

FILED

**BEFORE THE COMMISSIONER OF INSURANCE
OF THE STATE OF KANSAS**

OCT 27 2016

**COMMISSIONER OF INSURANCE
STATE OF KANSAS**

In the Matter of)
)
AMERICAN FAMILY MUTUAL)
INSURANCE COMPANY)
)
NAIC #19275)

Docket No. 4911-SO

CONSENT AGREEMENT AND FINAL ORDER
(Pursuant to K.S.A. 2015 Supp. 40-2404, K.S.A. 40-2407 and
K.S.A. 2015 Supp. 77-537)

Now on this 27 day of October, 2016, the Kansas Insurance Department (“KID”) and American Family Mutual Insurance Company (“American Family”) come before the Commissioner for formal disposition of the above captioned matter. The parties submit a proposed Consent Agreement and Final Order for adoption, rejection, or modification pursuant to the provisions of K.S.A. 77-537.

KID and American Family wish to resolve this matter by entering into this Consent Agreement. American Family hereby waives any and all rights to further administrative adjudication or review of this matter, including any and all right conferred upon it under K.S.A. 77-501 *et seq.* This Consent Agreement and Final Order constitutes the final order in this matter. Pursuant to the authority granted to the Commissioner of Insurance (“Commissioner”) by K.S.A. 2010 Supp. 40-2404 and K.S.A. 40-2407 and in accordance with K.S.A. 2010 Supp. 77-537, the Commissioner hereby adopts the proposed Consent Order and admonishes and assesses penalty against American Family Mutual Insurance Company ("American Family") for engaging in an unfair claim settlement practice and violating applicable provisions of the Kansas Insurance

Code and the Kansas Administrative Code. This Order shall become effective as a Final Order, without further notice, when signed by the Commissioner or his designee and filed of record with the KID.

Findings of Fact

The Commissioner has been shown the following facts:

1. American Family is located at 6000 American Parkway, P.O. Box 7430, Madison, WI 53783.
2. American Family has been authorized to transact and has continuously transacted insurance business in the State of Kansas since September 4, 1941.
3. American Family did not pay claimants the actual cash value (“ACV”) to tear off roof shingles on some homeowners, mobile home and dwelling fire claims between April 1, 2014 and July 27, 2015.
4. The policies in question contained ACV provisions that defined ACV as “[t]he amount which it would cost to repair or replace covered property with material of like kind and quality, less allowance for physical deterioration and depreciation, including obsolescence.”
5. The policies also contained debris removal provisions that covered “reasonable expenses you incur to remove debris” or “your reasonable expenses for the removal of debris”.
6. In 2007, KID issued a Summary Order, Docket No.3673-SO, fining American Family for depreciating the cost of tear off of damaged roofs relying, in part, Branch v. Farmers Insurance Company, Inc., and Farmers Group, Inc., 311 F3d 1241 (10th Cir. 2002) to support the finding that the damaged roof in question constituted debris, and debris removal was not depreciable under the policy terms.

7. American Family indicates that ACV roof tear off claims were processed under the debris removal provision of the policy to be paid without depreciation at the time incurred or considered an expense.
8. However, as a result of the KID's January, 2014 efforts to survey and investigate industry practices in adjusting tear off and ACV claims, American Family found some inconsistencies in its claim practices where ACV roof tear off costs were included in ACV claims settlement calculations without clear indication of the ability to recover 100% when the expense was incurred.
9. As a result of KID's efforts to make sure insureds were adequately informed and not misled on the adjustment of roof tear off claims, American Family changed their claims practices with regard to roof tear off to withhold 100% of the estimated costs until incurred as provided in their debris removal policy provision, and changed the language in their claims settlement documentation to include the notation: "The following line items have been deferred 100% until incurred."
10. On July 20, 2015, KID advised American Family that roof tear off claims should not be adjusted as "debris removal" or settled under the debris removal provision of the policy but should be paid as part of the ACV payment.
11. During this time, there was no Kansas decision establishing whether roof tear off claims were to be adjusted under the debris removal provision without depreciation or under the ACV provision with depreciation. On July 22, 2015, the Kansas Federal District Court in Graves v American Family Mutual Insurance Company, 14-2417-EFM, decided that labor claims could be depreciated indicating that a roof is a single integrated product made up of labor and materials and that a reasonable insured would understand that the policy

allows depreciation of all costs associated with replacing a roof. That decision is on appeal to the Tenth Circuit Court of Appeals.

12. In July, 2015, KID instructed American Family to conduct an audit of tear off claims for ACV policies from April 1, 2014 through July 27, 2015 to determine what policyholders would have been paid had they been adjusted under the ACV provision.
13. American Family reported that between April 1, 2014 and July 27, 2015, 283 claims involving damage to roofs on ACV policies were filed and of those, 136 had not been paid an amount for roof removal. Applying an ACV calculation to those claims, whether or not the tear off cost had been incurred, resulted in an amount that totaled \$65,505.83.
14. At KID's instruction, American Family made payments to consumers between August 20, 2015 and September 20, 2015 to pay ACV totaling \$65,505.83 on claims from April 1, 2014 through July 27, 2015 that had been adjusted under the debris removal provision.
15. American Family failed to clearly and sufficiently advise insureds with regard to the adjustment of roof tear off claims in a consistent manner.

Applicable Law

16. K.S.A. 40-2404(9)(a) states, that it is an unfair claim settlement practice when a company violates the law "flagrantly and in conscious disregard" thereof or "with such frequency as to indicate a general business practice by (a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
17. K.S.A. 40-2406 states:
 - (a) Whenever the commissioner has reason to believe that any such person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice, whether or not defined in K.S.A. 40-2404 and amendments thereto, and that a proceeding by the commissioner in respect thereto would be in the interest of the public, the commissioner shall issue and serve upon such person a statement of the charges in that respect and conduct a hearing thereon in accordance with the provisions of the Kansas administrative procedure act.

18. K.S.A. 40-2407 provides:

(a) If, after such hearing, the commissioner shall determine that the person charged has engaged in an unfair method of competition or an unfair or deceptive act or practice, the commissioner shall render an order requiring such person to cease and desist from engaging in such method of competition, act or practice and the act or practice is a violation of K.S.A. 40-2404 and amendments thereto, the commissioner may in the exercise of discretion order any one or more of the following:

(1) Payment of a monetary penalty of not more than \$1,000 for each and every act or violation, but not to exceed an aggregate penalty of \$10,000, unless the person knew or reasonably should have known such person was in violation of this act, in which case the penalty shall be not more than \$5,000 for each and every act or violation, but not to exceed an aggregate of \$50,000 in any six-month period;

Conclusions of Law

Based on the Findings of Fact enumerated in paragraphs 1 through 15, and the applicable law, the Commissioner finds as follows:

19. The Commissioner has jurisdiction over American Family and the subject matter of this proceeding and such proceeding is held in the public interest.

20. American Family has violated K.S.A. 40-2404(9)(a) by incorrectly and inconsistently describing the policy provisions and among the affected insureds.

IT IS THEREFORE ORDERED BY THE COMMISSIONER OF INSURANCE

21. Pursuant to K.S.A. 40-2407(a)(1), American Family is ordered to pay an administrative penalty in the amount of \$20,000.00 for the above stated violation of K.S.A. 40-2404(9).

22. American Family shall cease and desist from adjusting roof tear off under the debris removal provision and shall adjust roof tear off claims under the ACV loss settlement policy provisions.

23. The Commissioner shall retain jurisdiction over this matter to issue any orders deemed necessary.

IT IS SO ORDERED THIS 27th DAY OF October, 2016 IN THE CITY OF TOPEKA, COUNTY OF SHAWNEE, STATE OF KANSAS.



Ken Selzer, C.P.A.
Commissioner of Insurance

BY: John Wine

John Wine
General Counsel

American Family Mutual Insurance Company

Leslie Even
By: Leslie Even
Compliance + Ethics Director

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served the above and foregoing Summary Order and Notice of Rights on this 27th day of October, 2016, by causing the same to be deposited in the United States Mail, first-class postage prepaid, addressed to the following:

Ms. Lori J. Bochniak
Associate General Counsel
American Family Mutual Insurance Company
6000 American Parkway
P.O. Box 7430
Madison, WI 53783-0001

Susan Ellmaker

Susan Ellmaker, Staff Attorney