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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 DeWitt White, successor in interest to )  
10 Douglas Woodward, Laura Woodward, )  
and Douglas Woodward Insurance )  
Agency LLC, )

No. CV-11-00230-PHX-NVW

**ORDER**

11 Plaintiff,

12

13 vs.

14 Arch Insurance Company, et al., )

15 Defendants. )

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17 Before the Court is Defendant Arch Insurance Company’s Motion to Dismiss  
18 Plaintiff’s Complaint (Doc. 10), which states that it is made pursuant to Fed. R. Civ. P.  
19 12(b)(6) and 56(b).<sup>1</sup> Pursuant to Fed. R. Civ. P. 12(d), the Court treats the Motion as a  
20 motion for summary judgment under Rule 56(a) because it presents matters outside the  
21 pleadings.<sup>2</sup> Plaintiff does not object to considering the motion as one for summary  
22 judgment and offers his own evidence in response to the motion. Therefore, there is no  
23 prejudice to Plaintiff in treating the motion as one for summary judgment.

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<sup>1</sup>The Motion should have referenced Rule 56(a), not 56(b).

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<sup>2</sup>Finding that oral argument will not assist the Court, Defendant’s request for oral argument is declined.

1           The Motion partially complies with the Rules of Practice of the U.S. District Court  
2 for the District of Arizona. Under the Local Rules, any party filing a motion for summary  
3 judgment must also file a separate statement of facts “setting forth each material fact on  
4 which the party relies in support of the motion.” LRCiv 56.1(a). “Each material fact in  
5 the separate statement . . . must refer to a specific admissible portion of the record where  
6 the fact finds support. . . .” *Id.* “Memoranda of law filed in support of or in opposition to  
7 a motion for summary judgment, including reply memoranda, must include citations to  
8 the specific paragraph in the statement of facts that supports assertions made in the  
9 memoranda regarding any material fact on which the party relies in support of or in  
10 opposition to the motion.” LRCiv 56.1(e). Here, the Motion includes a statement of  
11 facts, though it is not separate from the motion or memorandum, and the memorandum  
12 does not include citations to specific paragraphs of the statement of facts.

13           Plaintiff has filed a separate controverting statement of facts, but it does not  
14 comply with Local Rule 56.1(b), which states:

15           Any party opposing a motion for summary judgment must file a statement  
16 separate from that party’s memorandum of law, setting forth: (1) for each  
17 paragraph of the moving party’s separate statement of facts, a  
18 correspondingly numbered paragraph indicating whether the party disputes  
19 the statement of fact set forth in that paragraph and a reference to the  
20 specific admissible portion of the record supporting the party’s position if  
21 the fact is disputed; and (2) any additional facts that establish a genuine  
22 issue of material fact or otherwise preclude judgment in favor of the moving  
23 party. . . . Each numbered paragraph of the statement of facts set forth in  
24 the moving party’s separate statement of facts must, unless otherwise  
25 ordered, be deemed admitted for purposes of the motion for summary  
26 judgment if not specifically controverted by a correspondingly numbered  
27 paragraph in the opposing party’s separate statement of facts.

28           Plaintiff did not respond separately to any specific paragraphs in Defendant’s statement of  
facts.

          In spite of both parties’ failure to comply with the Local Rules, the Court will  
decide the Motion as filed to avoid delay and additional legal expense for the parties  
because the material facts are not disputed. The Court can access the undisputed facts  
without undue burden and will do so to decide the motion, though it is not required to.

1           There is confusion in the briefs of both parties. Rather than prolong this order with  
2 corrections of each of those confusions, this order addresses the correct and dispositive  
3 legal analysis.

4       **I.     Background**

5           In 2007, both Plaintiff DeWitt White and Douglas Woodward were agents for  
6 Farmers Insurance Company of Arizona. At that time, Farmers agents and district  
7 managers were provided professional liability coverage by a Company Sponsored  
8 Insurance Agents Errors and Omissions Policy issued by Defendant Arch Insurance  
9 Company.

10          In 2007, Woodward also was insured under ten Farmers policies for automobile,  
11 homeowner, landlord, boat, off-road vehicle, retail, and umbrella insurance. He was  
12 employed by the Douglas A. Woodward Insurance Agency, Inc., and was both the agent  
13 and the insured on these policies.

14          In March 2007, Plaintiff invited Douglas and Laura Woodward to vacation with  
15 him and his girlfriend in Puerto Penasco (Rocky Point), Mexico, as “last minute”  
16 substitutes for Plaintiff’s daughter and boyfriend. The Woodwards were not involved in  
17 making any trip plans and rode to Rocky Point in Plaintiff’s truck. They had vacationed  
18 in Rocky Point many times on their own and had never rented jet skis there. The  
19 Woodwards had no intention of renting jet skis in Rocky Point. During the Woodwards’  
20 four-day vacation with Plaintiff and his girlfriend, Plaintiff arranged for a thirty-minute  
21 rental of jet skis and insisted that Douglas Woodward ride with Plaintiff and his  
22 girlfriend. Laura Woodward was sick, but Douglas Woodward reluctantly went with  
23 Plaintiff and his girlfriend. While Douglas Woodward, Plaintiff, and Plaintiff’s girlfriend  
24 were riding the jet skis, two of the jet skis collided, and Plaintiff suffered serious injuries  
25 requiring medical treatment. In May 2007, Douglas Woodward gave Farmers notice of  
26 Plaintiff’s personal injury claim.

27          In December 2007, Woodward tendered Plaintiff’s personal injury claim to Arch.  
28 Arch’s claims administrator, Lancer Claims Service, sent a letter to Woodward asking for

1 a one or two page letter describing “the transaction in dispute” and a copy of Woodward’s  
2 complete file on this matter. Woodward responded by email, identifying himself as the  
3 agent and Plaintiff as the claimant. Woodward described the jet ski collision, but made  
4 no mention of any professional negligence.

5 In July 2008, Lancer Claims Service notified Plaintiff’s attorney that Arch failed to  
6 find any liability or wrongdoing by Woodward that would warrant payment to Plaintiff.

7 Lancer’s letter explained:

8 As you are aware, Mr. Woodward and Mr. White are both Farmers’ agents.  
9 However, Mr. Woodward has never acted in the capacity as Mr. White’s  
10 agent. Mr. Woodward has never written any policies or been asked to write  
11 any policies for Mr. White. The two men had been friends for many years  
12 and in 2007, Mr. White invited Mr. Woodward to Mexico with others. Mr.  
13 Woodward did not have any expectation that he would be riding a jet ski  
14 and has only ridden a jet ski a couple of times in his life. Moreover, on the  
15 day of the accident, Mr. Woodward did not want to ride jet skis, however  
16 was convinced to do so by your client.

17 Furthermore, as we discussed, the claim by your client is not an Errors &  
18 Omissions claim. There is no claim by a customer against Mr. Woodward,  
19 as his agent. Nevertheless, you have stated that if we deny Mr. White’s  
20 claim, you will file a lawsuit against Mr. Woodward’s agency for failure to  
21 sell himself an insurance policy to cover the accident that occurred between  
22 Mr. Woodward and Mr. White. You further stated that you would  
23 thereafter obtain an assignment of the lawsuit from Mr. Woodward, which  
24 will become an E&O claim, and you would then file a lawsuit against Mr.  
25 Woodward’s E&O insurance carrier for bad faith. . . . .

26 Mr. Woodward has been made aware of your intentions and understands  
27 that entering into an agreement with you for such an assignment would  
28 constitute a violation of Exclusion I, cited above. Furthermore, please note  
that coverage is prohibited under Mr. Woodward’s Policy when an Insured  
brings a claim against another Insured pursuant to Exclusion XIV, which is  
cited above. It is our understanding that your client, Mr. White, is a  
contracted agent with Farmers Insurance. Therefore, he meets the  
definition of an INSURED as cited above.

In conclusion, based on our investigation, we find no evidence of  
professional negligence on the part of our insured, Mr. Woodward or his  
agency.

(Doc. 10-6.)

In October 2008, Farmers notified Woodward that none of his ten Farmers  
insurance policies covered Plaintiff’s personal injury claim because the accident occurred  
in Mexico, did not involve a four-wheel land vehicle or an off-road vehicle, involved jet

1 skis, etc. Woodward's personal umbrella policy expressly excluded liability for bodily  
2 injury arising out of the use of any watercraft used by the insured.

3 In December 2008, Plaintiff sued the Woodwards for personal injury in Maricopa  
4 County Superior Court, alleging that he had incurred medical special damages and  
5 incurred lost income special damages of up to the aggregate amount of \$300,000, as well  
6 as general damages of pain, anguish, suffering, anxiety, discomfort, and the overall  
7 impairment to his quality of life. In January 2009, defense and indemnity of the  
8 Complaint was tendered to Arch via mail to Lancer.

9 In March 2009, Lancer acknowledged receipt of the claim filed by Douglas  
10 Woodward against the Douglas A. Woodward Insurance Agency, Inc., based on the  
11 underlying lawsuit titled *DeWitt White v. Douglas Woodward, et al.*, filed in Maricopa  
12 County Superior Court, and declined tender of the defense and indemnity of the lawsuit.  
13 Lancer's March 2009 letter addressed to Douglas Woodward stated in part:

14 As you are aware, this matter was originally reported to us as a claim by  
15 Mr. White that you failed to offer or write coverage for a Jet Ski rental in  
16 Mexico. Mr. White contended that your agency, Douglas Woodward  
17 Insurance Agency, LLC should have sold a policy to you (Mr. Woodward),  
18 so that when you went on the trip to Mexico with Mr. White, you would  
19 have had coverage for rental of a jet ski and subsequent injuries that may  
20 have resulted from an accident while riding a jet ski. Mr. White has now  
21 filed a Complaint against you for the accident and his resulting injuries,  
22 medical bills. There is no allegation in the complaint about failing to  
23 provide professional services for others. You confirmed that Mr. White is  
24 not a customer of yours and that, at the time of the loss, he was also a  
25 Farmers agent.

26 (Doc. 10-7.) The letter also quoted the policy exclusion for bodily injury.

27 After Arch denied coverage of Plaintiff's claim under Douglas Woodward's  
28 professional liability insurance policy, Plaintiff and the Woodwards settled Plaintiff's  
personal injury case by means of a *Damron* agreement. *See Damron v. Sledge*, 105 Ariz.  
151, 460 P.2d 997 (1969). Under Arizona law, when an insurer refuses to defend its  
insured, the insured may settle the case and assign any rights he had against the insurer  
for bad faith in refusing to defend in exchange for a covenant not to execute. Absent  
fraud or collusion, the existence and scope of the insured's liability is fixed by the

1 settlement agreement, and the insurer may dispute only coverage under the insured's  
2 policy. If coverage is found, the insurer must pay the damages stipulated by the insured  
3 and the third-party plaintiff. Under their *Damron* agreement, Plaintiff and the  
4 Woodwards agreed to judgment in favor of Plaintiff and against the Woodwards in the  
5 amount of \$875,000.00 plus interest, Plaintiff agreed not to take any action against the  
6 Woodwards to collect the judgment, and the Woodwards individually and on behalf of the  
7 Douglas A. Woodward Insurance Agency assigned to Plaintiff their claim and all causes  
8 of action, including breach of contract and bad faith, against Arch Insurance Company.

9 On September 8, 2010, Plaintiff filed the present suit in Maricopa County Superior  
10 Court. On December 16, 2010, Plaintiff served the complaint on Arch. On February 2,  
11 2011, Arch removed the case to this Court under 28 U.S.C. §§ 1332(a)(2) and 1441(b).

12 Plaintiff's Complaint alleges, in part:

13 11. Defendants Woodward were insured by Farmer's Group of  
14 Insurance Companies including Farmer's Insurance and Foremost Marine  
Insurance, however, there was no liability insurance which covered the loss.

15 12. Mr. Woodward's insurance agency (Douglas Woodward  
16 Insurance Agency, LLC, hereinafter "Agency") holds Errors and Omissions  
17 coverage through Arch Insurance Company with at least \$1,000,000.00  
18 liability limits under that policy. The policy provided coverage of at least  
19 \$1,000,000.00 for Errors and Omissions made by the Agency, its agents or  
employees under that policy. The policy also provided that Arch Insurance  
had a duty to defend any suit seeking such damages related to said Errors  
and Omissions.

20 13. Mr. Woodward's Farmer's agent<sup>3</sup> failed to procure adequate  
21 coverage for its insured, Douglas Woodward, or mistakenly believed that  
Mr. Woodward had adequate coverage.

22 14. This failure and/or mistaken belief concerning insurance  
23 coverage was negligent. . . . In the context of global resolution of the  
24 underlying lawsuit, the Woodwards assigned the Errors and Omissions  
25 claim to Plaintiff DeWitt White and the Woodward Agency assigned the  
26 breach of contract and bad faith claims to Plaintiff DeWitt White.

27 . . . .

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28 <sup>3</sup>"Mr. Woodward's Farmer's agent" is Mr. Woodward.

1           27. Arch Insurance Company breached the contractual duty to  
2 defend and as a consequence is obligated to pay the agreed upon judgment  
and all defense fees and costs incurred by the Woodwards and the Agency.

3           28. Arch Insurance Company anticipatorily breached the  
4 contractual duty to indemnify and as a consequence is obligated to pay the  
agreed upon judgment and all defense fees and costs incurred by the  
5 Woodwards and the Agency.

6           29. Arch Insurance Company breached the duty of good faith and  
7 fair dealing and as a consequence is obligated to pay the agreed upon  
judgment and all defense fees and costs incurred by the Woodwards and the  
Agency.

8 (Doc. 1-2.) In his response to the motion for summary judgment, Plaintiff concedes that  
9 Arch's conduct was not an anticipatory breach, but rather only a breach of contract.

10 (Doc. 17 at 14.)

## 11 **II. Legal Standard**

12           Summary judgment shall be granted if the evidence shows there is no genuine  
13 dispute as to any material fact and the moving party is entitled to judgment as a matter of  
14 law. Fed. R. Civ. P. 56(a). The moving party must produce evidence and show there is  
15 no genuine issue of material fact. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*,  
16 210 F.3d 1099, 1102 (9<sup>th</sup> Cir. 2000). To defeat a motion for summary judgment, the  
17 nonmoving party must show that there are genuine issues of material fact. *Anderson v.*  
18 *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A material fact is one that might affect the  
19 outcome of the suit under the governing law. *Id.* at 248. A factual issue is genuine "if the  
20 evidence is such that a reasonable jury could return a verdict for the nonmoving party."  
21 *Id.*

## 22 **III. Analysis**

23           Plaintiff contends that, as successor in interest to the Woodwards, he may assert  
24 breach of contract and bad faith claims against Arch for its refusal to defend and  
25 indemnify the Douglas A. Woodward Insurance Agency, Inc., against Douglas  
26 Woodward's claim that the agency committed professional negligence by failing to  
27 properly advise him regarding the adequacy of the coverage provided to him by his ten  
28 Farmers policies. However, the Company Sponsored Insurance Agents Errors and

1 Omissions Policy issued by Arch that was in effect at the time of the accident does not  
2 provide coverage for such a claim.

3 The Errors and Omissions Policy identifies the insured as “AGENTS AND  
4 DISTRICT MANAGERS OF FARMERS INSURANCE EXCHANGE.” For purposes of  
5 this motion, it is assumed that the insureds are both Douglas Woodward and Douglas A.  
6 Woodward Insurance Agency, Inc.

7 A corporation can act only through its officers and agents. *Miller v. Arnal Corp.*,  
8 129 Ariz. 484, 491, 632 P.2d 987, 994 (1981). Thus, the corporation cannot commit  
9 professional negligence unless its agent commits professional negligence. In this case,  
10 the insurance sold to Douglas Woodward by the Douglas A. Woodward Insurance  
11 Agency was sold through its agent, Douglas Woodward. Any negligent advice given to  
12 Douglas Woodward by the Douglas A. Woodward Insurance Agency was given through  
13 its agent, Douglas Woodward, also a named insured. The Errors and Omissions Policy  
14 expressly covers “any negligent act, error or omission of the INSURED . . . in rendering  
15 or failing to render PROFESSIONAL SERVICES **for others** . . . .” Plaintiff does not  
16 allege Woodward negligently rendered or failed to render professional services for others,  
17 only for himself.

18 Further, even if Woodward had advised and sold insurance to a third party rather  
19 than to himself, under the facts presented here, he was not negligent. “An insurance agent  
20 owes a duty to the insured to exercise reasonable care, skill and diligence in carrying out  
21 the agent’s duties in procuring insurance.” *Darner Motor Sales, Inc. v. Universal*  
22 *Underwriters Ins. Co.*, 140 Ariz. 383, 397, 682 P.2d 388, 402 (1984). An insurance agent  
23 “must exercise the degree of care ordinarily expected of persons in the profession.” *Id.* at  
24 398, 682 P.2d at 403. Plaintiff does not allege that Woodward mishandled an application  
25 for insurance or failed to timely forward a premium to the insurer. Rather, Plaintiff  
26 alleges that Woodward failed to assume responsibility, without any request from the  
27 insured, for advising whether the insured’s current policies would cover bodily injury of  
28 another that the insured caused while using a rented jet ski in Mexico when the insured



1 did not expect to go to Mexico and did not intend to use a jet ski, much less a rented one.  
2 Independently assuming such a responsibility exceeds the degree of care ordinarily  
3 expected of insurance agents.

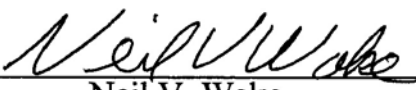
4 When this case is backed out of the *Damron* agreement and the assignment of  
5 Woodward's claim to White, it is a bare lawsuit by Woodward against Woodward for not  
6 buying his own insurance. He does so to tap into the professional liability insurance he  
7 had to protect him from claims by others. The law recognizes no liability of Woodward  
8 to himself and gives no remedy for it. Woodward, another named insured selling  
9 insurance to himself, is not an "other[]" as required by the policy.

10 The Errors and Omissions Policy does not cover a professional negligence claim  
11 by Douglas A. Woodward against the Douglas A. Woodward Insurance Agency, Inc.  
12 There is no breach of contract and no bad faith denial of coverage.

13 IT IS THEREFORE ORDERED that Defendant Arch Insurance Company's  
14 Motion to Dismiss Plaintiff's Complaint (Doc. 10), a motion for summary judgment  
15 under Fed. R. Civ. P. 56(a), is granted.

16 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendant  
17 and against Plaintiff and that Plaintiff take nothing. The Clerk shall terminate this case.

18 DATED this 8<sup>th</sup> day of July, 2011.

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22 Neil V. Wake  
23 United States District Judge  
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