

1 Department's statement that the allegations in the original
2 Notice, specifically Counts I through IV did not pertain to
3 Respondent Wakefield,¹ the request to continue the
4 hearing was denied.

5 The transactions which are the basis for the
6 allegations in Counts I through IV occurred prior to the
7 incorporation of Respondent AIL Insurance, Inc.

8 For the reasons stated above, all findings of fact,
9 conclusions of law and any resulting order pertaining to Counts
10 I through IV are solely against Respondent Posey. Only the
11 allegations contained in Count V of the Amended Notice pertain
12 to all Respondents listed herein.

13 As to Count V there are expressly no findings made
14 regarding the amounts which may be owing to Respondents from
15 Discount Insurance Group, Inc., or findings interpreting the
16 contract for the sale of Respondent AIL or Respondent Posey's
17 business to Discount Insurance Group, Inc.

18 FINDINGS OF FACT

19 1. Notice of this hearing was mailed to all
20 Respondents at their last addresses of record.

21 2. Respondent Philip Gordon Posey ("Respondent
22 Posey"), is currently licensed as a property and casualty agent
23 and broker and a life and disability agent by the State of
24 Arizona (License No. 714407). Respondent Posey does business
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27 ¹The statement was contained in "Objection to Motion
28 to Continue" filed on October 15, 1993.

1 under the assumed names Philip Gordon, Insurance Renewal
2 Services and Arizona Insurance Locators.

3 3. Respondent AIL Insurance, Inc. ("Respondent AIL")
4 is presently licensed as a property and casualty agent and a
5 life and disability agent by the State of Arizona (License No.
6 14410).

7 4. Respondent Chris Lynn Wakefield ("Wakefield") is
8 currently licensed as a property and casualty insurance agent
9 and broker by the State of Arizona (License No. 810184).

10 5. Respondents Posey and Wakefield were the original
11 stockholders and officers of Respondent AIL when it was
12 incorporated on February 26, 1993. Subsequently, in or about
13 September, 1993 Respondent Wakefield resigned as an officer of
14 AIL and gifted his stock to Respondent Posey.

15 Count I

16 6. On or about October 7, 1992, Gina Briles
17 ("Briles") contacted Respondent Posey dba Arizona Insurance
18 Locators' office to cancel the automobile insurance policies she
19 had purchased there underwritten by Century National Insurance
20 Company ("Century National") and Victoria Insurance. Briles'
21 policy underwritten by Century National was financed by Emerald
22 Finance Company ("Emerald").

23 7. On or about October 29, 1992, Emerald mailed a
24 refund check #50043, in the amount of \$269.40 made payable to
25 Regina Briles and to Respondent Posey dba Arizona Insurance
26 Locators.

27 8. On or about January 13, 1993 as a result of not
28 receiving her refund for the Century National policy, and as a

1 result of Respondent Posey's office's nonresponsivness to her
2 inquires, Briles filed a complaint with the Arizona Department
3 of Insurance.

4 9. On February 19, 1993 Respondent Posey issued
5 Briles her premium refund check in the amount of \$269.40.
6 Respondent Posey mailed Briles her refund check approximately
7 110 days or four months after Posey received the money from
8 Emerald.

9 10. Respondent Posey's testified that he was forced
10 to cut back in office staff during the fall of 1992 because of a
11 business slow down and that he eventually sold his book of
12 business to Discount Insurance Group, Inc. on February 15,
13 1993. Respondent Posey did not contest the fact that Briles
14 experienced a long delay in the return of her premium.

15 11. Based on the evidence presented, we find that
16 Respondent Posey took an excessive amount of time to refund
17 Brile's premium and was nonresponsive to Briles' inquiries.

18 Count II

19 12. On or about October 18, 1992, Catherine Ludwig
20 ("Ludwig") purchased an automobile insurance policy from
21 Respondent Posey dba Arizona Insurance Locators underwritten by
22 Sutter Insurance Company ("Sutter"). Ludwig completed an
23 application and remitted a premium payment in the amount of
24 \$168.00.

25 13. Approximately 3 days later, on or about October
26 21, 1992, Ludwig cancelled her policy.

27 14. During the period from December, 1992 through
28 March, 1993, Ludwig made numerous attempts to contact Respondent

1 Posey's office regarding her refund, but was never able to speak
2 to an agent.

3 15. On or about March 25, 1993, Ludwig filed a
4 complaint with the Department of Insurance.

5 16. In May 1993, over six months after Ludwig's
6 cancellation of the policy, Respondent received Ludwig's refund
7 in the amount of \$168.00 from Discount Insurance Group, Inc.
8 (the agency which had purchased Respondent Posey's book of
9 business).

10 17. Respondent Posey admitted that he should have
11 refunded Ludwig's money as soon as Ludwig's original check
12 cleared the bank. Posey did not forward Ludwig's application to
13 Sutter because Ludwig had informed Posey that Ludwig wanted to
14 cancel the policy approximately three days after Ludwig
15 completed the application. Respondent Posey therefore treated
16 Ludwig's application as if coverage was never bound, and he saw
17 no reason to forward the cancelled application to Sutter at that
18 point. Respondent Posey's broker agreement with Sutter requires
19 Posey to forward the applications and premiums to Sutter within
20 72 hours or three days of Posey's receipt of the application.

21 18. Respondent Posey further testified that Ludwig's
22 file had been lost, that his office had experienced cut backs in
23 staff and that he eventually sold his business (see Finding of
24 Fact No. 10); and that all of this resulted in the delay of
25 Ludwig's repayment.

26 19. Based on the evidence presented, we find that
27 Respondent Posey took an excessive amount of time to refund
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1 Ludwig's premium and that Respondent Posey was nonresponsive to
2 Ludwig's inquiries.

3 Count III

4 20. On or about October 16, 1992, Rosa A. Valdez
5 ("Valdez") purchased an automobile insurance policy from
6 Respondent Posey dba Arizona Insurance Locators underwritten by
7 Empire Fire & Marine Insurance Company ("Empire"). Valdez
8 remitted a premium payment in the amount of \$356.00.

9 21. On or about November 19, 1992, CenCal Insurance
10 Services ("CenCal"), the managing general agent for Empire
11 cancelled Valdez' policy because Valdez had not been a resident
12 of the United States for three years as required in Empire's
13 underwriting guidelines.

14 22. On or about November 30, 1992, CenCal issued a
15 refund check (#060588) for Valdez in the amount of \$219.30
16 payable to Arizona Insurance Locators.

17 23. On or about January 20, 1993, Valdez filed a
18 complaint with the Department of Insurance against Respondent
19 Posey dba Arizona Insurance Locators for failure to return her
20 premium.

21 24. On January 23, 1993 Valdez received her refund,
22 approximately two months after Respondent Posey had received the
23 refund from CenCal. The refund was for \$53.70 more than Posey
24 had received from CenCal. Posey calculated the refund amount he
25 owed Valdez based on Respondent Posey's reconciliation of
26 Valdez' account.

27 25. On or about February 16, 1993, the Department
28 sent Respondent Posey dba Arizona Insurance Locators an inquiry

1 regarding Valdez' complaint which ordered him to respond by
2 March 15, 1993. Although Respondent Posey claims to have
3 responded to the Department, he was unable to supply a copy of
4 such response. We find Respondent Posey has failed to respond
5 as ordered.

6 26. Respondent Posey testified that he was forced to
7 cut back in office staff during the fall of 1992 because of a
8 business slow down and that he eventually sold his book of
9 business to Discount Insurance Group, Inc. on February 15,
10 1993. Respondent Posey did not contest the fact that Valdez
11 experienced a delay in the return of her premium.

12 27. Based on the evidence presented, we find that
13 Respondent Posey took an excessive amount of time to refund
14 Valdez' premium.

15 Count IV

16 28. On or about September 6, 1992, Hugo Villegas
17 ("Villegas") requested automobile insurance from Respondent
18 Posey dba Arizona Insurance Locators for which the collision
19 coverage was underwritten by Phoenix Indemnity Insurance Company
20 ("Phoenix Indemnity") and for which the liability coverage was
21 underwritten by Midland Risk Insurance Company. Villegas paid
22 \$504.00 as a down payment. The Phoenix Indemnity policy was
23 financed by Dwight Financial, Inc. and the Midland Risk policy
24 was financed by Emerald Finance Company.

25 29. On or about September 16, 1992, Villegas
26 cancelled his coverage and requested a refund of his premium
27 down payment.

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30. On or about November 30, 1992, Dwight Financial issued a refund check in the amount of \$60.57 made payable to Arizona Insurance Locators.

31. On or about November 2, 1992, Emerald issued a refund check in the amount of \$176.86 made payable to Arizona Insurance Locators.

32. On or about January 15, 1993, Respondent Posey dba Arizona Insurance Locators issued Villegas a check in the amount of \$121.43. Villegas, believing he was due a larger refund, did not cash the check. Subsequently, on or about April 12, 1993, Villegas attempted to cash the check. The check was returned by the bank as account closed.

33. On or about February 1, 1993, Villegas filed a complaint with the Department of Insurance against Respondent Posey dba Arizona Insurance Locators for failure to return his premium down payment.

34. Respondent Posey testified that he had closed his business bank account when he sold his book of business to Discount Insurance Group, Inc. in February 1993. Although Respondent Posey testified he was personally unaware that the check had not cleared, his testimony was unpersuasive. When the bank account was closed, Posey would or should have known the account did not balance.

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1 35. Based on the evidence presented, we find that
2 Respondent Posey should have known that the check had not
3 cleared and that he owed Villegas \$121.43.²

4 Count V

5 36. On or about February 15, 1993, Respondent Posey
6 sold his book of business to Discount Insurance Group, Inc.
7 ("Discount").

8 37. Respondents Posey and Wakefield incorporated
9 Respondent AIL in conjunction with the sale.

10 38. As terms of the sale, AIL was to share office
11 space located at 1620 W. University, #2, Mesa, Arizona with
12 Discount. The contract for the sale of the book of business
13 between Respondent Posey and Discount outlined provisions for
14 the payment to Respondent Posey for the book of business, the
15 payment of shared overhead costs, and payment of commissions to
16 Respondent AIL. The contract further provided that Respondent
17 Posey and Respondent Wakefield were to submit all insurance
18 business generated by Respondent AIL to Discount. The contract
19 did not specify how the premium money collected by Respondent
20 AIL was to be handled or require AIL to establish trust accounts.

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24 ²It appears from the evidence that Villegas paid fees
25 to two separate premium finance companies and insurers because
26 the liability coverage and comprehensive coverage were
27 underwritten by two separate insurers and the two coverages
28 separately financed. The Department did not allege
misrepresentation, nor prove that Villegas is entitled to a
refund in excess of \$121.43.

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39. It is undisputed that a contractual dispute exists between Respondent AIL, Respondent Posey, and Respondent Wakefield on one side and Discount on the other.

40. Between August 13, 1993 and August 15, 1993, Respondent AIL received approximately 17 insurance applications and premium payments from various applicants requesting automobile insurance through Discount.

41. There was no evidence presented as to what insurer would be underwriting the policies, or whether the insurer required trust accounts or the segregation of monies.

42. There was no evidence presented as to any understanding that may have existed between the potential insureds and Respondent AIL as to the application of their particular premium monies.

43. Respondent AIL forwarded the 17 applications together with a portion of the premium payments AIL received to Discount, but failed to forward to Discount the cash portion of the premium AIL had received, which amounted to \$3,237.00.

44. Respondent Posey admitted to failing to forward the \$3,237.00 in premium monies to Discount. Posey testified that Discount owed AIL approximately \$26,168.73 pursuant to the terms of the buy/sell agreement for the purchase of Respondent Posey's book of business to Discount, and that Posey was keeping the premium money as an offset or recoupment for monies Discount owed AIL. Respondent also testified that he (Posey) had no intention of paying the \$3,237.00 to either Discount or the appropriate insurers.

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45. Discount from its own funds paid the correct premiums to the insurers. Discount through its owner Mr. Vander Molen testified that all the premium funds were routinely given to Discount by Respondent AIL on a daily basis.

46. Respondent Posey testified that he had no responsibility to the insureds to make sure their premium money was sent to the insurer. He testified that he wrote the policies in the name of Discount.

47. Respondent Wakefield testified that he was aware of Respondent Posey's actions as described in paragraphs 36 through 44 and reasons for failing to forward the premium money.

CONCLUSIONS OF LAW

1. The Director has jurisdiction in this matter pursuant to A.R.S. §20-142.

2. Notice of this hearing was proper to each Respondent pursuant to A.R.S. §§20-163 and 41-1061.

3. The Department has shown by substantial evidence that conduct by Respondent Posey as alleged in Counts I through V constitutes a conduct of affairs under his licenses showing him to be incompetent or a source of injury and loss to the public or any insurer, in violation of A.R.S. §20-316(A)(7). As a result of Respondent Posey's conduct, policyholders experienced significant delays in receiving premium refunds and had to make repeated requests to obtain these refunds. Further,

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1 as of the hearing date Villegas had still not received his
2 refund.³

3 4. Respondent Posey has argued that AIL was entitled
4 to assert its legal "right of recoupment". Respondent Posey
5 cited Morris v. Achen, 155 Ariz. 512, 747 P.2d 1211 (Ariz.
6 1987), in support of his position. In Morris the Arizona
7 Supreme Court, citing Black's Law Dictionary and W.J. Kroger
8 Company, 112 Ariz. 285, 541 P.2d 385 (1975), defined recoupment
9 as an equitable right of reduction by the defendant of part of
10 the plaintiff's claim because of a right in the defendant
11 arising out of the same transaction." The Court went on to
12 assert that recoupment can be asserted in Arizona, even if the
13 party is not entitled to relief on the direct action.

14 Although Morris does not specifically address the
15 question to be briefed as requested by the hearing officer, it
16 does establish a general right to recoupment in Arizona unless
17 the facts of this case can be distinguished, or other law is
18 controlling when applied to principals and agents.

19 The Department has made no attempt to distinguish
20 Morris nor has the Department taken the position that Morris
21 is inapplicable to this situation. The Department relies solely
22 on the propositions that Respondent is not entitled to a set-off
23 or recoupment because 1) no such provision was written in the
24 buy-sell agreement between Respondents and Discount, 2) an


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26 ³In Respondent Posey's closing brief, he states that
27 Villegas has, since the hearing, received his refund but no
28 proof was presented.


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3. Respondent Posey shall pay \$121.43 to Hugo Villegas as restitution. Respondent Posey shall supply proof of the payment to the Department on or before March 15, 1994.

4. The aggrieved party may request a rehearing with respect to this Order by filing a written petition with the Hearing Officer within 30 days of the date of this Order, setting forth the basis for such relief pursuant to A.A.C. R4-14-114(B).

DATED this 24th day of February, 1994.


CHRIS HERSTAM
Director of Insurance


KATRINA ROGERS
Chief Hearing Officer

COPY of the foregoing mailed/delivered this 24th day of February, 1994, to:

Gay Ann Williams, Deputy Director
Charles R. Cohen, Executive Assistant Director
Jay Rubin, Assistant Director
Arnold Sniegowski, Investigator
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2 Mesa, Arizona 85210

3 Philip Gordon Posey
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7 Chris Lynn Wakefield
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10 Chris Crawford
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