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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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American Family Mutual Insurance Co., a)
Wisconsin corporation,

No. CV07-2237-PHX-NVW

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Plaintiff,

ORDER

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vs.

[Not for Publication]

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National Fire & Marine Insurance Co., a)
foreign corporation; et al,

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Defendants.

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Pending before the Court is Defendant Northland Insurance Company’s Motion for Summary Judgment (Phase One) (doc. #472).

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A party moving for summary judgment must “file a statement, separate from the motion and memorandum of law, setting forth each material fact on which the party relies in support of the motion.” LRCiv 56.1(a). Any party opposing a motion for summary judgment must file a separate statement responding to each paragraph of the moving party’s separate statement of facts and setting forth any additional facts that establish a genuine issue of material or otherwise preclude judgment in favor of the moving party. LRCiv 56.1(b). LRCiv 56.1(d) permits the moving party to file a “reply memorandum,” but does not permit the moving party to file a separate statement responding to the nonmoving party’s separate statement. Any evidentiary objections to the nonmoving party’s separate statement may be included in the reply memorandum, but may not be

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1 made in a separate statement. Therefore, the Court disregards and does not rely upon
2 Defendant Northland Insurance Company's Response to Plaintiff's Separate Statement of
3 Facts and Supplemental Statement of Undisputed Facts in Support of Defendant's Motion
4 for Summary Judgment (doc. #555).

5 **I. Legal Standard for Summary Judgment**

6 The Court should grant summary judgment if the evidence shows there is no
7 genuine issue as to any material fact and the moving party is entitled to judgment as a
8 matter of law. Fed. R. Civ. P. 56(c). The moving party must produce evidence and
9 persuade the Court there is no genuine issue of material fact. *Nissan Fire & Marine Ins.*
10 *Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). To defeat a motion for
11 summary judgment, the nonmoving party must show that there are genuine issues of
12 material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A material fact
13 is one that might affect the outcome of the suit under the governing law. *Id.* at 248. A
14 factual issue is genuine "if the evidence is such that a reasonable jury could return a
15 verdict for the nonmoving party." *Id.*

16 The party seeking summary judgment bears the initial burden of informing the
17 court of the basis for its motion and identifying those portions of the pleadings,
18 depositions, answers to interrogatories, and admissions on file, together with the
19 affidavits, if any, which it believes demonstrate the absence of any genuine issue of
20 material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nature of this
21 responsibility varies, however, depending on whether the moving party or the nonmoving
22 party would bear the burden of proof at trial on the issues relevant to the summary
23 judgment motion. If the nonmoving party would bear the burden of persuasion at trial,
24 the moving party may carry its initial burden of production under Rule 56(c) by
25 producing "evidence negating an essential element of the nonmoving party's case," or by
26 showing, "after suitable discovery," that the "nonmoving party does not have enough
27 evidence of an essential element of its claim or defense to carry its ultimate burden of
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1 persuasion at trial.” *Nissan Fire*, 210 F.3d at 1105-06; *High Tech Gays v. Defense Indus.*
2 *Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990).

3 When the moving party has carried its burden under Rule 56(c), the nonmoving
4 party must produce evidence to support its claim or defense by more than simply showing
5 “there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*
6 *v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Where the record, taken as a whole,
7 could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
8 issue of material fact for trial. *Id.*

9 In the context of summary judgment, the court presumes the nonmoving party’s
10 evidence is true and draws all inferences from the evidence in the light most favorable to
11 the nonmoving party. *Eisenberg v. Ins. Co. of North America*, 815 F.2d 1285, 1289 (9th
12 Cir. 1987). If the nonmoving party produces direct evidence of a genuine issue of fact,
13 the court does not weigh such evidence against the moving party’s conflicting evidence,
14 but rather submits the issue to the trier of fact for resolution. *Id.*

15 However, each numbered paragraph of the moving party’s separate statement of
16 facts shall be deemed admitted for purposes of the motion for summary judgment if not
17 specifically controverted by a correspondingly numbered paragraph in the opposing
18 party’s separate statement of facts. LRCiv 56.1(b).

19 **II. Facts Undisputed or Presumed True for Summary Judgment**

20 Astragal, L.L.C. (“Astragal”) was the developer of the project commonly known
21 as Astragal Luxury Villas at Thompson Peak located in Maricopa County, Arizona
22 (“Villas”). Astragal entered into a contract with George F. Tibsherany Development
23 Company (“GFTDC”) to serve as the general contractor for the Villas. GFTDC entered
24 into a subcontract agreement with Willman & Sanetra Plastering (“Willman”), among
25 others, to perform work at the Villas. The subcontract required Willman to maintain
26 specifically described insurance coverage and to cause all its insurance companies to
27 name GFTDC as an additional insured on all insurance policies required under the
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1 subcontract. A Certificate of Liability Insurance dated April 19, 2002, was issued to
2 GFTDC showing Willman was insured by Northland Insurance Company (“Northland”).

3 Northland issued a commercial general liability policy to Willman, policy number
4 RL000148, effective April 19, 2002, through April 19, 2003 (“Policy”). The Policy
5 includes a Contractor’s Blanket Additional Insured Endorsement. The Policy also
6 includes the following language:

7 **2. Duties In The Event of Occurrence, Offense, Claim Or Suit**

8 **a.** You¹ must see to it that we are notified as soon as practicable
9 of an “occurrence” or an offense which may result in a claim.
To the extent possible, notice should include:

- 10 (1) How, when and where the “occurrence” or offense
took place;
11 (2) The names and addresses of any injured persons and
witnesses; and
12 (3) The nature and location of any injury or damage
arising out of the “occurrence” or offense.

13 **b.** If a claim is made or “suit” is brought against any insured,
you must:

- 14 (1) Immediately record the specifics of the claim or “suit”
and the date received; and
15 (2) Notify us as soon as practicable.

16 You must see to it that we receive written notice of the claim
or “suit” as soon as practicable.

17 **c.** You and any other involved insured must:

- 18 (1) Immediately send us copies of any demands, notices,
19 summonses, or legal papers received in connection
with the claim or “suit”;
20 (2) Authorize us to obtain records and other information;
21 (3) Cooperate with us in the investigation or settlement of
the claim or defense against the “suit”; and
22 (4) Assist us, upon our request, in the enforcement of any
right against any person or organization which may be
23 liable to the insured because of injury or damage to
which the insurance may also apply.

24 **d.** No insured will, except at that insured’s own cost, voluntarily
25 make a payment, assume any obligation, or incur any
expense, other than for first aid, without our consent.

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28 ¹“You” in the Policy refers to Willman.

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2 On October 19, 2004, Astragal Condominium Unit Owners Association (“Astragal
3 HOA”) filed a lawsuit against Astragal and GFTDC alleging numerous defects in the
4 construction of the Villas (“HOA Lawsuit”). At all relevant times, GFTDC was insured
5 under a commercial general liability policy issued by American Family Mutual Insurance
6 Co. (“American Family”). American Family provided a defense to GFTDC in the HOA
7 Lawsuit.

8 On August 11, 2005, GFTDC filed a third-party complaint in the HOA Lawsuit
9 against Willman and other subcontractors to recover damages against the subcontractors
10 to the extent they had failed to perform their scope of work in a workmanlike manner.
11 Gust Rosenfeld represented GFTDC in the HOA Lawsuit. Matthew Bedwell, an attorney
12 at Gust Rosenfeld, provided Gloria Zanella, a legal secretary for Gust Rosenfeld, with a
13 draft letter to be mailed to each of the subcontractors named as third-party defendants to
14 GFTDC’s third-party complaint with a copy to each of the insurance companies indicated
15 on certificates of liability insurance or other insurance documents for each subcontractor.
16 In addition to the draft letter, Bedwell provided Zanella with a list of subcontractors
17 named as third-party defendants and a binder of certificates of liability for the listed
18 subcontractors. Zanella prepared a letter addressed to each of the subcontractors and
19 listed the insurance companies indicated on the certificates of liability insurance for each
20 particular subcontractor as recipients of a copy of the letter.

21 To obtain addresses for the insurance companies, Zanella researched the Arizona
22 Department of Insurance website, the internet, and other sources. She then compiled the
23 insurance companies’ addresses on a document titled “List of Insurer Addresses.” After
24 obtaining the addresses, Zanella printed a copy of each letter for each of insurance
25 companies indicated on the letter as a copy recipient. Zanella addressed envelopes for
26 each insurance company that was copied on one of the letters and enclosed a copy of the
27 signed letter and enclosures provided by Bedwell. After stuffing the envelopes and
28 sealing them, Zanella placed the envelopes in the firm’s outgoing mail baskets for postage

1 to be affixed by mail room employees and for delivery by Central Courier personnel to
2 the United States Postal Service. She did not arrange for any of the letters to be mailed
3 by certified or registered mail.

4 If Zanella was unable to locate an insurance company's address, a copy was
5 mailed once the address was obtained. Zanella's affidavit states, "To my knowledge,
6 every subcontractor and insurance company carbon copied on the letter was mailed a
7 copy." Her affidavit does not state that she recalls, has personal knowledge of, or has
8 records of printing a copy for Northland, addressing an envelope to Northland, or mailing
9 a letter addressed to Northland.

10 A letter dated August 17, 2005, was sent to Rick Senetra, Willman, that demanded
11 a defense and indemnity from Willman as well as insurance coverage as an additional
12 insured under Willman's insurance policy ("Willman Tender Letter"). The letter states
13 that Willman was "required to name GFTDC as an additional insured under the policies
14 issued by Northland Insurance, Western Agricultural, National Union Fire Insurance
15 Company, Genesis Indemnity, Hartford Insurance Company, AIG, Kemper Indemnity
16 Insurance, Liberty Mutual and Great States Insurance Company." The Willman Tender
17 Letter also states:

18 Accordingly, please immediately place your insurance carrier on
19 notice of this claim and further put them on notice that GFTDC will be
20 looking to them directly as an additional insured for coverage under the
21 policy in regard to the allegations being presented by the condominium unit
22 owners association. By copy of this correspondence to your agent and
23 insurance carrier, we are formally placing them on notice of GFTDC's
24 demand for defense and coverage under the terms and conditions of the
25 policy of insurance noted above and noted in the attached certificate.
26 GFTDC formally demands that your insurance carrier respond to this
27 request for defense and coverage within 20 days. In addition, GFTDC
28 intends to look to you and your insurance carrier for the payment of all
expenses and costs associated with this defense as it relates to the
allegations from the condominium unit owners association. Please confirm
within 20 days of the date of this correspondence your agreement to defend
and indemnity [sic] GFTDC completely in regard to any and all allegations
being presented.

The Willman Tender Letter indicates a copy was mailed to each of the following:
Northland Insurance, Western Agricultural, National Union Fire Ins. Co., Genesis

1 Indemnity, Hartford Insurance Co., AIG, Kemper Indemnity Ins., Liberty Mutual, and
2 Great States Ins. Co.

3 However, Northland denies receipt of the Willman Tender Letter. Scott Stanek, a
4 Managing Director for Northland, personally reviewed Northland's claims file regarding
5 the HOA Lawsuit and was unable to locate a copy of the Willman Tender Letter or any
6 other letter or communication tendering the defense or indemnification of GFTDC to
7 Northland. An electronic log note from the Northland file dated April 17, 2006, states
8 that no tender had been received from the project developer. The attorneys who
9 represented Willman in the HOA Lawsuit did not receive a copy of the Willman Tender
10 Letter.

11 American Family is seeking to recover defense costs and indemnification from
12 Northland under the theory American Family and Northland both insured GFTDC.
13 American Family's Third Amended Complaint seeks (1) indemnification in connection
14 with the Astragal HOA property damage claims, (2) contribution for the cost of the
15 defense, and (3) equitable contribution for breach of duties by failing to participate in the
16 defense of GFTDC.

17 **III. Analysis**

18 Under the doctrine of equitable contribution, an insurer who has paid a claim may
19 seek contribution directly from other carriers that are liable for the same loss. *W.*
20 *Agricultural Ins. Co. v. Indus. Indem. Ins. Co.*, 838 P.2d 1353, 1355 (Ariz. App. 1992).
21 One insurer may be required to contribute to another insurer's payment of a claim if the
22 policies cover (1) the same parties, (2) in the same interest, (3) in the same property, and
23 (4) against the same casualty. *Id.* The doctrine is appropriate where two insurers have
24 agreed to indemnify the same party because it avoids the loss claimant making an
25 arbitrary choice as to which insurer should pay and it does not give one indemnitor an
26 incentive to avoid paying a just claim to its insured hoping the other indemnitor will pay.
27 *Id.* at 1356. However, if a party to an insurance policy breaches it, the other party is no
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1 longer obligated to perform its contractual obligations under the policy. *Holt v. Utica*
2 *Mut. Ins. Co.*, 759 P.2d 623, 628 (Ariz. 1988).

3 **A. GFTDC Failed to Properly Tender Its Demand for Defense and**
4 **Indemnification to Northland.**

5 Northland contends that American Family may not obtain equitable contribution
6 from Northland because GFTDC failed to tender its defense and to demand
7 indemnification. American Family contends that genuine issues of material fact
8 regarding GFTDC's tender of defense preclude summary judgment.

9 Before an insurer's duty to defend may be found, it must be shown that the insurer
10 received sufficient notice that the insured was tendering the defense to it. *Purvis v.*
11 *Hartford Accident & Indem. Co.*, 877 P.2d 827, 830 (Ariz. App. 1994). A tender of
12 defense, "whether written or oral, must contain full and fair information concerning the
13 pending action and an unequivocal, certain and explicit demand to undertake the defense
14 thereof, with an offer to surrender control of the action to the indemnitor at least as to that
15 portion of the claim for which the indemnitee seeks ultimately to hold the indemnitor
16 liable." *Litton Sys., Inc. v. Shaw's Sales & Serv., Ltd.*, 579 P.2d 48, 52 (Ariz. App. 1978);
17 *accord Purvis*, 877 P.2d at 830. "What is required is knowledge that the suit is
18 potentially within the policy's coverage coupled with knowledge that the insurer's
19 assistance is desired." *Purvis*, 877 P.2d at 830 (quoting *Hartford Accident & Indem. Co.*
20 *v. Gulf Ins. Co.*, 776 F.2d 1380, 1383 (7th Cir. 1985)).

21 Arizona law recognizes a "mail delivery rule." *Lee v. Arizona*, 182 P.3d 1169,
22 1171, ¶ 8 (Ariz. 2008). Under this common law rule:

23 [T]here is a presumption that a "letter properly addressed, stamped and
24 deposited in the United States mail will reach the addressee." That is, proof
25 of the fact of mailing will, absent any contrary evidence, establish that
26 delivery occurred. If, however, the addressee denies receipt, the
27 presumption of delivery disappears, but the fact of mailing still has
28 evidentiary force. The denial of receipt creates an issue of fact that the
factfinder must resolve to determine if delivery actually occurred.

Id. (citations omitted). See *Anderson v. United States*, 966 F.2d 487, 491-92 (9th Cir.
1992) (mailbox rule applied where plaintiff's contention she had mailed tax return was

1 supported by her notarized statement that she had mailed the return, her sworn testimony
2 that she had seen the postal clerk postmark her return and place the envelope in the
3 mailing pouch, and the affidavit of a witness who accompanied plaintiff to the post office,
4 waited in the car, and saw plaintiff return to the car from the post office without the
5 envelope that had contained the tax return).

6 American Family urges the Court to presume, under the common law mailbox rule,
7 that the Willman Tender Letter was received by Northland. The “mail delivery rule,”
8 however, requires “proof of the fact of mailing.” *See Lee*, 182 P.3d at 1171, ¶ 8. The
9 evidence submitted by American Family shows only that GFTDC’s counsel prepared
10 tender letters to numerous subcontractors, intended to mail copies to all of the
11 subcontractors’ insurers, did not mail all of the letters and copies at the same time, placed
12 some envelopes with letters in the firm’s outgoing mail baskets, and did not send any of
13 the letters or copies by registered or certified mail. It does not show that anyone has
14 personal knowledge of, or records of, printing a copy for Northland, addressing an
15 envelope to Northland, or mailing a letter addressed to Northland. American Family has
16 not submitted proof that the Willman Tender Letter was actually mailed to Northland by
17 GFTDC or its counsel. There is, therefore, no basis for applying the “mail delivery rule”
18 or presuming that Northland received the Willman Tender Letter.

19 Northland has produced evidence negating an essential element of American
20 Family’s case and shown that American Family does not have enough evidence to carry
21 its ultimate burden of persuasion at trial. *See Nissan Fire*, 210 F.3d at 1105-06.
22 American Family has not submitted direct evidence of a genuine issue of fact regarding
23 GFTDC’s failure to tender its defense and demand for indemnification to Northland. *See*
24 *Eisenberg*, 815 F.2d at 1289. GFTDC’s failure to tender its defense and demand for
25 indemnity to Northland relieves Northland of its obligations to GFTDC under the Policy.
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1 **B. GFTDC Breached Its Contractual Obligation to Immediately Send**
2 **Northland Copies of Any Demands, Notices, Summonses or Legal**
3 **Papers Regarding the HOA Lawsuit.**

3 Northland contends that GFTDC breached Section IV, paragraph 2(c)(1) of the
4 Policy, which required GFTDC to immediately send Northland “copies of any demands,
5 notices, summonses, or legal papers received in connection with the claim or ‘suit’” by
6 failing to send Northland a copy of the HOA Lawsuit complaint or summons served on
7 GFTDC on October 25, 2004, or a demand for defense. Even if GFTDC had mailed the
8 Willman Tender Letter to Northland, Northland contends GFTDC should have attempted
9 further contact with Northland when it did not receive a response within 20 days as
10 demanded by the letter to ensure that Northland was notified as required by the Policy.
11 American Family contends that it would be inequitable to enforce the Policy’s notice
12 requirements because Northland did not deliver a copy of the Policy to Northland and
13 therefore GFTDC did not have notice of the notice requirements.

14 An insured’s failure to give notice does not relieve an insurer of its contractual
15 liability unless it can show that it has been prejudiced thereby. *Lindus v. N. Ins.*, 438 P.2d
16 311, 315 (Ariz. 1968); *Zuckerman v. Transamerica Ins. Co.*, 650 P.2d 441, 445, 447
17 (Ariz. 1982); *Liberty Mut. Fire Ins. Co. v. Mandile*, 963 P.2d 295, 302 (Ariz. App. 1997).
18 Nonetheless, American Family does not dispute that Northland was deprived of
19 opportunity to investigate the claim, participate in GFTDC’s defense, control the
20 litigation, and contribute to the settlement agreement reached in the HOA Lawsuit. *See*
21 *Motiva Enterprises, LLC v. St. Paul Fire & Marine Ins. Co.*, 445 F.3d 381, 386 (5th Cir.
22 2006) (breaching a consent-to-settle provision prejudiced a primary insurer as a matter of
23 law where the insurer was not consulted about the settlement, the settlement was not
24 tendered to it, and the insurer had no opportunity to participate in or consent to the
25 ultimate settlement decision).

26 Relying on *Zuckerman*, American Family contends that “it would be inequitable
27 and contrary to GFTDC’s reasonable expectations to enforce a boilerplate policy
28 conditions [sic] of which it had no notice” because Northland did not provide GFTDC a

1 copy of the Policy. In *Zuckerman*, an insurance policy for fire loss contained a clause
2 requiring that any action for recovery on a claim insured under the policy must be
3 commenced within twelve months after the loss, which was significantly shorter than the
4 Arizona limitations period for an action on a written contract. 650 P.2d at 442-43, 444.
5 Within the one-year period, the insured consulted counsel and also negotiated directly
6 with the insurer's adjuster. Although tentative settlement was reached, the agreement fell
7 apart, and the insured filed an action against the insurer three months after the expiration
8 of the one-year policy period. *Id.* at 443. The Arizona Supreme Court held the insurer
9 was estopped to enforce the adhesive clause because it did "no more than provide a trap
10 for the unwary." *Id.* at 448-49. The court further found the insurer was not prejudiced by
11 the fact that the suit was brought more than one year after the loss occurred because there
12 never was any dispute regarding the loss, its cause, the existence of coverage for the loss,
13 or the amount of damage. *Id.*

14 Here, the Policy's requirements that insureds immediately send Northland copies
15 of legal papers received in connection with lawsuits against the insureds is not "a trap for
16 the unwary." GFTDC's subcontract with Willman required Willman to obtain insurance
17 that named GFTDC as an additional insured. A Certificate of Liability Insurance was
18 issued to GFTDC showing Willman was insured by Northland. If GFTDC wanted to read
19 the specific language of the Policy, it could have requested that Northland send it a copy.
20 Requiring insureds to send Northland copies of legal papers received in connection with
21 lawsuits against the insureds for which they want coverage is not outside of reasonable
22 expectations and is identical to the requirement in other subcontractors' policies covering
23 GFTDC as an additional insured. Northland does not contend that GFTDC failed to send
24 specific documents or comply with specific procedures or timelines—GFTDC did not
25 send Northland *anything* it received in connection with the HOA Lawsuit.

26 Moreover, the Policy included a blanket additional insured endorsement. If
27 GFTDC was covered as an additional insured under the Policy as a result of entering into
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1 the subcontract with Willman, Northland likely would not have received notice of that
2 event or any need to send GFTDC a copy of the Policy.

3 GFTDC's counsel prepared a letter to Willman that identified Northland as a copy
4 recipient. American Family cannot claim that GFTDC did not know that the Policy
5 required it to send Northland papers received in connection with the HOA Lawsuit or was
6 surprised by such a requirement. It is not inequitable to find GFTDC breached Section
7 IV, paragraph 2(c)(1) of the Policy, which required GFTDC to send Northland documents
8 related to the HOA Lawsuit.

9 GFTDC's breach of the Policy's notice requirements relieves Northland of its
10 obligations to GFTDC under the Policy.

11 **IV. Attorneys' Fees**

12 Northland seeks award of attorneys' fees under A.R.S. § 12-341.01(A). Under the
13 statute, the Court may exercise its discretion to award attorneys' fees to the successful
14 party in any contested action arising out of a contract upon consideration of multiple
15 factors. *Associated Indem. Corp. v. Warner*, 694 P.2d 1181, 1184 (Ariz. 1985). Because
16 Northland has not addressed any of the factors the Court should consider in determining
17 whether to exercise its discretion under the statute and has not presented in any argument
18 in favor of exercising such discretion, the Court will deny Northland's request for
19 attorneys' fees.

20 **V. Rule 54(b) Certification**

21 There is no just reason for delay in entry of final judgment in favor of Defendant
22 Northland Insurance Company. Granting Northland summary judgment resolves all
23 claims in this action against this Defendant. Further, the issues decided in this Order are
24 discrete and do not overlap with issues to be decided later in this case. Moreover, an
25 immediate appeal of this Order would not threaten duplication of judicial work through
26 repetitive appeals on related issues or transactions and may contribute to appellate
27 economy by permitting review of this Order in conjunction with review of other Orders
28 issued today in this action on similar issues. For these reasons, pursuant to Fed. R. Civ.

1 P. 54(b), the Court directs entry of final judgment against Plaintiff American Family
2 Mutual Insurance Co. and in favor of Defendant Northland Insurance Company.

3 IT IS THEREFORE ORDERED that Defendant Northland Insurance Company's
4 Motion for Summary Judgment (Phase One) (doc. #472) is granted.

5 IT IS FURTHER ORDERED that Defendant Northland Insurance Company's
6 request for attorneys' fees is denied.

7 IT IS FURTHER ORDERED that the Court expressly determines that there is no
8 just reason for delay in the entry of final judgment in favor of Defendant Northland
9 Insurance Company. The Court directs the Clerk to enter final judgment against Plaintiff
10 American Family Mutual Insurance Co. and in favor of Defendant Northland Insurance
11 Company.

12 DATED this 2nd day of September, 2009.

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Neil V. Wake
United States District Judge