policy should ambiguity favor insured. *Id.*

Intent of Parties. Court will enforce insurance contract according to parties' intent. *Taylor v. State Farm*, 175 Ariz. 148, 854 P.2d 1134 (1993).

Language. Intention of parties is derived from language used in terms of insurance policy. *Industrial Indem. v. Goettl*, 138 Ariz. 315, 674 P.2d 869 (App. 1983); *Tolifson v. Globe American Cas. Co.*, 138 Ariz. 31, 672 P.2d 983 (App. 1983).

Statutory Provisions. Omnibus clause prescribed in Financial Responsibility Act is part of every motor vehicle liability policy, regardless of whether policy expressly so states, and exclusionary clauses negating coverage are void to extent of Act. *Universal Underwriters v. State Auto & Cas. Underwriters*, 108 Ariz. 113, 493 P.2d 495 (1972).

Oral Binders. Generally, oral contract of insurance is valid and enforceable if parties have agreed on all essential terms of contract, including subject matter, risk insured against, time of commencement, duration of risk, amount of insurance, and amount of premium. *Gulf Ins. v. Grisham*, 126 Ariz. 123, 613 P.2d 283 (1980).

Reasonable Expectations. Doctrine applied when inequitable to enforce policy provisions contrary to reasonable expectations of insured. Applied if terms are ambiguous, policy has hidden trap, pitfall, or fine print



takes away coverage given by large print. *Evenchik v. State Farm*, 139 Ariz. 453, 679 P.2d 99 (App. 1984). Doctrine to require coverage notwithstanding limitations is not limited to situations where insured's expectations of coverage were induced by insurer's promises or misrepresentations. *State Farm v. Dimmer*, 160 Ariz. 453, 773 P.2d 1012 (App. 1988); *contra*, *State Farm v. Powers*, 163 Ariz. 213, 786 P.2d 1064 (App. 1989). Where insurance agent has reason to believe insured who manifests assent to standardized, written insurance contract would not do so if he knew writing contained particular term, term is not part of contract. *Darner Motor Sales v. Universal Underwriters*, 140 Ariz. 383, 682 P.2d 388 (1984). Even unambiguous terms in contract should not defeat reasonable expectations of parties, particularly if those expectations stem from negotiations including insurer. *Id.*

A court may apply reasonable expectations doctrine, which requires that insurance policy exclusions that subtract from coverage that consumer reasonably expects must be agreed to and intended by consumer, when reasonably intelligent consumer cannot understand language in insurance policy, when insured does not receive full and adequate notice and provision is unusual, unexpected, or emasculates apparent coverage, when some activity reasonably attributable to insurer would create objective impression of coverage in the mind of reasonable insured, or when some activity reasonably attributable to insurer has induced insured to reasonably believe that coverage exists, although policy clearly denies such coverage. *American Family Mut. Ins. Co. v. White*, 204 Ariz. 500, 65 P.3d 449 (App. 2003).

Time of occurrence of accident, within meaning of accident indemnity policy, is not time wrongful act was committed, but time when complaining party was actually damaged. *Outdoor World v. Continental Cas.*, 122 Ariz. 292, 594 P.2d 546 (App. 1979).

Parol Evidence. Even when meaning of contract language appears clear on its face, court may nevertheless consider extrinsic evidence relating to intent of contracting parties to determine whether language is reasonably susceptible to differing interpretations. If court determines language is susceptible to multiple interpretations, extrinsic evidence is admissible for the purpose of interpreting contract. *Taylor v. State Farm*, 175 Ariz. 148, 854 P.2d 1134 (1993).

## DAMAGES

See also "ATTORNEYS."

Generally. Arizona allows unlimited recovery for actual damages in tort: expenses for past and prospective medical care, past and prospective pain and suffering,

lost earnings and diminished earning capacity, striving insofar as possible to make injured party whole. *Wendelken v. Superior Ct.*, 137 Ariz. 455, 671 P.2d 896 (1983).

Claim for damages based upon alleged unreasonable or arbitrary delay by insurer in performing its repair obligations under automobile liability policy, damages measured by loss of use are proper, separate and apart from any express coverage provided for in the policy. *Stephan v. Allstate*, 26 Ariz. App. 367, 548 P.2d 1179 (1976).

Appellate Review. Excessive Verdicts. Determination of whether award of damages is excessive must be done on case-by-case basis. *Moorer v. Clayton Mfg.*, 128 Ariz. 565, 627 P.2d 716 (App. 1981).

Contract. Damages recoverable are those proximately caused by breach. *N. Ariz. Gas v. Petrolane*, 145 Ariz. 467, 702 P.2d 696 (App. 1984).

In action against insurer and claims administrator to recover for alleged bad faith refusal to pay benefits due under group health policy, insureds could recover damages for anxiety, emotional distress, and embarrassment, even if no intentional infliction of emotional distress and no outrageous conduct. *Farr v. Transamerica*, 145 Ariz. 1, 699 P.2d 376 (App. 1984).

Indemnification. Agreement may provide for indemnification against liability or against loss or damages. *INA v. Valley Forge*, 150 Ariz. 248, 722 P.2d 975 (App. 1986).

Interest. Whether a party is entitled to interest is a matter of law, which the court reviews *de novo*. *Employer's Mut. Cas. Co. v. McKeon*, 170 Ariz. 75, 821 P.2d 766 (App. 1991). Prejudgment interest on a liquidated claim is a matter of right. *Fleming v. Pima County*, 141 Ariz. 149, 685 P.2d 1301 (1984). A claim is liquidated if plaintiffs provide a basis for precisely calculating the amounts claimed. *Employer's, supra*. As a general rule, trial judge should calculate prejudgment interest from the date the claim becomes due. *Lindsey v. Univ. of Ariz.*, 157 Ariz. 48, 754 P.2d 1152 (App. 1987).

Negligent infliction of emotional distress is recoverable, but must be manifested as physical injury. *Rowland v. Union Hills*, 157 Ariz. 301, 757 P.2d 105 (App. 1988). Substantial, long term emotional disturbances can be sufficient to support claim for negligent infliction of emotional distress. *Monaco v. HealthPartners of Southern Ariz.*, 196 Ariz. 299, 995 P.2d 735 (1999). Mental injury/emotional distress includes embarrassment, humiliation and anxiety. *United Steelworkers v. Milstead*, 705 F. Supp. 1426 (D. Ariz. 1988).

Punitive damages are awardable upon showing by clear and convincing evidence either that defendant intended to injure plaintiff or that defendant consciously pursued course of conduct knowing he created substantial risk of significant harm to others. *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986). Evil mind may be inferred from conduct that is oppressive, outrageous, or intolerable. *Id.* Breach of covenant of good faith and fair dealing allows recovery for economic, pain, humiliation, inconvenience, and pecuniary loss. *Id.*

**Business Interruption.** Even new business can recover lost profits if proven with reasonable certainty. *Jorgensen Co. v. Tesmer Mfg. Co.*, 10 Ariz. App. 445, 459 P.2d 533 (1969).

The Arizona Property and Casualty Guaranty Fund established in A.R.S. §20-662 exists to mitigate adverse effects caused by insolvency of insurers, not to fully replace coverage that would have existed were those insurers solvent. *Jangula v. Arizona Prop. & Cas. Ins. Guar. Fund*, 207 Ariz. 468, 88 P.3d 182 (App. 2004). Damages payable under the Fund pursuant to A.R.S. §20-673 (c) are the smallest of: 1) claimant's damages; 2) face amount of policy issued by insolvent insurer; 3) \$99,900. *Id.* These damages are always reduced by the amount of any recovery under claimant's insurance. *Id.* Debts may be offset as mutual debts under A.R.S. §20-638 (A) (allowing offsets against debts owed to insolvent insurers) if the obligations are due to and from the same parties in the same capacities. *Urias v. PCS Health Systems, Inc.*, 211 Ariz. 81, 118 P.3d 29 (App. 2005).

## DEATH

A.R.S. §12-509 provide that person absent from his last domicile for five successive years shall be presumed dead, unless proof is made that he was alive within that time.

A.R.S. §12-611 *et seq.* govern wrongful death actions, and all actions must conform to statute. Injured party can recover if he would have been able to maintain action if death had not ensued and has reference not to nature of loss or injury but to circumstances under which injury arose and nature of wrongful act, neglect, or default complained of. *Summerfield v. Superior Ct.*, 144 Ariz. 467, 698 P.2d 712 (1985).

Wrongful death action may be brought for benefit of estate only when there is no surviving spouse, child or parent. *Salinas v. Kahn*, 2 Ariz. App. 181, 407 P.2d 120, *modified*, 2 Ariz. App. 348, 409 P.2d 64 (1965).

Wrongful death action vests in plaintiff/beneficiary immediately upon wrongful death and becomes property

right in beneficiary and survives to representative. *Katz v. Filandro*, 153 Ariz. 601, 739 P.2d 822 (App. 1987).

Action may be maintained for death of viable fetus that was stillborn as a result of medical malpractice. *Summerfield v. Superior Ct.*, 144 Ariz. 467, 698 P.2d 712 (1985); *Burnham v. Miller*, 193 Ariz. 312, 972 P.2d 645 (1998). See also *Jeter v. Mayo Clinic Arizona*, 211 Ariz. 386, 121 P.3d 1256 (App. 2005) (a cryopreserved, three-day-old eight-cell pre-embryo is not a "person" for whose loss or destruction can be recovered under Arizona's wrongful death statutes).

A.R.S. §14-3110 disallows recovery in survival actions for pain and suffering of decedent. However, claim for pain and suffering under Arizona's elder abuse statute, A.R.S. §46-455 (B), survives death of abused person. *In re Denton*, 190 Ariz. 152, 945 P.2d 1283 (1997).

**Contributory Negligence.** Contributory negligence of deceased imputed to personal representative in wrongful death action. *Quintero v. Continental Rent-A-Car*, 105 Ariz. 135, 460 P.2d 189 (1969).

**Damages.** Mental suffering, pain, and shock, etc., of beneficiaries, caused by death of decedent, are recoverable as damages in wrongful death actions. *City of Tucson v. Wondergem*, 105 Ariz. 429, 466 P.2d 383 (1970). Proportion of damages that each statutory beneficiary in wrongful death action is entitled to recover is not based upon equal division among beneficiaries; rather, proportion is amount of damage suffered by each. *Quinonez v. Andersen*, 144 Ariz. 193, 696 P.2d 1342 (App. 1984).

Loss of consortium damages awarded to parents of stillborn child in medical malpractice suit. *Burnham v. Miller*, 193 Ariz. 312, 972 P.2d 645 (App. 1998).

**Limitations of Actions.** Two-year statute of limitations for wrongful death actions begins to run at date of decedent's death, *Gomez v. Levertson*, 19 Ariz. App. 604, 509 P.2d 735 (1973), unless application of two-year limitations period would abrogate cause of action before it could reasonably be discovered, in which case discovery rule applies. *Anson v. American Motors*, 155 Ariz. 420, 747 P.2d 581 (App. 1987).

**Prospective Earnings.** Future earnings, etc., should be computed to reflect present worth. *Downs v. Sulphur Springs Valley Electric Co-op*, 80 Ariz. 286, 297 P.2d 339 (1956).

**Punitive Damages.** Punitive damages are permitted in wrongful death actions. *Boies v. Cole*, 99 Ariz. 198, 407 P.2d 917 (1965). Punitive damages are also available under elder abuse statute. A.R.S. §46-455 (H).



## DISABILITY

See "ACCIDENT AND HEALTH INSURANCE."

A.R.S. §20-1341 *et seq.* provide disability insurance standards.

A.R.S. §20-1401 *et seq.* provide group and blanket disability insurance standards.

Proof of Condition. Standard for disability under policy is whether condition prevents insured from performing substantial and material duties of occupation in his or her usual or customary way. *Nystrom v. Massachusetts Cas.*, 148 Ariz. 208, 713 P.2d 1266 (App. 1986); *Radkowsky v. Provident*, 196 Ariz. 110, 993 P.2d 1074 (1999).

## FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables; "AUTOMOBILES, Compulsory Coverage."

## FIRE INSURANCE

A.R.S. §20-1501 *et seq.* govern all fire insurance policies. A.R.S. §20-1503 designates New York standard fire policy edition of 1943 as Arizona's standard fire policy.

A.R.S. §20-1105 provides that insurance contracts on property only benefit those persons with insurable interest, defined as any actual, lawful, and substantial economic interest in safety or preservation of property.

Arson. A person commits arson of occupied structure by knowingly and unlawfully damaging occupied structure by knowingly causing fire or explosion. A.R.S. §13-1704; *see also Godwin v. Farmers Ins.*, 129 Ariz. 416, 631 P.2d 571 (App. 1981).

Assignment. After loss by fire has occurred and rights under policy have accrued, assignment may be made without consent of insurer, and assignment is not regarded as transfer of policy itself, but rather chose in action. *St. Paul Fire & Marine v. Allstate*, 25 Ariz. App. 309, 543 P.2d 147 (1975).

Cancellation. Substitution standing alone does not effect cancellation of original policy contract. Insurance contract may only be canceled pursuant to its terms or by mutual consent. *Northern Ins. v. Mabry*, 4 Ariz. App. 217, 419 P.2d 347 (1966).

Contribution. Insurer properly undertaking burden of full settlement to insured is not volunteer and does not lose right to contribution. *St. Paul Fire & Marine v. Allstate*, 25 Ariz. App. 309, 543 P.2d 147 (1975).

Definitions. Absent policy definition, word fire as used in standard fire policy is to be understood in ordi-

nary and popular, rather than in technical and scientific, terms. *Hartford Fire v. Elec. Dist. No. 4*, 9 Ariz. App. 374, 452 P.2d 539 (1969).

Arizona adopts New York rule as to when and if loss occurs under fire insurance contract; rights and obligations of parties are fixed as of time of casualty without reference to subsequent events. *Granite State v. Employers Mut.*, 125 Ariz. 275, 609 P.2d 90 (App. 1980).

Arizona adopts "modern view" in determining whether innocent insured entitled to recover their share of damages notwithstanding wrongdoing of co-insureds; examine intent of parties based on policy language. *Brown v. U.S. Fidelity*, 194 Ariz. 85, 977 P.2d 807 (App. 1998); *Nangler v. Farmers Ins. Co. of Ariz.*, 205 Ariz. 517, 73 P.3d 1252 (App. 2003).

Measure of Loss. Measure of damages for destruction or injury to buildings which may at once be replaced, where exact cost of restoring property is capable of definite ascertainment, is that cost, but cost of repair or replacement cannot exceed difference between fair market value of structure before and after injury. *A.I.D. Ins. Svcs. v. Riley*, 25 Ariz. App. 132, 541 P.2d 595 (1975).

Burden of Proof. To sustain defense of arson, insurer had burden to prove by preponderance of evidence that fire was of incendiary origin and that insured was responsible for it. *Godwin v. Farmers*, 129 Ariz. 416, 631 P.2d 571 (App. 1981).

Mortgage Clause. Under standard mortgage clause, conveyance of insured property without insurer's consent voids policy as to grantee, but not as to mortgagee. *Brogioitti v. Walter*, 43 Ariz. 290, 30 P.2d 835 (1934), *but see Harbour v. Reliable Ins.*, 94 Ariz. 344, 385 P.2d 220 (1963).

Mortgagee. Where mortgagee purchased property at foreclosure sale, mortgagee did not lose benefit of fire insurance policy provisions protecting lender, regardless of acts or omissions of owner who had previously vacated property. *Roosevelt Sav. Bank v. State Farm*, 27 Ariz. App. 522, 556 P.2d 823 (1976). Mortgagee's knowledge of extended vacancy of house on which foreclosure proceedings had commenced raised no duty to fire insurer to seek receiver or end vacancy to seek recovery under lender's loss payable endorsement of policy providing that lender was not jeopardized by acts or omissions of owner. *Id.*

Terrorism. A.R.S. §20-1503 (B) allows fire policies to exclude coverage for losses resulting from terrorism.



**FRAUD**

See also "REPRESENTATIONS AND WARRANTIES."

Generally. Under Arizona law, allowing insurer to deny coverage due to fraud in insurance application, "legal fraud" occurs when 1) a question asked by insurer seeks facts that are presumably within the personal knowledge of insured, 2) insurer would naturally contemplate that insured's answer represented actual facts, and 3) the answer is false. A.R.S. §20-1109. *James River v. Herbert Schenk*, 523 F.3d 915 (9<sup>th</sup> Cir. 2008).

A showing of either actual or legal fraud can void insurance policy. A.R.S. §20-1109. *Russell v. Royal Maccabees Life*, 193 Ariz. 464, 974 P.2d 443 (App. 1998). Insurer must prove an intent to deceive, or actual fraud, to rescind a policy where response is merely expression of opinion. *Id.*

**GUEST CASES**

See "AUTOMOBILES, Guests."

**HOSPITALS**

See "MALPRACTICE."

Hospital entitled to lien on patient's liability or indemnity claims against third parties for "customary" charges for care, treatment and transportation in excess of \$250 except health insurance and underinsured and uninsured motorist coverage. A.R.S. §33-931 (A), (C); A.R.S. §36-2915. With valid lien against any funds patient under Medicare-type program might recover, hospital must pay its fair share of attorney fees and costs when patient successfully litigates. *La Bombard v. Samaritan Health*, 195 Ariz. 543, 991 P.2d 246 (App. 1998).

Hospital entitled to qualified immunity under Uniform Anatomical Gift Act (A.R.S. §36-842, *et seq.*) against unauthorized harvesting if no bad faith. *Ramirez v. Health Partners*, 193 Ariz. 325, 972 P.2d 658 (App. 1998).

Evidence-Records. Contents and records of peer review proceedings are fully confidential and inadmissible as evidence in any court of law. A.R.S. §36-445.01 (B).

**HUSBAND AND WIFE**

Community Property. See A.R.S. §25-211 *et seq.*

Interspousal Immunity. Doctrine of interspousal tort immunity is abolished. *Fernandez v. Romo*, 132 Ariz. 447, 646 P.2d 878 (1982).

Loss of Consortium. Includes love, affection, protection, support, services, companionship, care, society, and sexual relations in marital relationship. *Frank v. Superior Ct.*, 150 Ariz. 228, 722 P.2d 955 (1986). May be maintained absent actual physical injury; emotional distress enough. *City of Glendale v. Bradshaw*, 108 Ariz. 582, 503 P.2d 803 (1972) (spouse recovery); *Barnes v. Outlaw*, 192 Ariz. 283, 964 P.2d 484 (1998); *Reben v. Ely*, 146 Ariz. 309, 705 P.2d 1360 (App. 1985) (parents may recover for loss of consortium for their minor children); *Frank v. Superior Ct.*, 150 Ariz. 228, 722 P.2d 955 (1986) (expanded to adult children); *Villareal v. State, Dep't of Transp.*, 160 Ariz. 474, 774 P.2d 213 (1989) (children may claim for their parents); *Burnham v. Miller*, 193 Ariz. 312, 972 P.2d 645, (App. 1998) (parents may claim for stillborn child). Claim for loss of consortium is personal to spouse of injured person. *Bain v. Superior Ct.*, 148 Ariz. 331, 714 P.2d 824 (1986).

Damages for personal injuries, as distinguished from compensation for loss of wages and expenses, are spouse's separate property. *Jurek v. Jurek*, 124 Ariz. 596, 606 P.2d 812 (1980).

Liability. Where spouse was not proven to have participated in conduct giving rise to damages, recovery may not be had against that spouse in individual capacity or against separate property. *Reese v. Credit*, 12 Ariz. App. 233, 469 P.2d 467 (1970). However, community is liable for intentional torts of either spouse if tortious act was committed with intent to benefit community, regardless of whether in fact community received any benefit. *Sellby v. Savard*, 134 Ariz. 222, 655 P.2d 342 (1982). Upon divorce, former spouses remain jointly liable for such acts committed while married. *Comm. Guardian Bank v. Hamlin*, 182 Ariz. 627, 898 P.2d 1005 (App. 1995).

Process. Serving defendant-husband at place of business was not valid service as to defendant-wife. *Del Castillo v. Harbour*, 8 Ariz. App. 233, 445 P.2d 181 (1968).

**INFANTS**

See also, "AUTOMOBILES, Age"; "LIABILITY INSURANCE"; "NEGLIGENCE."

Actions. Infant injured in womb may maintain action for personal injuries if infant survives birth. *Summerfield v. Superior Ct.*, 144 Ariz. 467, 698 P.2d 712 (1985).

Interfamilial Immunity. Parental immunity doctrine abolished. *Broadbent v. Broadbent*, 184 Ariz. 74, 907 P.2d 43 (1995).



Liability of Parents. Mere parental relationship will not impose liability upon parents for torts of their children. *Parsons v. Smithey*, 109 Ariz. 49, 504 P.2d 1272 (1973).

For parents to be liable, plaintiff must prove that child had propensity to engage in sort of conduct complained of and that parents had knowledge of that disposition. *Id.*

A.R.S. §12-661 provides that liability for malicious or willful act by minor shall be imputed to parents or legal guardian having custody and control, but such liability shall not exceed \$10,000 per tort. Insurer may exclude coverage for minor's acts imputed to parents.

Arizona has adopted Restatement (Second) of Torts §316, which states that parent under duty to exercise reasonable care to control minor child to prevent child from intentionally harming others if 1) parent knows or has reason to know that parent has ability to control child; and 2) parent knows or should know of necessity and opportunity for exercising such control. *Pfaff ex rel. Stalcup v. Ilstrup*, 155 Ariz. 373, 746 P.2d 1303 (App. 1987).

Negligence. Standard of care is that of ordinary child of like age, intelligence, and experience. *First Nat'l Bank v. Dupree*, 136 Ariz. 296, 665 P.2d 1018 (App. 1983).

Process. Guardian is not agent authorized by mere existence of guardianship to accept service of process for minor. Service at child's usual place of abode is best method of service. *Bowen v. Graham*, 140 Ariz. 593, 684 P.2d 165 (App. 1984).

### INLAND MARINE

See A.R.S. §20-255. Purpose of marine and transportation insurance is not to impose conditions in insurance contract but to define type of insurance regulated by state. *Cagle v. Home Ins.*, 14 Ariz. App. 360, 483 P.2d 592 (1971). Builder's risk insurance covering partially constructed building and materials may be inland marine insurance exempt from Arizona standard fire policy requirements until building is complete, owner accepts building, or contractor's insurable interest terminates. *Liberty Ins. Underwriters, Inc. v. Weitz Co., L.L.C.*, 215 Ariz. 80, 158 P.3d 209 (App. 2007).

### LIABILITY INSURANCE

Alcohol Exclusion. Alcohol exclusion in automobile liability policy is invalid under financial responsibility law. *Weekes v. Atlantic Nat'l*, 370 F.2d 264 (9<sup>th</sup> Cir. 1966). Exclusion of user of automobile invalid to extent of financial responsibility act.

Resident of Same Household. Factors to consider in determining whether individual is resident of same household within meaning of coverage provisions of automobile liability policy include, but are not limited to, individual's presence in, or absence from, named insured's home on date of occurrence, reasons or circumstances relating thereto, relationship of individual to named insured, living arrangement of individual in earlier time periods, individual's subjective or declared intent concerning place of residence, and existence of second place of lodging. *Mid-Century v. Duzykowski*, 131 Ariz. 428, 641 P.2d 1272 (1982).

Insolvency of primary liability carrier did not require excess liability insurer to pay as primary insurer. *Maricopa County v. Federal Ins.*, 157 Ariz. 308, 757 P.2d 112 (App. 1988). An insurer through use of an excess clause may provide that its policy provides liability coverage only for amounts due after all other available insurance has been exhausted, even though its policy is a primary one. *American Family v. Continental Casualty*, 200 Ariz. 119, 23 P.3d 664 (App. 2001).

Automobile policy exclusion providing coverage only in amount of statutory minimum for family members residing in home did not violate public policy. *State Farm v. Dimmer*, 160 Ariz. 453, 773 P.2d 1012 (App. 1988).

Auto insurer's liability is absolute once accident has occurred, even if policy was procured through fraudulent misrepresentations. *Midland v. Watford*, 179 Ariz. 168, 876 P.2d 1203 (App. 1994).

Construction of Terms. Whether terms of insurance contract are ambiguous is a question of law. *Swanson v. Safeco*, 186 Ariz. 637, 925 P.2d 1354 (App. 1995). Ambiguities are construed in favor of insured, but this rule applies only to provisions that are actually ambiguous. *Keggi v. Northbrook Prop & Cas. Ins. Co.*, 199 Ariz. 43, 13 P.3d 785 (App. 2000). However, courts are not compelled to blindly follow interpretation least favorable to insurer. *State Farm v. Wilson*, 162 Ariz. 251, 782 P.2d 727 (1989). Although individual clauses standing alone might not be ambiguous, policy must be read as a whole to give reasonable and harmonious meaning and effect to all its provisions. *Sparks v. Republic Nat'l Life*, 132 Ariz. 529, 647 P.2d 1127 (1982).

Bad Faith. There is legal duty implied in insurance contract that insurance company must act in good faith in dealing with its insured on claim; violation of that duty of good faith is tort. Tort claim will not lie if coverage is "fairly debatable." *Noble v. National Am. Life*, 128 Ariz. 188, 624 P.2d 866 (1981). Tort of bad faith refusal to pay arises when insurance company intentionally denies or fails to process or pay claim without rea-



sonable basis for such action. *Id.* A bad faith claim against an insurer is derived from the insurance contract. *Hayden Bus. Ctr. Condos. Ass'n v. Pegasus Dev. Corp.*, 209 Ariz. 511, 105 P.3d 157 (App. 2005). Therefore, a stranger to the contract cannot bring a bad faith claim against the insurer absent an assignment. *Id.* But see *Lofts at Fillmore Condo. Ass'n v. Reliance Commercial Const.*, 218 Ariz. 574, 190 P.3d 733 (2008). (Purchasers could bring breach of warranty action against contractor even though they had no direct relationship with contractor).

Bad faith is established if insured demonstrates that insurer had knowledge of, or recklessly disregarded, lack of reasonable basis for denying claim. *Farr v. Transamerica*, 145 Ariz. 1, 699 P.2d 376 (App. 1984). In every contract, law implies covenant of good faith and fair dealing; each party is obliged not to impair right of other to receive benefits flowing from contract. Insurance contract creates special contractual relationship from which tort action arises if covenant of good faith and fair dealing is intentionally breached. *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986).

To establish prima facie case of bad faith on part of insurer, insured had to prove that insurer acted intentionally and that insurer dealt unfairly or dishonestly with insureds' claim or failed to give fair and equal consideration to insureds' interests. *Hawkins v. Allstate*, 152 Ariz. 490, 733 P.2d 1073 (1987).

Cooperation of Insured. When insurer defends under a reservation of rights, cooperation clause of insurance contract is not violated by a *Morris* agreement, in which insured admits to liability and assigns breach of contract and bad faith claims against insurer to claimant in exchange for covenant not to execute against insured. *Safeway Ins. Co. v. Guerrero*, 210 Ariz. 5, 106 P.3d 1020 (2005). In order to protect insurer, courts place burden on insureds to show that any *Morris* agreement is free of fraud or collusion, and if insurer eventually succeeds in establishing that the claim is not covered by the policy, insurer is not liable for any part of settlement. *Id.* If an insurer declines to accept an offer from a third party claimant to settle within policy limits, and insured executes a *Morris* agreement, and bad faith of insurer is not later established, the *Morris* agreement will be considered a breach of cooperation clause and insurer will be excused from any duty to pay stipulated judgment, no matter how reasonable the amount. *Id.*

Duty to Insured. In general, liability insurer owes two express duties and one implied duty to its insured: express duties are duty to defend insured and duty to indemnify insured, and implied duty is duty to treat settlement offers with equal consideration. *Waddell v. Titan Ins. Co.*, 207 Ariz. 529, 88 P.3d 1141 (App. 2004).

Duty to Settle. Bad faith of insurer in failing to settle claim within policy limits exposes insurer to full liability judgment thereafter obtained against insured, but when insurer acts in good faith on adequate information, it cannot be held liable for excess liability due to its failure to settle. *Brisco v. Meritplan*, 132 Ariz. 72, 643 P.2d 1042 (App. 1982). Bad faith failure to settle claim governed by two-year statute of limitations; claim accrues when underlying action becomes final and non-appealable. *Taylor v. State Farm*, 185 Ariz. 174, 913 P.2d 1092 (1996).

To prove bad faith claim based on failure to settle, plaintiff must demonstrate that in the investigation, evaluation, and processing of claim, insurer acted unreasonably and either knew or was conscious of fact that its conduct was unreasonable. *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 63 P.3d 282 (2003).

Duty to settle does not require insurer to initiate settlement negotiations. *Fulton v. Woodford*, 26 Ariz. App. 17, 545 P.2d 979 (1976). Insured must demonstrate that it could reasonably have been foreseen that claimant's recovery would exceed policy limits. *Id.* Insurer has implied contractual duty to give equal consideration to its interests and those of its insured when considering settlement proposals. *Safeway Ins. Co. v. Guerrero*, 210 Ariz. 5, 106 P.3d 1020 (2005).

Duty of Care. Evaluation of liability case by insurer to determine whether to defend action or to settle should not be determined by looking to policy limits. Rather, insurer should evaluate claim as though it alone would be responsible for payment of any judgment; insurer must view claim objectively and render equal consideration to interests of itself and of insured. *General Acc. Fire & Life v. Little*, 103 Ariz. 435, 443 P.2d 690 (1968).

No dishonest or fraudulent motive on part of insurer is required to find that insurer has failed to give required equality of consideration to interests of insured in refusing to settle within policy limits. *State Farm v. Civil Serv. Empl. Ins.*, 19 Ariz. App. 594, 509 P.2d 725 (1973).

Negligence in failing to settle litigation within policy limits is not, alone, sufficient to impose liability on insurer to pay judgment in excess of policy limits; insurer must have acted in bad faith. *Farmers v. Henderson*, 82 Ariz. 335, 313 P.2d 404 (1957).

Carriers owe insureds duty to indemnify, defend, and treat settlement proposals with equal consideration. *Ariz. Prop. & Cas. Ins. Guar. Fund v. Helme*, 153 Ariz. 129, 735 P.2d 451 (1987). An insurer must evaluate a claim objectively and as though it alone would be responsible for the payment of any judgment rendered.

*Acosta v. Phoenix Indem. Ins. Co.*, 214 Ariz. 380, 153 3d 401 (App. 2007).

**Duty to Defend.** Duty to defend is not synonymous with, nor determinative of, question of coverage. *Continental Cas. v. Signal*, 119 Ariz. 234, 580 P.2d 372 (App. 1978). If insurer defends pursuant to contractual duty to defend, it must do so under properly communicated reservation of rights to later litigate coverage. *Farmers v. Vagnozzi*, 138 Ariz. 443, 675 P.2d 703 (1983).

Liability insurer is obligated to defend whenever it would be bound to indemnify insured if injured person prevailed on allegations of complaint in underlying action. *Aetna v. PPG Indus.*, 554 F. Supp. 290 (D. Ariz. 1983); *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 176 Ariz. 247 (App. 1996). However, insured may not condition insurer's right to defend upon agreement by insurer to waive its right to later litigate question of coverage. *McGough v. Insurance Co. of No. America.*, 143 Ariz. 26, 691 P.2d 738 (App. 1984).

Payment of policy limits does not by itself discharge duty to defend, where in tendering limits, insurer fails to obtain full release of insured. *California Cas. v. State Farm*, 185 Ariz. 165, 913 P.2d 505 (App. 1996).

If complaint filed against insured alleges several causes of action, some of which are not covered by policy but one or more of which are within policy, insurer is bound to defend action. *Aetna v. PPG Indus.*, 554 F. Supp. 290 (D. Ariz. 1983).

Although insurer may refuse to defend when facts appear to exclude coverage, if insurer does so and awaits determination of its obligation in subsequent proceeding, it acts at its peril, and if it guesses wrong it must bear consequences of breach of contract. *Granite State v. Mountain States Tel. & Tel.*, 117 Ariz. 432, 573 P.2d 506 (App. 1977). If insurer succeeds in establishing that claim is not covered by policy, insurer is not liable for any part of settlement. *Safeway Ins. Co. v. Guerrero*, 210 Ariz. 5, 106 P.3d 1020 (2005).

Where insurer did not breach its duty to defend, it does not forfeit its right to intervene in damages hearing between insured and plaintiff. *Mora v. Phoenix Indem.*, 196 Ariz. 315, 996 P.2d 116 (App. 1999).

A special relationship exists between insurer and counsel it assigns to represent its insured. *Safeway Ins. Co. v. Guerrero*, 210 Ariz. 5, 106 P.3d 1020 (2005). When attorney hired by insurer uses confidential relationship between attorney and client to gather information so as to deny insured coverage under policy, such conduct constitutes waiver of any policy defenses and is so contrary to public policy that insurer is estopped as matter of law from disclaiming liability under exclusion-

ary clause. *Parsons v. Continental Nat'l*, 113 Ariz. 223, 550 P.2d 94 (1976). This rule applies to liability above policy limits, as well as cases defended under reservation of rights. *Lake Havasu Community Hosp. v. Ariz. Title Ins. & Trust*, 141 Ariz. 363, 687 P.2d 371 (App. 1984), *overruled on other grounds as recognized by Sprang v. Peterson Lumber*, 165 Ariz. 257, 798 P.2d 395 (App. 1990).

Liability insurer has definite and substantial interest in outcome of litigation against insured, and its mere denial of coverage does not deprive it of standing to institute proceedings on behalf of its insured to set aside default judgment against insured. *Koven v. Saberdyne*, 128 Ariz. 318, 625 P.2d 907 (App. 1980).

Where there is conflict of interest between insured and insurer, parties will not be estopped from litigating in subsequent proceeding those issues where there was conflict. *Farmers v. Vagnozzi*, 138 Ariz. 443, 675 P.2d 703 (1983).

**Intentional Acts.** "Expected or intended" exclusion applies if act was intentional and there was either subjective desire to cause some specific harm (intent) or substantial certainty (expectation) some significant harm would occur. *Ohio Cas. v. Henderson*, 189 Ariz. 184, 939 P.2d 1337 (1997). Exclusion does not apply to injuries inflicted by insured when acting in justifiable self-defense, nor as a result of mistaken identity. *Trans-america v. Meere*, 143 Ariz. 351, 694 P.2d 181 (1984).

Intentional acts exclusion in homeowner's policy applied to attempted child molestation. *K.B. v. State Farm*, 189 Ariz. 263, 941 P.2d 1288 (App. 1997). Voluntary intoxication did not preclude "intentional" act. *Id.*

**Noncooperation.** To extent of limits required by Arizona Financial Responsibility Law, noncooperation is not valid defense in action on automobile liability policy. *State Farm v. Thompson*, 372 F.2d 256 (9<sup>th</sup> Cir. 1967).

**Other Insurance.** A.R.S. §28-4010 creates conclusive presumption that where two or more policies affording valid and collectible liability insurance apply to same motor vehicle, insurance afforded by that policy in which motor vehicle is described or rated as owned automobile shall be primary, and insurance afforded by any other policy or policies shall be excess. Other insurance clauses in policies are valid and operate to preclude stacking of policies to provide recovery in excess of prescribed minimum statutory limit contracted for by parties. These clauses are not triggered by existence of primary, self-insured responsibility. *State Farm v. Bogart*, 149 Ariz. 145, 717 P.2d 449 (1986). *But see Consolidated Ent. v. Schwindt*, 172 Ariz. 35, 833 P.2d 706 (1992).



Occurrence. Occurrence policy provides for all occurrences that take place during policy period. *Lennar Corp. v. Auto-Owners Ins. Co.*, 214 Ariz. 255, 151 P.3d 538 (App. 2007). Actual damage is needed for there to be an occurrence, even if property damaged incrementally. *Id.* Property damage from faulty construction may be an occurrence. *Id.*

Where two policies cover same occurrence and both contain other insurance clauses, excess insurance provisions are mutually repugnant and must be disregarded, and each insurer is then liable for pro-rata share of settlement or judgment. *Harbor v. USAA*, 114 Ariz. 58, 559 P.2d 178 (App. 1976).

Primary/Secondary Coverage. When there is secondary coverage, primary carrier satisfies its duty to defend when it pays its policy limits and secures covenant not to execute in favor of its insured. *Continental v. Farmers*, 180 Ariz. 236, 883 P.2d 473 (App. 1994).

Punitive Damages. Where insurer provided coverage for all damages, punitive damages are included within applicable policy limits unless coverage is specifically excluded in policy language. *Price v. Hartford Acc. & Indem.*, 108 Ariz. 485, 502 P.2d 522 (1972). Policy furthered by punitive damage rule would not be served by compelling insurers to pay punitive damage awards, nor is exclusion by insurer of punitive damage from minimum policy coverage invalid or contrary to Financial Responsibility Laws. *Cassel v. Schacht*, 140 Ariz. 495, 683 P.2d 294 (1984).

Reservation of Rights. Insurer is entitled to provide a defense in underlying action without waiving its right to later litigate whether event giving rise to the action is covered by policy. *Ariz. Property & Cas. Ins. Gar. Fund v. Martin*, 210 Ariz. 478, 113 P.3d 701 (App. 2005). Reserving right to litigate coverage does not permit insurer to re-litigate liabilities and damages as coverage issues in subsequent declaratory relief action. *Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, 98 P.3d 572 (App. 2004). Tort action determines existence of actionable fault, liability, and damages. *Id.*; see also *Ariz. Property & Cas.*, *supra*. Subsequent declaratory relief actions determine only whether the event giving rise to the tort action is covered by the policy, and therefore, whether the insurer is liable for all or any portion of the damages. *Ariz. Property & Cas.*, *supra*. When insurer defends under reservation of rights, and insured settles with plaintiff, insurer loses its ability to contest insured's liability, but retains its right to contest coverage and reasonableness of settlement. *USAA v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987).

Exclusions. To limit liability, insurer must do so in language clearly communicating that intent. *Mid-*

*Century v. Samaniego*, 140 Ariz. 324, 681 P.2d 476 (App. 1984). See also *American Family Mut. Ins. Co. v. White*, 204 Ariz. 500, 65 P.3d 449 (App. 2003).

Where liability policy excluded coverage for intentional acts of insured that resulted in injury, exclusion applied if injury resulted from natural and probable consequences of intentional acts, and subjective intent of insured was immaterial. *Steinmetz v. National Am.*, 121 Ariz. 268, 589 P.2d 911 (App. 1978).

Insurance policies covering liability arising from "sudden and accidental" release of pollution does not cover gradual pollution because policy language incorporates notion of temporal brevity. *Smith v. Hughes Aircraft*, 783 F. Supp. 1222 (D. Ariz. 1991), *aff'd in relevant part*, 22 F.3d 1432 (9<sup>th</sup> Cir. 1993).

Policy exclusion of coverage to employees of named insured when injured party is fellow employee or when injured employee was acting in course of his employment at time of injury is valid. *Atkins v. Pacific Indem.*, 125 Ariz. 46, 607 P.2d 29 (App. 1979).

Word "insured" in exclusionary clause, stating policy shall not apply to any obligation for which insured may be held liable under any Workers' Compensation law, applies only to insured asserting coverage and not collectively so as to include, with named insured, co-employee, covered as additional insured, who allegedly caused injury. *Cota v. Industrial Indem.*, 141 Ariz. 526, 687 P.2d 1281 (App. 1984).

Exclusion in insurance policy covering commercial vehicles that denied coverage to certain people loading and unloading covered vehicles was valid. *Wilshire Ins. v. Home Ins.*, 179 Ariz. 602, 880 P.2d 1148 (App. 1994).

Owned premises exclusion validly excluded liability coverage for dog bite which occurred off the owned premises. *California Cas. Ins. Co. v. American Fam. Mut. Ins. Co.*, 208 Ariz. 416, 94 P.3d 616 (App. 2004).

Absent express provision in application, insurance company is under duty to act upon application for insurance within reasonable period of time, and violation of duty subjects company to liability for negligence. *Continental Life & Acc. v. Songer*, 124 Ariz. 294, 603 P.2d 921 (App. 1979).

For there to be contribution among insurers, interest, as well as risk in subject matter, must be identical. *Granite States v. Employers Mut.*, 125 Ariz. 275, 609 P.2d 90 (App. 1980).

The insurer which has performed its duty to provide defense may compel contribution for share of defense costs from another insurer who had similar duty to de-

find same insured but failed to defend. *National Indem. v. St. Paul*, 150 Ariz. 458, 724 P.2d 544 (1986).

### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

A.R.S. §20-1115 provides that policy may not prevent bringing action against insurer for more than six months after cause of action arises or limit time in which suit may be brought to less than two years from accrual of cause of action, except on property, marine, or transportation policies that may not be limited to less than one year from date of loss. A.R.S. §12-548 provides that action on written contracts executed within state must be commenced within six years of accrual of action. A.R.S. §12-544 provides limitation of four years for contracts executed outside state. A.R.S. §12-543 places three-year limitation on debts not evidenced in writing and for actions for relief on grounds of fraud or mistake, which accrue only upon discovery of fact by aggrieved party. A.R.S. §12-542 mandates that personal injury and wrongful death actions must be commenced within two years after claim accrues. However, courts will follow the discovery rule in wrongful death actions. *Anson v. Am. Motor Corp.*, 155 Ariz. 420, 747 P.2d 581 (App. 1987). A.R.S. §12-821 mandates that person who has claim against public entity or public employee acting within course and scope of employment must file claim within one year after cause of action accrues. Bad faith claims are subject to two-year statute of limitation which begins to run when elements of claim become present. *Ness v. Western Security*, 174 Ariz. 497, 851 P.2d 122 (App. 1992).

**Accrual.** Unless policy otherwise defines, period of limitation begins to run from date of loss and not from date insurer rejected insured's proof of loss. *Adams v. Northern Ins. Co. of New York*, 16 Ariz. App. 337, 493 P.2d 504 (App. 1972). Question of accrual is treated as one of equitable tolling. *Walk v. Ring*, 202 Ariz. 310, 44 P.3d 990 (2002).

**Tolling.** If person entitled to bring action is at time cause of action accrues either under eighteen years of age or of unsound mind, period of such disability shall not be deemed portion of period limited for commencement of action. A.R.S. §12-502. Such person shall have same time after removal of disability that is allowed to others. *Id.* This Section's tolling of limitations periods for persons of unsound mind is applicable only to personal claim of those for whose benefit the section was enacted; therefore, person who seeks to recover medical expenses or damages for personal injury to incapacitated person cannot claim its protection. *Sahf v. Lake Havasu City*, 150 Ariz. 50, 721 P.2d 1177 (App. 1986). Personal disabilities commencing after time cause of action ac-

crues do not toll statute of limitation. *Nelson v. Nelson*, 137 Ariz. 213, 669 P.2d 990 (App. 1983).

**Discovery Rule.** Statute of Limitations commences for breach of contract actions when person entitled to bring action knew, or in exercise of reasonable diligence, should have known of breach. *Gust, Rosenfeld & Henderson v. Prudential*, 182 Ariz. 586, 898 P.2d 964 (1995).

Discovery rule delays accrual of cause of action based on childhood sexual abuse to when plaintiff retrieves repressed memories of abuse. *Doe v. Roe*, 191 Ariz. 313, 955 P.2d 951 (1998). When discovery occurs is a question of fact for jury. *Id.* Admissibility of expert testimony of repression is not limited by "Frye" test. *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000).

**Waiver.** Insurer's promise of payment or failure to deny liability until after limitation period stated in policy has run may result in waiver or estoppel. *Shea North v. Ohio Cas.*, 115 Ariz. 296, 564 P.2d 1263 (App. 1977).

Negotiation alone between insurer and insured is insufficient to support finding of waiver or estoppel of limitations period if negotiation is terminated within adequate time for insured to institute action on policy. *Id.*

Although A.R.S. §20-1115 (A) (3) allows policy provision requiring insured to bring suit on policy within shorter time period than that allowed by applicable statute of limitations, insurer may be estopped from enforcing provision if policy is adhesive and insurer can show no prejudice from insured's failure to bring suit within shortened time limit. *Zuckerman v. Transamerica*, 133 Ariz. 139, 650 P.2d 441 (1982).

**Estoppel.** Insurer is not estopped from enforcing its period of limitations clause if it clearly states limits of its liability and its refusal to recognize any further liability. *Nangle v. Farmers Ins. Co. of Ariz.*, 205 Ariz. 517, 73 P.3d 1252 (App. 2003).

**Savings Statute.** Parties in some circumstances may re-file dismissed claim within six months after statute of limitation has run. Abatement, voluntary dismissal, and dismissal for lack of prosecution require leave of court. A.R.S. §12-504 (A). Not abatement when case dismissed because defendant improperly served according to state process rules after case removed to federal court; absolute right to re-file. *Schwartz v. Arizona Primary Care*, 192 Ariz. 290, 964 P.2d 491 (App. 1998).

### MALPRACTICE

See also "ATTORNEYS."



A.R.S. §12-561 *et seq.* govern medical malpractice actions.

A.R.S. §12-561 provides that action against health care providers may be based upon alleged negligence, misconduct, errors or omissions, breach of contract, or providing health care without express or implied consent.

A.R.S. §12-562 forbids action against health care providers based upon assault or battery and further requires that action based upon breach of contract cannot be brought unless contract is in writing.

A.R.S. §12-565 provides that in any medical malpractice action, defendant may introduce evidence that plaintiff has or will receive collateral benefits as a result of injury or death (social security, worker's compensation, insurance, etc.). Where defendant elects to introduce such evidence, plaintiff may introduce evidence of any amount that plaintiff paid or contributed to secure benefits, or evidence that benefit is subject to lien, or right of reimbursement or subrogation.

**Causation.** To recover, act must be shown to have been probable and not merely possible cause of injury or death. *Thompson v. Sun City Comm. Hosp.*, 142 Ariz. 1, 688 P.2d 647 (App. 1983), *aff'd in part, rev'd in part*, 141 Ariz. 597, 688 P.2d 605 (1984); A.R.S. §12-563.

Hospitals may be liable for injuries resulting from negligent supervision of members of their medical staffs. Essential factor to be proved by plaintiff is hospital's knowledge, either actual or constructive. *Ziegler v. Superior Ct.*, 134 Ariz. 390, 656 P.2d 1251 (App. 1982).

**Informed Consent.** Informed consent means voluntary decision following presentation of all facts necessary to form basis of intelligent consent by patient or guardian with no minimizing of known dangers of any procedures. A.R.S. §36-501 (21).

**Standard of Care.** Duty of care owed by physician to patient is different from hospital's duty; duty of care owed by physician is determined by common-law principles that require reference to that which is usually done by members of profession. *Thompson v. Sun City Comm. Hosp.*, 141 Ariz. 597, 688 P.2d 605 (1984). Health care providers and other professionals are held to higher standard of care than that of ordinary prudent person. *Bell v. Maricopa Med. Ctr.*, 157 Ariz. 192, 755 P.2d 1180 (App. 1988).

**Charitable Immunity.** Arizona does not recognize doctrine of charitable immunity. *Ray v. TMC*, 72 Ariz. 22, 230 P.2d 220 (1951).

Tortious conduct, whether intentional or not, is covered by professional liability insurance if conduct is

intertwined with professional services provided. *St. Paul v. Asbury*, 149 Ariz. 565, 720 P.2d 540 (App. 1986).

Injury in medical malpractice case is development of problem into more serious condition that poses greater damage to patient or that requires more extensive treatment, not necessarily when misdiagnosis occurred. *DeBoer v. Brown*, 138 Ariz. 168, 673 P.2d 912 (1983).

## NEGLIGENCE

See also "AUTOMOBILES."

Article XVIII, Section 5 of State Constitution provides that contributory negligence must be submitted to jury in all cases.

**Age.** Not only age of child, but also his individual capacity and experience, are to be considered by jury in determining negligence. *Gilbert v. Quintet*, 91 Ariz. 29, 369 P.2d 267 (1962). Four and one-half-year old child could not be contributorily negligent as a matter of law. *Vigue v. Noyes*, 113 Ariz. 237, 550 P.2d 234 (1976).

**Assumption of Risk.** Assumption of risk may be defense to allegation of gross negligence. *Menendez v. Bartlett*, 125 Ariz. 48, 607 P.2d 31 (App. 1980). Elements are risk of harm to plaintiff caused by condition of defendant's property, plaintiff's actual knowledge of risk and appreciation of its magnitude, and plaintiff's voluntary choice to accept risk given the circumstances. *Gonzales v. APS*, 161 Ariz. 84, 775 P.2d 1148 (App. 1989).

**Attractive Nuisance.** Attractive nuisance doctrine, as defined by Restatement of Torts, is adopted in Arizona. *Giacona v. Tapley*, 5 Ariz. App. 494, 428 P.2d 439 (App. 1967). Attractive nuisance is created by one who maintains on his premises artificial condition or instrumentality inherently dangerous to small children who might be tempted to tamper with it; in determining whether liability should be imposed under this doctrine, extent of probability of resulting injury must be weighed against practicability of protection to obviate danger. *Downs v. Sulphur Springs Valley Elec. Co-Op*, 80 Ariz. 286, 297 P.2d 339 (1956). Attractive nuisance doctrine is inapplicable to irrigation canals. *Partin v. Olney*, 121 Ariz. 448, 591 P.2d 74 (App. 1978), but is applicable to deep gullies and erosion created by overflow of irrigation water. *Clarke v. Edging*, 20 Ariz. App. 267, 512 P.2d 30 (1973).

**Children.** Occupier of property must exercise such care toward child licensee as reasonably prudent person would exercise toward children under like circumstances. *Shannon v. Butler Homes*, 102 Ariz. 312, 428 P.2d 990 (1967).

Rule that trespasser may not recover for injuries sustained on premises of another applies to children as

well as adults, unless facts bring case within attractive nuisance rule. *Holbrook Light & Power v. Gordon*, 61 Ariz. 256, 148 P.2d 360 (1944).

Trespasser may not recover unless landowner is guilty of some willful or wanton disregard for trespasser's safety. *Webster v. Culbertson*, 158 Ariz. 159, 761 P.2d 1063 (1988) (adopting Restatement of Torts, §337). Under Arizona law, landowner may be liable for harm caused to trespasser by artificial condition on land, such as fence, or modification to land, such as trench, when landowner knows of trespasser. *Delgado v. Southern Pac. Trans.*, 763 F. Supp. 1509 (D. Ariz. 1991). Possessor of land is required to protect trespasser's safety once possessor knows or reasonably should discover trespasser's presence. *Id.*

**Comparative Negligence.** Arizona has adopted, with limited changes, Uniform Contribution Among Tortfeasors Act. A.R.S. §§12-2501 to 12-2509. A.R.S. §12-2501 recognizes right to contribution between two or more persons who are jointly or severally liable in tort for same injury or for same wrongful death and states that relative degrees of fault of claimant. Fault may be apportioned to non-party at fault whose identity is not completely known. *Rosner v. Denim & Diamonds*, 188 Ariz. 431, 937 P.2d 353 (App. 1996). *But see Scottsdale v. Candejas*, \_\_\_ Ariz. \_\_\_, 205 P.3d 1128 (App. 2009). (Rule requiring defendants to give notice of any nonparty at fault did not allow trial court to apportion any percentage of fault to nonparty in suit where company and worker failed to submit an adequate nonparty notice in compliance with A.R.S. §12-2506 (B)). Theory of "comparative fault" nonuse of seatbelt is factor jury may consider to reduce damages. *Law v. Superior Ct.*, 157 Ariz. 147, 755 P.2d 1135 (1988); A.R.S. §28-909 (seatbelt statute). Vicarious liability of employer of independent contractor, where employer has non-delegable duty, is unaffected by comparative fault statutes. *Wiggs v. City of Phoenix*, 198 Ariz. 367, 10 P.3d 625 (2000).

**Contributory Negligence.** Defense of contributory negligence or of assumption of risk is in all cases question of fact for jury. If jury applies either defense, claimant's action is not barred, but full damages shall be reduced in proportion to relative degree of claimant's fault that is proximate cause of injury or death. A.R.S. §12-2505. Fault can be apportioned to non-parties. A.R.S. §12-2506 (B).

**Punitive Damages.** Punitive damages are awardable upon showing by clear and convincing evidence either that defendant intended to injure plaintiff or that defendant consciously pursued course of conduct knowing he created substantial risk of significant harm to others. *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986).

**Limitations on Awards.** Arizona does not have statutory provision limiting damages in negligence actions.

**Duty.** Question is whether defendant is under any obligation to act for benefit of plaintiff. Foreseeability is not a factor to be considered by courts when making determinations of duty in negligence actions. *Gipson v. Kasey*, 214 Ariz. 141, 150 P.3d 228 (2007). Special or direct relationship is not essential in order for creation of a duty of care. *Id.* If duty exists, it is always same: to conform to standard of reasonable conduct in light of apparent risk. *Stanley v. McCarver*, 208 Ariz. 219, 92 P.3d 849 (2004). Standard of conduct varies depending upon facts of each case. *Coburn v. Tucson*, 143 Ariz. 50, 691 P.2d 1078 (1984). In negligence action, plaintiff has burden of proving duty, breach of standard of care, proximate cause, and damages. *Markowitz v. Arizona Parks Bd.*, 146 Ariz. 352, 706 P.2d 364 (1985).

**Negligence Defined.** Negligence is conduct deviating from recognized standard. *Bell v. Maricopa Med. Ctr.*, 157 Ariz. 192, 755 P.2d 1180 (App. 1988).

Slip and fall plaintiff may avoid onus of showing defendant's knowledge by presenting some evidence to show that it was more likely that defendant's employees, rather than third person, created condition. *Dulles v. Safeway*, 168 Ariz. 4, 810 P.2d 627 (App. 1991).

Applicable standard of care for engineer is to exercise degree of skill, care, and diligence as engineers ordinarily exercise under like circumstances, and expert testimony is ordinarily required to establish whether standard has been met. *Easter v. Percy*, 168 Ariz. 46, 810 P.2d 1053 (App. 1991).

**Governmental Immunity.** Right to sue state is not statutory grant; rather, it is common law rule in Arizona that government is liable for its tortious conduct, and immunity is the exception. *Pritchard v. State*, 163 Ariz. 427, 788 P.2d 1178 (1990). City was not immune from negligence suit under A.R.S. §12-820.01, which provides governmental immunity for policy decisions, when government had never actually considered risk which caused harm. *Goss v. Globe*, 180 Ariz. 229, 883 P.2d 466 (App. 1994).

Claims against governmental agency must be filed within one year and claim notice within 180 days after cause of action accrues. A.R.S. §§12-820; 12-821.01. Notice must state facts sufficient to identify basis of claim, a sum certain for which claim may be settled and facts supporting that amount, and be properly served on agent authorized for service of process. A.R.S. §12-821.01. Claim filing is mandatory, but procedural and subject to waiver, estoppel and equitable tolling. *Pritchard v. State*, 163 Ariz. 427, 788 P.2d 1178 (1990).

A parent is not immune from liability for act or omission that injured his child if parent did not act as reasonable and prudent parent in the situation would. *Broadbent v. Broadbent*, 184 Ariz. 74, 907 P.2d 43 (1995).

**Firefighters and Police.** The firefighters rule, which generally prohibits an injured firefighter from suing persons whose only connection with the injury was their negligent conduct in creating the fire, applies to police officers. *White v. State*, 220 Ariz. 42, 202 P.3d 507 (App. 2008). The firefighters rule does not apply to situations in which the professional rescuer is injured as a result of the independent negligence of a third party, to non-emergency situations such as routine building inspections and to off-duty rescue professionals who voluntarily respond in emergency situations. *Id.*

**Good Samaritans.** Good Samaritan doctrine has two aspects: one applies when one person undertakes to render services to another person who claims such service caused him to suffer physical harm, while other applies where one person undertakes to render services to second person and third person claims that such service caused him to suffer physical harm. *Roberson v. United States*, 382 F.2d 714 (9<sup>th</sup> Cir. 1967). Volunteer is immune from civil liability in any action based upon act or omission of volunteer resulting in damage or injury if volunteer acted in good faith and within scope of volunteer's official function and duty for non-profit organization, hospital or governmental entity and damage or injury was not caused by willful, wanton, or grossly negligent misconduct of volunteer. A.R.S. §12-982.

**Independent Contractors.** Upon completion and acceptance of work by owner, contractor is not liable for tortious conduct of third persons for injuries thereafter suffered, unless work is inherently, intrinsically, or abnormally dangerous or so manifestly defective as to be eminently dangerous to third persons. *Shannon v. Butler Homes*, 102 Ariz. 312, 428 P.2d 990 (1967).

Factors to consider regarding whether a relationship rises to that of an employee/employer, as opposed to an independent contractor, include employer's supervision of work, integration into employer's business operations, distinct nature of worker's business, limitations on delegation of work, designation of place of work, duration of employment, method of payment, and belief of the parties. *Santiago v. Phoenix Newspapers*, 164 Ariz. 505, 794 P.2d 138 (1990).

Contractor is not liable for injuries sustained by third person once work has been completed and accepted by owner of project; however, this rule applies only when contractor has no discretion and is merely following plans and specifications provided by its employer. *L.*

*H. Bell & Assoc. v. Granger*, 112 Ariz. 440, 543 P.2d 428 (1975).

**Lent Employees.** General employer can only be held liable for negligent acts of lent employee if general employer has control or has right to control performance of employee's work. *McDaniel v. Troy Design*, 186 Ariz. 552, 925 P.2d 693 (App. 1996).

**Land.** Defective conditions are not necessarily dangerous conditions, and test in determining whether defective condition is dangerous one is whether there is unreasonable risk of harm. *Berne v. Greyhound Parks*, 104 Ariz. 38, 448 P.2d 388 (1968).

Although proprietor of premises is under affirmative duty to make premises reasonably safe for use by business invitee, he is not insurer of safety of invitees and is not required at his peril to keep premises absolutely safe. *Id.* Business invitee is owed reasonably safe means of ingress and egress. *Stephens v. Bashas'*, 186 Ariz. 427, 924 P.2d 117 (App. 1996).

Although social guest may be on host's property as result of expressed invitation, guest is only licensee and is not entitled to same care for his safety by host as one who is on property of another as business invitee; host owes no duty of inspection and affirmative care to make premises safe for visitor. *Shannon v. Butler Homes*, 102 Ariz. 312, 428 P.2d 990 (1967). *But see Martinez v. Woodmar*, 189 Ariz. 206, 941 P.2d 218 (1997) (condominium homeowner's association has duty to exercise reasonable care in preventing criminal injury to both owners and guests).

There is no liability on part of occupant of building to invitee for injuries from dangers that are obvious or as well known to invitee as to occupant of building. *Daugherty v. Montgomery Ward*, 102 Ariz. 267, 428 P.2d 419 (1967).

Duty that landowner owes invitee to maintain property in reasonably safe condition may be diluted or distinguished if invitee engages in explicitly or impliedly unpermitted activities or goes beyond area to which invited. *Nicoletti v. Westcor*, 131 Ariz. 140, 639 P.2d 330 (1982).

A property owner or possessor is not liable to recreational or educational user except upon showing that owner or possessor was guilty of willful, malicious, or grossly negligent conduct that was direct cause of injury to recreational or educational user. A.R.S. §33-1551.

Standard of care for determining contributory negligence of mentally disabled person is same as that of ordinary careful person under same circumstances. *Galindo v. TMT*, 152 Ariz. 434, 733 P.2d 631 (App. 1986).



Imputed Negligence. Doctrine of imputed negligence is abandoned in context of personal injury automobile negligence actions except in cases of agency relationship. *Reed v. Hinderland*, 135 Ariz. 213, 660 P.2d 464 (1983). Doctrine of imputed spousal negligence has been abolished. *Gibson v. Boyle*, 139 Ariz. 512, 679 P.2d 535 (App. 1983).

Liquor Liability/Dram Shop Act. A.R.S. §§4-301 through 4-312 govern civil liability of liquor licensees and non-licensees for personal injury and property damage resulting from furnishing of alcohol. A.R.S. §4-312 (B), which limited liability of tavern owners to situations where alcohol was furnished to obviously intoxicated persons, was held unconstitutional because it deprived plaintiff of general negligence cause of action. *Young v. DFW*, 184 Ariz. 187, 908 P.2d 1 (App. 1995). Social hosts may be held liable for personal injury and property damage resulting from furnishing of alcohol to minor. *Hernandez v. Bd. of Regents*, 177 Ariz. 244, 866 P.2d 1330 (1994); *see also Hernandez v. Flavio*, 187 Ariz. 506, 930 P.2d 1309 (1997).

Prior Accidents. Evidence of prior accidents is admissible in negligence action, and trial court has discretion to admit or preclude evidence of absence of prior accidents. *Jones v. Pak-Mor Mfg.*, 145 Ariz. 132, 700 P.2d 830 (App. 1984), *approved and vacated in part*, 145 Ariz. 121, 700 P.2d 819 (1985).

Proximate Cause. Liability for one's negligent acts cannot be predicated upon negligence alone. To be actionable such negligence must be proximate cause of injury to plaintiff. *Stearman v. Miranda*, 97 Ariz. 55, 396 P.2d 622 (1964).

Proximate cause of injury is any cause that in natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which injury would not have occurred. *Pacht v. Morris*, 107 Ariz. 392, 489 P.2d 29 (1971); *Barrett v. Harris*, 207 Ariz. 374, 86 P.3d 954 (App. 2004). An "efficient intervening cause," which breaks sequence of events for proximate causation for negligence, is an independent cause that occurs between the original act or omission and the final harm and is necessary in bringing about that harm. *Gipson v. Kasey*, 212 Ariz. 235, 129 P.3d 957 (App. 2006), *approved and vacated in part*, 214 Ariz. 141 (2007).

Separate actions by separate individuals may each be proximate cause of one accident. *Zelman v. Stauder*, 11 Ariz. App. 547, 466 P.2d 766 (1970).

Intervening cause does not relieve earlier actor of liability if intervening cause was reasonably foreseeable. *D'Hedouville v. Pioneer Hotel*, 552 F.2d 886 (9<sup>th</sup> Cir. 1977). Intervening cause becomes superseding cause,

thereby relieving defendant of liability for original conduct, when intervening force was unforeseeable and may be described, with benefit of hindsight, as extraordinary. *Barrett v. Harris*, 207 Ariz. 374, 86 P.3d 954 (App. 2004).

Basic issue of intervening and superseding causes is whether defendant is to be held liable for injury to which he has made substantial contribution, when it is brought about by later cause of independent origin, for which he is not responsible. *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983).

Where negligent conduct of first actor increases foreseeable risk of particular harm occurring through conduct of second actor, fact that harm is brought about through intervention of another force does not relieve first actor of liability. *Id.*

Res Ipsa Loquitur. Res ipsa loquitur is theory of circumstantial evidence under which jury may reasonably find negligence and causation from facts of accident and defendant's relation to accident. *Jackson v. H. H. Robertson*, 118 Ariz. 29, 574 P.2d 822 (1978).

Elements of res ipsa loquitur: 1) accident must be of kind which ordinarily does not occur in absence of someone's negligence; 2) accident must be caused by agency or instrumentality within exclusive control of defendant; 3) accident must not have been due to any voluntary action on part of plaintiff; 4) and plaintiff must not be in position to show particular circumstance that caused offending agency or instrumentality to operate to his injury. *Carranza v. TMC*, 135 Ariz. 490, 662 P.2d 455 (App. 1983).

Statutes. Violation of statute enacted for public safety is negligence per se. *Kauffman v. Schroeder*, 116 Ariz. 104, 568 P.2d 411 (1977). Where legislature has exercised its power and prerogative to regulate conduct in interest of health, safety, and general welfare, regulation becomes standard of minimum care that shall be controlling. *Konow v. Southern Pac.*, 105 Ariz. 386, 465 P.2d 366 (1970).

Violation of safety statute constitutes negligence per se, but negligence per se does not establish liability unless there is causal relationship between violation and claimed injury. *Beaty v. Jenkins*, 3 Ariz. App. 375, 414 P.2d 763 (App. 1966).

## NO-FAULT INSURANCE

Arizona has no statutory provision for no-fault insurance.



## PENALTY AND ATTORNEY FEES

Action alleging insurer's bad-faith failure to pay valid claim is one arising out of contract within meaning of A.R.S. §12-341.01 authorizing recovery of attorney's fees. *Sparks v. Republic Nat'l Life*, 132 Ariz. 529, 647 P.2d 1127 (1982).

Title insurance company was not entitled to attorney fees as successful party on petition to review to Supreme Court, under statute allowing award of attorney fees to successful party, where insurer presented its request for attorney fees for the first time in its supplemental brief to the Supreme Court. *First Am. Title v. Action Acquisitions, LLC*, 218 Ariz. 394, 187 P.3d 1107 (2008). A.R.S. §12-341.01 (A).

## PRIVILEGED COMMUNICATIONS

**Attorney/Client.** Communications between client and client's attorney are considered confidential and therefore privileged if communications were made in context of attorney-client relationship and were maintained in confidence. A.R.S. §12-2234 and 13-4062 (2); *Alexander v. Superior Ct.*, 141 Ariz. 157, 685 P.2d 1309 (1984). Purpose of attorney-client privilege is to encourage client to confide in attorney all information necessary in order that attorney may provide effective legal representation; to effectuate this purpose, privilege protects only confidential communications between client and his or her attorney. A.R.S. §12-2234; *Granger v. Wisner*, 134 Ariz. 377, 656 P.2d 1238 (1982).

**Clergy/Penitent.** Statutory clergyman/penitent privilege belongs to penitent, and clergyman may not disclose penitent's confidences without penitent's consent. A.R.S. §§12-2233 and 13-4062 (3); *Church of Jesus Christ v. Superior Ct.*, 159 Ariz. 24, 764 P.2d 759 (App. 1988). Whether a person is a clergyman of a particular religious organization, and is thereby covered by clergy-penitent privilege in criminal proceedings, should be determined by that organization's ecclesiastical rules, customs, and laws. *Waters v. O'Connor*, 209 Ariz. 380, 103 P.3d 292 (App. 2004)

**Doctor/Patient.** Physician may not be examined as to any communications made by his patient regarding disease or disorder or as to any knowledge obtained by personal examination. A.R.S. §§12-2235 and 13-4062 (4). Primary purpose of physician/patient privilege is to protect communications made by patient to his or her physician for purpose of treatment. A.R.S. §13-4062 (4); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180 (1984). To be privileged under physician-patient privilege, information must be acquired by physician in examination or consultation with patient under circumstances in which it is intended that communication be

private and confidential. *State v. Beatty*, 158 Ariz. 232, 762 P.2d 519 (1988).

**Anti-marital Fact Privilege.** Spouse shall not be examined for or against other spouse without others consent except in certain narrow circumstances. A.R.S. §§12-2231, 12-2232, 13-4062 (1).

**Marital Communications Privilege.** During marriage or afterwards, neither husband nor wife shall be examined as to any communications made by one to the other during marriage except for divorce or civil actions against each other, and criminal actions, or alienation of affection or adultery actions against third parties. A.R.S. §§12-2232 and 13-4062 (1). Marital communications privilege applies even if marriage was "irretrievably broken." *Blazek v. Superior Ct.*, 177 Ariz. 535, 869 P.2d 509 (App. 1994).

**Waiver.** Privilege as to confidential communications may be expressly waived, and privileged information thereafter is no longer protected. *Bain v. Superior Ct.*, 148 Ariz. 331, 714 P.2d 824 (1986). Privilege is impliedly waived if privileged material is voluntarily disclosed by privilege holder. *Danielson v. Superior Ct.*, 157 Ariz. 41, 754 P.2d 1145 (App. 1987). Privilege is impliedly waived if 1) assertion of privilege result of affirmative act by asserting party; 2) through affirmative act, protected information put at issue; and 3) applicable of privilege would deny opposing party information vital to opposing party's defense. *State Farm v. Lee*, 199 Ariz. 52, 13 P.3d 1169 (2000). Person who testifies to communication otherwise protected under attorney/client or physician/patient privilege thereby consents to examination of such attorney or physician. A.R.S. §12-2236.

## PRODUCTS LIABILITY

A.R.S. §12-681 *et seq.* govern all product liability actions.

Generally, Arizona is committed to Restatement (Second) of Torts, §402 (A).

**Burden of Proof.** Plaintiff must prove that product that caused his injury was defective, that defect was unreasonably dangerous, and that plaintiff's injuries were proximately caused by defect. *Raschke v. Carrier Corp.*, 146 Ariz. 9, 703 P.2d 556 (App. 1985).

To establish prima facie case of strict liability in tort, plaintiff must show that product is defective and unreasonably dangerous, that defective condition existed at time it left defendant's control, and that defective condition proximately caused plaintiff's injuries or property loss. *Rocky Mountain Fire & Cas. v. Biddulph Oldsmobile*, 131 Ariz. 289, 640 P.2d 851 (1982).

Manufacturer of product in strict liability is treated as having skill of expert concerning its product. *Baroldy v. Ortho*, 157 Ariz. 574, 760 P.2d 574 (App. 1988).

Food. It is a valid affirmative defense to assert that proximate cause of incident giving rise to cause of action was repeated consumption of food product that is not defective and unreasonably dangerous if consumed in reasonable quantities. A.R.S. §12-683.

Change in Condition. Mere fact that product is to undergo processing or other substantial change will not in all cases relieve seller of liability; question is essentially whether responsibility for discovery and prevention of dangerous defect shifted to intermediate party who is to make changes. *O.S. Stapley Co. v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968). Once evidence of substantial change is shown, burden shifts to plaintiff to show no substantial change. *Kuhnke v. Textron*, 140 Ariz. 587, 684 P.2d 159 (App. 1984).

Only unforeseeable modification of product bars recovery from manufacturer in products liability action. *Anderson v. Nissei ASB Mach. Co., Ltd.*, 197 Ariz. 168, 3 P.3d 1088 (App. 1999).

Contributory Negligence. Contributory negligence is no defense to product liability action. *Mott's v. Coco's*, 158 Ariz. 350, 762 P.2d 637 (App. 1988). Contribution to fault does exist in action for product liability. A.R.S. §12-2509.

Defense of misuse is accepted defense in products liability actions. But abnormal or unintended uses do not necessarily constitute legal "misuse" if such "misuse" is foreseeable. *Brown v. Sears*, 136 Ariz. 556, 667 P.2d 750 (App. 1983).

When injury results from both defect in product and misuse of product, fault may be apportioned between manufacturer and user under A.R.S. §12-2506. *Jimenez v. Sears*, 183 Ariz. 399, 904 P.2d 861 (1995).

Defective Design. Product is defective in design if plaintiff shows that product failed to perform as safely as ordinary consumer would expect when used in intended or reasonably foreseeable manner. *Moorer v. Clayton Mfg.*, 128 Ariz. 565, 627 P.2d 716 (App. 1981).

Duty to Warn. Under strict liability in tort, manufacturer or seller has duty to warn users of dangers inherent in product's intended use and in uses that are reasonably foreseeable. *Kavanaugh v. Kavanaugh*, 131 Ariz. 344, 641 P.2d 258 (App. 1981).

Heeding presumption, rebuttable presumption used in strict liability information defect case to allow finder to presume that person injured by product use would have heeded adequate warning if it had been

given, is viable in Arizona. *Golonka v. General Motors Corp.*, 204 Ariz. 575, 65 P.3d 956 (App. 2003).

Product containing obvious hazard is generally considered neither defective nor unreasonably dangerous and therefore there is no duty to warn of such dangers. *Brown v. Sears*, 136 Ariz. 556, 667 P.2d 750 (App. 1983).

There is no duty to warn that consumption of a food product that is not defective and unreasonably dangerous may cause health problems if consumed excessively. A.R.S. §12-683.

Indemnification. When charged with negligent failure to provide warnings, distributor may receive indemnification from manufacturer. *Foremost-McKesson v. Allied Chemical*, 140 Ariz. 108, 680 P.2d 818 (App. 1983).

Lost Profits. Lost profits are "economic losses" and are not recoverable under products liability law. *Arrow Leasing v. Cummins Ariz. Diesel*, 136 Ariz. 444, 666 P.2d 544 (App. 1983).

Manufacturers. Rule of strict tort liability applies to manufacturers of defective, unreasonably dangerous products as well as to sellers of such products. *Sullivan v. Green Mfg.*, 118 Ariz. 181, 575 P.2d 811 (App. 1977).

Under common law, defect that existed when product left manufacturer's control would render both manufacturer and seller strictly liable. *Bridgestone/Firestone N. Am. Tire, L.L.C. v. A.P.S. Rent-A-Car & Leasing, Inc.*, 207 Ariz. 502, 88 P.3d 572 (App. 2004).

Presumptions. Failure of product does not automatically raise presumption of legal defect. *Rix v. Reeves*, 23 Ariz. App. 243, 532 P.2d 185 (1975).

Privity of contract is not required to recover under theory of strict liability in tort. *Nastri v. Wood Bros.*, 142 Ariz. 439, 690 P.2d 158 (App. 1984).

Safeguards. Fact that alternate safety feature may be available does not in and of itself render product, which has adopted different type of safety device, defective and unreasonably dangerous. *Brown v. Sears*, 136 Ariz. 556, 667 P.2d 750 (App. 1983).

State of the Art. A.R.S. §12-686 forbids evidence of changes in state of the art subsequent to time product first sold to defendant as method for proving defect.

Strict Liability. Rule of strict tort liability is applicable even though seller has exercised all possible care in preparation and sale of his product and user or consumer has not bought product from or entered into contractual relation with seller. *O. S. Stapley v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968); *Cordova v. Parrett*, 146

Ariz. 79, 703 P.2d 1228 (App. 1985). Strict liability is not based upon traditional concepts of fault but is imposed in attempt to make products safer. *Salt River Project v. Westinghouse*, 143 Ariz. 368, 694 P.2d 198 (1984), but abrogated on other grounds by *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 111 P.3d 1003 (2005). Trademark licensor that was neither manufacturer nor seller of alleged defective tire may be held strictly liable as manufacturer, based upon participation in design, specifications, quality control, marketing advertising or warranty. *Torres v. Goodyear*, 163 Ariz. 88, 786 P.2d 939 (1990). However, strict liability will not be imposed on an entity that bears no causal connection to the production or distribution of the product. A.R.S. §12-681 (5). *Antone v. GAAA*, 214 Ariz. 550, 155 P.3d 1074 (App. 2007).

**Unreasonably Dangerous.** In determining whether defect is unreasonably dangerous, courts should consider: usefulness and desirability of product; availability of other and safer products to meet same need; likelihood of injury and its probable seriousness; obviousness of danger; common knowledge and normal public expectation of danger, particularly for established product; avoidability of injury by care in use of product, including effect of instructions and warnings; and ability to eliminate danger without seriously impairing usefulness of product or making it unduly expensive. *Byrns v. Riddell*, 113 Ariz. 264, 550 P.2d 1065 (1976).

In order to prevent product from being unreasonably dangerous, seller may give directions or warnings on container as to its use and, where warning is given, seller may reasonably assume that it will be read and heeded; product bearing such warning, which is safe for use if it is followed, is not in defective condition nor is it unreasonably dangerous. *O. S. Stapley v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968).

**Used Goods.** Doctrine of strict liability in tort applies to commercial dealers in used goods. *Jordan v. Sunnyslope Appliance*, 135 Ariz. 309, 660 P.2d 1236 (App. 1983).

Warnings must be reasonably readable and apprise consumer exercising reasonable care under circumstances of existence and seriousness of danger sufficient to enable consumer to protect himself against it; thus, inadequate warning may be equal to no warning at all. *Brown v. Sears*, 136 Ariz. 556, 667 P.2d 750 (App. 1983).

## RELEASE

See Law Digest Tables.

A.R.S. §12-2504 provides that if release or covenant not to sue or not to enforce judgment is given in

good faith, then it is valid. However, such does not discharge other tortfeasors unless its terms so provide, but it does reduce claim against non-settling tortfeasor(s) to extent of amount stipulated or amount of consideration paid, whichever is greater. Further, it discharges settling tortfeasor from all liability for contribution to other tortfeasors.

**Burden of Proof.** One seeking benefit of release must show that it was intended to discharge him or that injured party has received full compensation. *Brown v. Valley Nat'l Bank*, 26 Ariz. App. 538, 549 P.2d 1056 (1976).

**Consideration.** Release must be supported by consideration, *State Farm v. Rossini*, 107 Ariz. 561, 490 P.2d 567 (1971), unless equitable estoppel can be shown instead. *Youngstown Welding v. Travelers*, 802 F.2d 1164 (9<sup>th</sup> Cir. 1986).

**Accord and Satisfaction.** Elements of accord and satisfaction are proper subject matter, competent parties, assent or meeting of minds of parties, and consideration. *Flagel v. Sw. Clinical Psychiatrists*, 157 Ariz. 196, 755 P.2d 1184 (App. 1988).

**Covenant not to Sue.** Covenant not to sue is not a release and, where it reserves right to sue a person who may be derivatively liable, that person not released. *Hall v. Schulte*, 172 Ariz. 279, 836 P.2d 989 (App. 1992).

**Infants/Capacity.** Release by infant plaintiff of personal injury claim is voidable at infant's election. *Arizona E. R.R. Co. v. Carillo*, 17 Ariz. 115, 149 P. 313 (1915). Minor may repudiate any settlement of right of action unless it is made by legally appointed guardian, and approved by court. *Pacheco v. Delgado*, 46 Ariz. 401, 52 P.2d 479 (1935); *Gomez v. Maricopa County*, 175 Ariz. 469, 857 P.2d 1323 (1993).

**Joint Tortfeasors.** Release of one tortfeasor does not constitute release of all tortfeasors, absent agreement to the contrary. *Anderson v. Mobile Discount*, 122 Ariz. 411, 595 P.2d 203 (App. 1979); see also *Spain v. General Motors Corp.*, 171 Ariz. 226, 829 P.2d 1272 (App. 1992).

**Mistake.** Unilateral mistake induced by misrepresentations or contractual ambiguity may constitute grounds for avoiding release. *Hendricks v. Simper*, 24 Ariz. App. 415, 539 P.2d 529 (1975).

## REPRESENTATIONS AND WARRANTIES

See also "WAIVER AND ESTOPPEL."

A.R.S. §20-1109 provides that statements and descriptions in applications for insurance shall be deemed representations, not warranties. Misrepresentations,

omissions, or incorrect statements shall not prevent recovery under policy unless they are: 1) fraudulent, 2) material to acceptance of risk, and 3) upon which insurer in good faith would not have issued policy, if it had knowledge of all true facts.

**Materiality.** Test of materiality of misrepresentation in application for policy is whether facts, if truly stated, might have influenced reasonable insurer in deciding whether to accept or reject risk. *Equitable Life v. Anderson*, 151 Ariz. 355, 727 P.2d 1066 (App. 1986).

Insurer is bound by incorrect application answer where insured submits answer in good faith at direction of insurer's agent. *Central Nat'l Life v. Peterson*, 23 Ariz. App. 4, 529 P.2d 1213 (1975).

**Presumptions.** In determining whether insureds had sufficient knowledge of facts, in determining whether they were dishonest, there exists presumption of honesty. *Maryland Cas. v. Clements*, 15 Ariz. App. 216, 487 P.2d 437 (1971).

**Statute.** For recovery to be barred under policy because of misrepresentations, insurer must show elements set forth in all three sub-paragraphs of statute concerning effect of misrepresentations upon policy; meeting requirements of only one or two of sub-paragraphs is insufficient. *Smith v. Republic Nat'l Life*, 107 Ariz. 112, 483 P.2d 527 (1971).

**Reformation.** Where policy of insurance, which was drawn up by agent of insurer and merely accepted by insured, does not represent intention of both parties, because of fault or neglect of agent, it may be reformed so as to express contract as it was intended to be made. *A.I.D. Ins. Svcs. v. Riley*, 25 Ariz. App. 132, 541 P.2d 595 (1975).

Proper burden of proof applicable to a policy defense of concealment or misrepresentation is proof by a preponderance of the evidence. *American Pepper Supply Co. v. Federal Ins. Co.*, 208 Ariz. 307, 93 P.3d 507 (2004).

### SERVICE OF PROCESS

A.R.S. §20-221 (A) provides that all authorized foreign or alien insurers must irrevocably appoint Director of Insurance as its attorney to receive service of legal process. Insurer must answer within 40 days after service upon Director. A.R.S. §20-222.

A.R.S. §20-221 (B) provides that domestic insurers shall be served in same manner as corporations, generally. Ariz. Rules of Civ. Proc., Rules 4 and 4.1.

A.R.S. §20-776 provides for service on domestic reciprocal insurer by serving insurer's attorney or Director of Insurance.

A.R.S. §20-403 (B) provides that service on unauthorized insurers shall be made by delivering to Director of Insurance two copies of process, who in turn shall mail one copy, by registered or certified mail, to insurer's last known principal place of business. In addition, plaintiff must send to insurer's last known principal place of business, by registered or certified mail, notice of service and copy of process. Plaintiff's attorney should also send notice of service and copy of process to defendant's last known principal place of business by registered or certified mail. A.R.S. §20-403 (C). Statute further provides that service of process on individual who transacts insurance business in Arizona on behalf of unauthorized resident insurer shall be valid. After service, plaintiff must file with court, on or before date insurer is required to appear, insured's receipt, or registry receipt issued by post office, and affidavit showing compliance with subsection. *Id.*

Service on individual within state who is not a minor or incompetent may be accomplished by: 1) delivery personally, 2) leave copy of process at residence with person at least 12 years old residing at residence, or 3) delivery to authorized agent. Service on corporation by leaving copy with registered agent. Ariz. Rules of Civ. Pro. 4.1 (d).

A.R.S. §28-2326 provides nonresident motorist, by himself or agent, appoints director for motor vehicle division as attorney upon whom may be served.

Statutory method for serving process is sole valid method of service. *Phoenix of Hartford v. Harmony Rests.*, 114 Ariz. 257, 560 P.2d 441 (App. 1977).

### SUBROGATION

A.R.S. §12-1643 provides that surety paying judgment is subrogated to rights of creditors.

If insured delays UIM claim so as to preclude insurer's subrogation claim, insurer allowed to join insured as real party in interest and "relation back" prevents statute of limitation bar. *Safeway v. Collins*, 192 Ariz. 262, 963 P.2d 1085 (App. 1998).

**Employees.** Insurer may not recover from employee of named insured for loss paid as result of negligence of employee. *State Farm v. Read Mullan*, 108 Ariz. 577, 503 P.2d 798 (1972).

**Equitable Subrogation.** This doctrine allows excess insurer to pursue bad faith claim against primary insurer. *Hartford Acc. & Indem. v. Aetna*, 164 Ariz. 286, 792 P.2d 749 (1990). Excess insurer subrogated to rights of

insured. *Id.* Excess carrier's mental state and conduct not at issue in equitable subrogation action. *Twin City v. Burke*, 204 Ariz. 251, 63 P.3d 282 (2003).

Generally. Insurer which has paid full amount of loss suffered by insured becomes subrogated to full extent of insured's claim against one primarily liable for loss, and in any suit to enforce claim, insurer is only real party in interest. *Hamman-McFarland Lumber v. Arizona Equip. Rental*, 16 Ariz. App. 188, 492 P.2d 437 (1972).

Mortgages. Loss of mortgaged property does not give insurer right of subrogation to rights of mortgagee. *Commercial Credit v. Eisenhour*, 28 Ariz. 112, 236 P. 126 (1925).

### UNINSURED MOTORISTS

A.R.S. §20-259.01 deals specifically with uninsured and underinsured motorist coverage.

Every insurer in Arizona writing automobile liability policies must offer underinsured motorist coverage in conjunction with general automobile liability coverage. *Id.*

Uninsured motorist statute is remedial and therefore should be liberally construed in order to carry out legislative intent. *Calvert v. Farmers*, 144 Ariz. 291, 697 P.2d 684 (1985). Automobile insurance policy excluding uninsured motorist coverage for injuries suffered off public roads caused by off-road vehicles is not invalid under Uninsured Motorist Act, A.R.S. §20-259.01.

Terms of uninsured motorist legislation are part of every liability policy. *Evenchik v. State Farm*, 139 Ariz. 453, 679 P.2d 99 (App. 1984).

Requirement in A.R.S. §20-259.01 that underinsured coverage be offered in writing to insured cannot be waived by named insured. *Estate of Ball ex rel. Sayre v. American Motorists*, 181 Ariz. 124, 888 P.2d 1311 (1995).

"Other insurance" clauses in motor vehicle policies providing uninsured motorist coverage are valid; thus, stacking of policies was not allowed. *Bakken v. State Farm*, 139 Ariz. 296, 678 P.2d 481 (App. 1983).

Although A.R.S. §20-259.01 allows insurers to prohibit stacking, practice by which insureds seek indemnification from same coverage under two or more policies, policy language is needed to incorporate that limitation; Statute is not self-executing. *State Farm v. Lindsey*, 182 Ariz. 329, 897 P.2d 631 (1995).

When negligent driver has liability policy, vehicle is not uninsured. *Evenchik v. State Farm*, 139 Ariz. 453, 679 P.2d 99 (App. 1984).

An unidentified motorist who causes accident without actually contacting other vehicle is "uninsured" within the meaning of A.R.S. §20-259.01 and any "physical contact" requirement in uninsured coverage is unenforceable. *Lowing v. Allstate*, 176 Ariz. 101, 859 P.2d 724 (1993).

Emancipated child who moved to Arizona while stepfather and mother stayed in N.Y. was not resident of same household of stepfather's policy relative to uninsured motorist. *Tencza v. Aetna*, 111 Ariz. 226, 527 P.2d 97 (1974).

Exclusion denying coverage to insured injured by uninsured motorist while insured occupied vehicle owned by insured, but not listed in policy, is invalid as contrary to coverage mandated by statute. *Calvert v. Farmers*, 144 Ariz. 291, 697 P.2d 684 (1985).

Clause excluding government-owned vehicles from automobile policy's definition of uninsured vehicles is contrary to public policy expressed in A.R.S. §20-259.01. *McClellan v. Sentry Indem.*, 140 Ariz. 558, 683 P.2d 757 (App. 1984); *but see, Transp. Ins. Co. v. Martinez*, 183 Ariz. 33, 899 P.2d 194 (App. 1995) (holding *McClellan* superseded by A.R.S. §20-255.01 on other grounds).

Automobile insurance policy exclusion which limits uninsured motorist (UM) coverage to statutory minimum amount for damages insured is entitled to recover from operator of government-owned vehicle is void as against public policy. *Transportation Ins. Co. v. Martinez*, 183 Ariz. 33, 899 P.2d 194 (App. 1995). A.R.S. §20-259.01 (G) does not permit insurer to reduce UIM coverage by workers' compensation benefits. *Cundiff v. State Farm Mut. Auto. Ins. Co.*, 217 Ariz. 358, 174 P.3d 270 (2008).

Notwithstanding subrogation clause insurer had no right to subrogation of insured's proceeds from any party other than uninsured motorist. A.R.S. §20-259.01 (I).

An insurer is not required to offer uninsured and underinsured coverage in connection with any general commercial liability policy, excess policy, umbrella policy or other policy that does not provide primary motor vehicle insurance. A.R.S. §20-259.01 (L).

### WAIVER AND ESTOPPEL

Waiver is voluntary and intentional relinquishment of known right, whereas estoppel means that party is precluded by his own acts from asserting right to detriment of another who, entitled to rely on such conduct, has acted thereon. *Srvcs. Holding v. Transamerica*, 180 Ariz. 198, 883 P.2d 435 (App. 1994).



A waiver will not be implied where insurer did not have full knowledge of all material facts. *Manzanita Park v. Ins. Co. of North America*, 857 F.2d 549 (9<sup>th</sup> Cir. 1988).

A.R.S. §20-1130 provides that acknowledgement of receipt of notice of loss or claim, or furnishing of forms for reporting loss or claim, or investigation of any loss or claim shall not be deemed to constitute waiver of any provision of policy or of any defense.

Defending. Where insurer undertook defense of action against insureds with full knowledge of facts and without disclaimer, insurer was precluded from subsequently avoiding policy on grounds of non-coverage. *Arizona Title & Trust v. Pace*, 8 Ariz. App. 269, 445 P.2d 471 (1968).

Insurer waived its right to invoke appraisal clause in fire policy when it failed to assert that right in a timely manner. *Meineke v. Twin City*, 181 Ariz. 576, 892 P.2d 1365 (App. 1994).

Defense without Reservation of Rights. Insurer may be estopped from asserting coverage defenses if it assumes an insured's defense without reserving its right to deny coverage. *Pueblo Santa Fe Townhomes Owners' Ass'n v. Transcontinental*, 218 Ariz. 13, 178 P.3d 485 (App. 2008).

Generally. It is more difficult to extend insurance under doctrines of waiver and estoppel than to avoid forfeiture. *Connolly v. Great Basin*, 6 Ariz. App. 280, 431 P.2d 921 (1967).

Judicial abhorrence of forfeitures prompts courts to liberally construe conduct of insurer in favor of finding waiver of forfeiture provision, thereby estopping insurer from asserting defense; however, there must be some conduct in recognition of continued validity of policy as binding obligation of insurer. *State Farm v. Robison*, 11 Ariz. App. 41, 461 P.2d 520 (1969).

The insured may raise issue of estoppel to establish coverage contrary to limitation in boiler-plate policy. When insurer's agent had represented coverage as greater than found in printed policy, fact that insured had not read policy word for word is not absolute bar to estoppel theory; it is for trier of fact to determine whether insured had duty to read. *Darner v. Universal Underwriters*, 140 Ariz. 383, 682 P.2d 388 (1984).

Insurer estopped from denying payment to hospital to which it had verified coverage. *St. Joseph's Hosp. & Med. Ctr. v. Reserve*, 154 Ariz. 307, 742 P.2d 808 (1987).

Non-Waiver Agreements. Insurer, by settling one claim arising from accident, was not estopped to deny

coverage as to other claims when settlement was made after execution of non-waiver agreement by insureds and there was nothing to show that insureds relied on settlement to their injury or that they were in any way injured or misled by release executed in their favor. *Saggau v. State Farm*, 16 Ariz. App. 361, 493 P.2d 528 (1972).

Oral Waiver. Where policy requires written waiver insurance agent can waive conditions subsequent only in writing. *Insurance Co. of No. America v. Williams*, 42 Ariz. 331, 26 P.2d 117 (1933).

Premiums. Acceptance of past-due premiums is waiver of forfeiture on any ground known to insurer. *Supreme Lodge v. Grijalva*, 28 Ariz. 77, 235 P. 397 (1925).

By accepting delinquent installment payments on premium for existing policy, insurer can be estopped from imposing late payment as bar to coverage; however, where insurer accepted late payments during initial policy term, this did not estop insurer from enforcing policy provision requiring timely payment of renewal premium before policy would be renewed. *Sereno v. Lumbermens*, 132 Ariz. 546, 647 P.2d 1144 (1982).

Insurer, choosing notice of cancellation route, could not assert policy automatically terminated to insured's prejudice. *Mid-Century v. Samaniego*, 140 Ariz. 324, 681 P.2d 476 (App. 1984).

## WORKERS' COMPENSATION

See Law Digest Tables.

A.R.S. §23-901 *et seq.* are applicable statutes.

Original Jurisdiction. Industrial Commission has exclusive jurisdiction, subject to appellate review, to determine all questions of fact and law involving claims for workers' compensation under act. *Hixon v. State Comp. Fund*, 115 Ariz. 392, 565 P.2d 898 (App. 1977).

Appellate Jurisdiction. A.R.S. §23-948 provides that only superior court, court of appeals, and supreme court shall have appellate jurisdiction over any order of Industrial Commission.

Benefits/Wages. In determining injured employee's monthly earning capacity, Industrial Commission has discretion to choose most appropriate formula in any given case. *Pena v. Industrial Comm'n*, 140 Ariz. 510, 683 P.2d 309 (App. 1984).

Medical Benefits. Claimant is entitled to all reasonable medical expenses as determined by administrative law judge. *Baudanza v. Industrial Comm'n*, 149 Ariz. 509, 720 P.2d 110 (App. 1986).



**Disability Benefits.** A.R.S. §23-1045 (B) provides that in the event of permanent total disability, compensation of 66-2/3% of average monthly wage shall be paid during life of injured person.

**Death Benefits.** A.R.S. §23-1046 provides death benefits to cover burial expenses and compensation to remaining family members.

**Spouse of deceased worker** who was married to worker at time of death, but not at time worker suffered trauma causing death, was entitled to collect death benefits. *Dunn v. Industrial Comm'n*, 177 Ariz. 190, 866 P.2d 858 (1994).

**Casual Employees.** Even if employment is casual within A.R.S. §23-901, worker is covered under act if his employment was in usual course of trade, business, or occupation of employer. *Flamingo Motor Inn v. Industrial Comm'n*, 133 Ariz. 200, 650 P.2d 502 (App. 1982).

**Dual Employment.** In dual employment cases, pursuit of worker at time of injury controls. *Pinson v. Industrial Comm'n*, 79 Ariz. 21, 281 P.2d 962 (1955).

**Special Employees.** Special employer liable under workers' compensation and entitled to statutory immunity for claim if employee has contract, express or implied, with special employer; work essentially that of employer; and employer controls details of work. *Wiseman v. DynAir Tech.*, 192 Ariz. 413, 966 P.2d 1017 (App. 1998).

**Exclusive Remedy.** Right to recover workers' compensation is exclusive remedy against employer unless injury is caused by wilful misconduct. A.R.S. §23-1022.

**Arising out of and in the Course of.** Generally, employee's injury by accident must arise out of and be in the course of employment to be compensable under workers' compensation law. Ariz. Const. art. 18 §8; A.R.S. §23-901 *et seq.*; *P.B. Bell & Assocs. v. Industrial Comm'n*, 142 Ariz. 501, 690 P.2d 802 (App. 1984). Arising out of and in the course of employment tests for compensability for industrial injury are separate tests and both must be satisfied. A.R.S. §23-1021 (A); *Circle K v. Industrial Comm'n*, 165 Ariz. 91, 796 P.2d 893 (1990).

Arising out of, within meaning of statute requiring that industrial injury must result from accident arising out of claimant's employment to be compensable, refers to origin and cause of injury. A.R.S. §23-1021 (A); *Circle K v. Industrial Comm'n*, 165 Ariz. 91, 796 P.2d 893 (1990).

In course of, within meaning of statute, refers to time, place, and circumstances under which injury oc-

curred. A.R.S. §23-1021 (A); *Farish v. Industrial Comm'n*, 167 Ariz. 288, 806 P.2d 877 (App. 1990). Intoxication while performing job duty does not take employee outside scope of employment. *Ortiz v. Clinton*, 187 Ariz. 294, 928 P.2d 718 (App. 1996). A.R.S. §23-1021 (D), which bars worker's compensation claims where the injury resulted from the employee's drug or alcohol abuse, was held unconstitutional in *Grammatico v. Indus. Comm'n*, 211 Ariz. 67, 117 P.3d 786 (2005).

**Causation.** In a workers' compensation case, legal causation has three elements: 1) the employee must have been acting in the course of employment, 2) the employee must have suffered a personal injury from an accident arising out of and in the course of such employment, and 3) the resulting injury must have been caused in whole or in part, or contributed to, by a necessary risk of the employee's employment, or a necessary risk or danger inherent in the nature of that employment or the employer's lack of due care. *Polanco v. Ind. Comm'n of Arizona*, 214 Ariz. 489, 154 P.3d 391 (App. 2007). Medical causation is established in a workers' compensation case by showing that the accident caused the injury. *Id.*

Wal-Mart employee who slipped on wet floor located in McDonalds located within store was not injured on her employer's premises. *Williams v. Industrial Comm'n*, 194 Ariz. 99, 977 P.2d 821 (App. 1998).

Settlement of claim is "award" that could be rearranged following subsequent injury. *Santiago v. Industrial Comm'n*, 193 Ariz. 369, 972 P.2d 1005 (1998).

**Occupational Disease.** Inclusion of occupational disease within act was not intended to create additional bars to legitimate claims based on occupational diseases. *Nelson v. Industrial Comm'n*, 120 Ariz. 278, 585 P.2d 887 (App. 1978).

**Mental Injury.** Mental conditions need not carry label disease or illness before they are compensable. *Hooper v. Industrial Comm'n*, 126 Ariz. 586, 617 P.2d 538 (App. 1980).

**Preexisting Injury.** Insurer is liable if it can be shown that injury during employment contributed to or accelerated disability, regardless of preexisting physical conditions. *Cont'l v. Industrial Comm'n*, 8 Ariz. App. 289, 445 P.2d 846 (1968), *vacated on other grounds*, 104 Ariz. 499, 455 P.2d 977 (1969). Employer takes employee as he finds him, and if industrial injury operates on existing weakness to produce further injurious results, industrial injury causes that result. *Lorentzen v. Industrial Comm'n*, 164 Ariz. 67, 790 P.2d 765 (App. 1990).

Apportionment of benefits pursuant to A.R.S. §23-901.05 is not permitted when disability results from superimposition of occupational disease upon non-occupational preexisting condition which did not adversely affect job performance. *Fry's v. Industrial Comm'n*, 177 Ariz. 264, 866 P.2d 1350 (1994).

Where work activity and daily use both contribute to gradual aggravation of pre-existing condition to cause injury, "mixed risk" claim satisfies "actual risk" test and is compensable. *Piner v. Superior Ct.*, 192 Ariz. 182, 962 P.2d 909 (1998).

Fellow Employee Rule. Employee injured by fellow employee must choose between suing fellow employee or receiving workers' compensation. A.R.S. §23-1024.

Liens. Statutory lien allows workers' compensation carrier to impose lien against money actually collectable from third party responsible for employee's injuries. A.R.S. §23-1023. Carrier may assert lien on third party recovery only to extent that compensation benefits paid exceed employer's proportionate share of total damages. *Aitken v. Industrial Comm'n*, 183 Ariz. 387, 904 P.2d 456 (1995). Worker's compensation carrier's lien against claimant's settlement of third-party action extended to that portion of settlement designated as claimant's spouse's recovery for loss of consortium; lien statute unambiguously stated that lien attaches to total recovery obtained from third party. A.R.S. §§23-1023 (A), (D); *Martinez v. Industrial Comm'n*, 168 Ariz. 307, 812 P.2d 1125 (App. 1991). Artful contrivances should not reduce or extinguish legitimate lien rights. *Grijalva v. State Comp. Fund*, 185 Ariz. 74, 912 P.2d 1303 (1996).

A workers' compensation carrier does not have lien against claimant's third-party recovery for amount carrier paid claimant pursuant to settlement agreement. *EBI v. Industrial Comm'n*, 178 Ariz. 624, 875 P.2d 857 (App. 1994).

Employee's tort claim is not automatically assigned to workers' compensation insurance carrier where no claim is made and no benefits are paid out. *Oaks v. McQuiller*, 191 Ariz. 333, 955 P.2d 971 (App. 1998).

Uninsured Employer. Employee who elects to file against special fund rather than pursue civil action, not entitled to costs and attorney's fees from fund. *Macintyre v. Industrial Comm'n*, 192 Ariz. 6, 960 P.2d 52 (App. 1998).

Attorneys' Fee. Industrial Commission has no statutory authority to unilaterally grant attorneys' fees and costs. *Pettinato v. Industrial Comm'n*, 144 Ariz. 501, 698 P.2d 746 (App. 1984). A.R.S. §23-1069 does allow industrial commission to fix reasonable contingent fee between claimant and his own attorney when they are unable to agree.

Positional Risk Doctrine. Provides that injury arises out of employment if it would not have occurred but for fact that employment placed plaintiff at that location at that particular time. Exception to general rule that course of employment excluded going to and coming from work applies if employer compensates employee for travel expenses and totality of circumstances implies that employment can be considered to include travel itself as substantial part of service performed. *Poole v. Industrial Comm'n*, 174 Ariz. 448, 850 P.2d 686 (App. 1993); *Hunt Bldg. Corp. v. Industrial Comm'n*, 148 Ariz. 102, 713 P.2d 303 (App. 1986).