

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

**WALID JAMMAL, KATHLEEN TUERSLEY,  
CINDA J. DURACHINSKY, AND  
NATHAN GARRETT**  
*on behalf of themselves and all others  
similarly situated,*

Plaintiffs

vs.

**AMERICAN FAMILY INSURANCE COMPANY,  
AMERICAN FAMILY MUTUAL INSURANCE  
COMPANY, AMERICAN FAMILY LIFE  
INSURANCE COMPANY, AMERICAN  
STANDARD INSURANCE COMPANY OF  
WISCONSIN, AMERICAN FAMILY  
TERMINATION BENEFITS PLAN,  
RETIREMENT PLAN FOR EMPLOYEES OF  
AMERICAN FAMILY INSURANCE GROUP,  
AMERICAN FAMILY 401K PLAN, GROUP  
LIFE PLAN, GROUP HEALTH PLAN, GROUP  
DENTAL PLAN, LONG TERM DISABILITY  
PLAN, AMERICAN FAMILY INSURANCE  
GROUP MASTER RETIREMENT TRUST,  
401K PLAN ADMINISTRATIVE COMMITTEE,  
AND THE COMMITTEE OF EMPLOYEE AND  
DISTRICT MANAGER RETIREMENT PLAN**

Defendants

Case No. 1:13-cv-437

Judge Donald C. Nugent

**SECOND AMENDED CLASS  
ACTION COMPLAINT**

Now come Plaintiffs, through counsel, and for their second amended class action complaint against the Defendants state and allege as follows:

**SUMMARY OF THE ACTION**

1. Congress enacted the Employee Retirement Income Security Act (“ERISA”) to provide basic protections for employees with respect to employee benefits plans offered by their employers. *See* 29 U.S.C. § 1001(a). Congress explicitly found that the protections in ERISA

were necessary because many employees, despite years of employment, were losing their anticipated retirement benefits because their employers' plans lacked vesting provisions. *Id.*

2. The Defendants in this case (collectively referred to as "American Family") have engaged in a scheme to undermine ERISA's protections, including its vesting requirements, and deny or otherwise limit benefits the law requires. Plaintiffs bring this class action complaint, on behalf of themselves and all others similarly situated, to end American Family's illegal and abusive practices.

3. American Family has employed a sales force of thousands of captive insurance agents ("Agent-employees") in nineteen states across the country to sell the company's insurance products (including auto, home, life, umbrella, business, health, and farm and ranch insurance policies) and retirement products.

4. American Family promises its Agent-employees that it will treat them as "independent contractors," extolling the virtues of, and the rewards that come with, business ownership.

5. But American Family never honors its promise of independence because it retains a right to exercise control over the manner and means by which the Agent-employees conduct every material aspect of their businesses.

6. For example, American Family owns the Agent-employees' books of business, requires that its Agent-employees exclusively sell American Family insurance products, and exclusively controls office hours and locations, the hiring and firing of office staff, and the conduct of the Agent-employees and staff in the office. American Family also controls signage, permitted advertising, compensation, production requirements, policy holder information, and

the company provides and closely monitors the Agent-employees' and staffs' use of computer hardware and software.

7. Regardless of how American Family characterizes its relationship with its Agent-employees, it hires them as at-will employees for an unlimited duration, giving both American Family and its Agent-employees the ability to terminate the employment relationship at any time.

8. Even though American Family calls its Agent-employees "independent contractors," the company provides them with some employee benefits, called "Termination Benefits" ("the Termination Benefits Plan" or "the Plan").<sup>1</sup> The Termination Benefits Plan provides death and pension benefits to Agent-employees using a formula based on each Agent-employee's years of service and the number of in-force policies he or she sold over during that time. The Termination Benefits Plan also provides lifetime retirement benefits in the form of an annuity to Agent-employees who retire from the company at or over age 60. *Compare* 29 U.S.C. § 1002(2)(A) (defining "employee pension benefit plan" and "pension plan" under ERISA to mean any plan, fund, or program established or maintained by an employer that by its express terms or as a result of surrounding circumstances "provides retirement income to employees.")

9. Moreover, if an Agent-employee dies during his or her employment with American Family prior to becoming eligible under the terms of the Plan, the Termination Benefits Plan also provides a \$50,000 benefit paid to the Agent-employee's beneficiary. *See* 29 U.S.C. 1002(1) (defining "employee welfare benefit plan" and "welfare plan" under ERISA to "mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or

---

<sup>1</sup> Prior to 1995, American Family referred to Termination Benefits as "Extended Earnings," which were, in form and substance, substantially identical to the Termination Benefits described in this complaint.

program was established or is maintained for the purpose of providing for its participants or their beneficiaries ... benefits in the event of ... death...”).

10. Nonetheless, American Family refuses to acknowledge that the Termination Benefits Plan is an employee benefit plan subject to ERISA’s employee protections, including mandatory accrual and vesting.

11. In fact, American Family often terminates the Agent-employees prior to their Termination Benefits vesting (pursuant to American Family’s rules, not ERISA vesting dates), or terminates its older Agent-employees prior to their eligibility for lifetime retirement benefits, thereby denying the Agent-employees benefits to which they had non-forfeitable rights under ERISA. Indeed, American Family has a common and systematic practice, in place for years, of terminating its Agent-employees just before they reach eligibility under the terms of the American Family Agreement for Termination Benefits or for lifetime benefits.

12. Also, as a result of misclassification and improper characterization of its Agent-employees as “independent contractors,” the company fails to provide its Agent-employees the same retirement, health, and other benefits it provides to all its other employees pursuant to several employee benefit pension and welfare plans established under ERISA (collectively, the “American Family Plans”).

13. By misclassifying its Agent-employee sales force as “independent contractors” rather than employees, American Family has not only unjustly enriched itself (by avoiding the business costs of extending ERISA-protected benefits to its Agent-employees and their staff), but has also evaded and continues to evade compliance with state and federal laws (including ERISA) governing employee benefit plans.

14. This lawsuit seeks:

- (A) a declaration that Plaintiffs and Class Members are legal “employees” for all purposes, including, but not limited to ERISA;
- (B) a declaration that the Termination Benefits Plan is an employee benefit plan subject to ERISA;
- (C) a declaration that the Termination Benefits Plan fails to comply with ERISA’s vesting and benefit accrual provisions;
- (D) payment to Plaintiffs and the Class of all amounts due under the Termination Benefits Plan as if Defendants had complied with ERISA, including its vesting and benefit accrual provisions;
- (E) an order retroactively reforming the Termination Benefits Plan to comply with ERISA’s vesting and benefit accrual provisions and requiring Defendants to pay restitution in the form of a surcharge or otherwise credit Plaintiffs and Class Members for all ERISA benefits to which they are retroactively entitled under the Termination Benefits Plan in order to be made whole and to prevent Defendants’ unjust enrichment;
- (F) a declaration that because Defendants excluded Plaintiffs and the Class from participating in the American Family Plans, the American Family Plans are not in compliance with ERISA and 26 U.S.C. § 410(b), including the minimum coverage requirements;
- (G) payment to Plaintiffs and the Class of all amounts due under the American Family Plans as if they had complied with ERISA;
- (H) an order reforming the American Family Plans to include Plaintiffs and the Class and to comply with ERISA and 26 U.S.C. § 410(b), including the minimum coverage requirements, and requiring Defendants to pay restitution in the form of a surcharge or otherwise credit Plaintiffs and Class Members for all ERISA benefits to which they are retroactively entitled under the American Family Plans in order to be made whole and to prevent Defendants’ unjust enrichment;
- (I) an injunction barring Defendants from continuing to misclassify the Class as “independent contractors” rather than “employees.”

### **JURISDICTION AND VENUE**

15. This Court has subject matter jurisdiction over the ERISA claims under 29 U.S.C. § 1132(e)(1) and over all other non-ERISA claims asserted in this action under 28 U.S.C. § 1367. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) as the amount

in controversy exceeds \$5,000,000, exclusive of interest and costs, and at least one member of the class is a citizen of a state different from the American Family Defendants.

16. This Court is a proper venue under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims asserted in this complaint occurred in this judicial district; to wit, the benefits owed under ERISA were due and owing to Plaintiffs in this judicial district, which is where the Plaintiffs were employed. This Court is also a proper venue under 29 U.S.C. § 1332(e)(2) because the breaches of the Plan took place in this judicial district; to wit, the Defendants failed to properly classify the Plaintiffs in this district as “employees” and refused to extend to them ERISA benefits despite their employment in this district.

### **PARTIES**

17. Plaintiff Walid Jammal was, during the relevant period, an Agent-employee for American Family who resides in North Olmsted, Ohio.

18. Mr. Jammal was employed by American Family as an Agent-employee in 2003 and was terminated from the company in or about December 2011.

19. Plaintiff Kathleen Tuersley was, during the relevant period, an Agent-employee for American Family who resides in Malvern, Ohio.

20. Ms. Tuersley was employed by American Family as an Agent-employee in December 1999 and was terminated from the company in or about September 2009.

21. Plaintiff Cinda J. Durachinsky was, during the relevant period, an Agent-employee for American Family who resides in Chagrin Falls, Ohio.

22. Ms. Durachinsky was employed by American Family as an Agent-employee in October 2008 and was terminated from the company on or about June 7, 2013.

23. Plaintiff Nathan Garrett was, during the relevant period, an Agent-employee for American Family who resides in Pittsburg, Kansas.

24. Mr. Garrett was employed by American Family starting as an Agent in Training on June 10, 2005, becoming an Agent-employee on April 1, 2007. Mr. Garrett was terminated by American Family on August 19, 2011.

25. Defendant American Family Insurance Company (“AFI”) is an Ohio corporation with its principal place of business located at 6000 American Parkway, Madison, Wisconsin 53783.

26. Defendant American Family Mutual Insurance Company (“AFMIC”) is a Wisconsin corporation with its principal place of business located at 6000 American Parkway, Madison, Wisconsin 53783.

27. Defendant American Standard Insurance Company of Wisconsin (“ASICW”) is a Wisconsin corporation with its principal place of business located at 6000 American Parkway, Madison, Wisconsin 53783.

28. Defendants AFI, AFMIC, and ASICW are referred to collectively as “American Family” throughout this complaint, unless specifically referred to by name.

29. “AFI,” “AFMIC,” “AICS,” and “American Family,” as used throughout this complaint, are specifically defined to include all successor, predecessor, and subsidiary entities to which these allegations pertain.

30. Defendant American Family Termination Benefits Plan is an employee benefit plan as defined in 29 U.S.C. §1002(3) that is, upon information and belief, both sponsored and administered by Defendants AFI, AFMIC, and ASICW.

31. Defendant Retirement Plan for Employees of American Family Insurance Group is an employee benefit plan as defined in 29 U.S.C. §1002(3) that is sponsored by Defendant AFMIC and administered by The Committee of Employee and District Manager Retirement Plan located at 6000 American Parkway, Madison, Wisconsin 53783.

32. Defendant The Committee of Employee and District Manager Retirement Plan is an administrator as defined in 29 U.S.C. § 1002(16)(A).

33. Defendant American Family 401K Plan is an employee benefit plan as defined in 29 U.S.C. §1002(3) that is sponsored by Defendant AFMIC and administered by the 401K Plan Administrative Committee located at 6000 American Parkway, Madison, Wisconsin 53783.

34. Defendant 401K Plan Administrative Committee is an administrator as defined in 29 U.S.C. § 1002(16)(A).

35. Defendant Group Life Plan is an employee benefit plan as defined in 29 U.S.C. §1002(3) that is sponsored and administrated by Defendant AFMIC.

36. Defendant Group Health Plan is an employee benefit plan as defined in 29 U.S.C. §1002(3) that is sponsored and administrated by Defendant AFMIC.

37. Defendant Group Dental Plan is an employee benefit plan as defined in 29 U.S.C. §1002(3) that is sponsored and administrated by Defendant AFMIC.

38. Defendant Long Term Disability Plan is an employee benefit plan as defined in 29 U.S.C. §1002(3) that is sponsored and administrated by Defendant AFMIC.

39. Defendant American Family Insurance Group Master Retirement Trust is an employee benefit plan as defined in 29 U.S.C. §1002(3) that is sponsored by Defendant AFMIC and administered by The Committee of Employee and District Manager Retirement Plan located at 6000 American Parkway, Madison, Wisconsin 53783.

40. Defendants Retirement Plan for Employees of American Family Insurance Group, American Family 401K Plan, Group Life Plan, Group Health Plan, Group Dental Plan, Long Term Disability Plan, American Family Insurance Group Master Retirement Trust are referred to collectively as “American Family Employee Benefit Plan Defendants” throughout this complaint, unless specifically referred to by name.

41. At all relevant times, American Family was engaged in selling insurance in the United States, including in the state of Ohio.

### **FACTS**

#### **American Family Treats Its “Agents” as “Employees” and Not “Independent Contractors”**

42. American Family employs thousands of Agent-employees to exclusively sell American Family insurance products. Until recently, American Family only sold its insurance products through its Agent-employees (*i.e.*, it did not sell directly to customers).

43. Each American Family Agent-employee must sign the American Family Agent Agreement (the “Agreement”) as a mandatory condition of employment. A copy of the Agreement for Plaintiff Jammal is attached hereto as **Exhibit A**. The Agent Agreements for Plaintiffs Tuersley, Durachinsky, and Garrett are the same in all material respects to the Jammal exemplar

44. The terms of the Agreement between each member of the Class and American Family are the same in all material respects, and the Agreements for Plaintiffs are representative of the Agreements between American Family and each member of the Class.

45. Each Agreement contains statements purporting to classify Plaintiffs and Class Members as independent contractors. For example, Section 6 of the Agreement says, “[i]t is the intent of the parties hereto that you are not an employee of the Company for any purposes, but

are an independent contractor for all purposes, including federal taxation with full control of your activities and the right to exercise independent judgment as to time, place and manner of soliciting insurance, servicing policyholders and otherwise carrying out the provisions of this agreement. As an independent contractor you are responsible for your self-employment taxes and are not eligible for various employee benefits such as Workers and Unemployment.” Ex. A at 4.

46. The Agreement is, and at all relevant times has been, a contract of adhesion, drafted exclusively by American Family, who gives the Agent-employees no opportunity to negotiate or change any terms and who requires the Agent-employees to sign the Agreement as presented by American Family as a condition of employment.

47. Not only is the Agreement a contract of adhesion, but American Family refuses to honor the Agreement to treat the agents as “independent contractors” and, instead, reserves to itself the right to control the manner and method of the Agent-employees’ business.

48. Indeed, unbeknownst to the Agent-employees at the time of signing, in addition to the Agreement, American Family has written and unwritten policies and procedures with which Agent-employees are required to comply as a condition of their employment.

49. These policies and procedures permit American Family to exercise almost total control over the Agent-employees’ business.

50. For example, American Family requires its Agent-employees and their staff members to adhere to a code of conduct and business ethics standards developed and drafted by American Family. *See* American Family Agent and Staff Code of Conduct and Business Ethics (“Code of Conduct”), attached as **Exhibit B**.

51. The Agreement does not disclose a “code of conduct” or otherwise indicate that there are American Family policies and procedures with which Agent-employees or their staff members must comply or risk termination.

52. When Agent-employees do not follow an American Family policy or procedure, whether disclosed or undisclosed, known or unknown, Agent-employees are subject to discipline by American Family, including termination of the Agreement and forfeiture of Termination Benefits. Indeed, American Family regularly resorts to these written and unwritten policies to avoid paying benefits due to Agent-employees.

53. Examples of how American Family reserves the right to exercise, and does exercise, control over the Agent-employees and every material aspect of their business are as follows:

- (A) *Exclusivity.* American Family insists that Agent-employees exclusively represent American Family; an Agent-employee cannot sell insurance for any other insurance company. Ex. A at Section 4(a). This is true even if the product the Agent-employee has an opportunity to sell is not offered by American Family. Ex. B at 8.
- (B) *Ownership of Agents’ Book of Business.* Agent-employees do not own their books of business. The Agent-employee is expected to solicit insurance business, pay for all of the expenses associated with solicitation, place the business with American Family, but yet has no ownership interest in that business asset. If American Family terminates the Agreement, or if the Agent-employee terminates the Agreement, American Family retains a right that it regularly exercises to “reassign” the book to different agents. Ex. A at Section 6(j)
- (C) *Required Code of Conduct and Code of Ethics.* American Family retains the right to terminate Agent-employees or the Agent-employees’ staff for violations of the Code of Conduct. Ex. B at 2. The Code of Conduct can be amended at any time by American Family without any input or consent of the Agent-employees or the Agent-employees’ staff who are bound by it.
- (D) *Control over hiring.*
  - (1) American Family controls who the Agent-employee can appoint or employ as a solicitor, broker or other licensed individual. Ex. A at Section

6(a)-(b). In other words, if an Agent-employee wants to hire a person licensed by the commissioner of insurance, American Family retains a right to bar the Agent-employee from hiring that person in their office. In January 2005, American Family broadened its control over an agent's ability to hire office staff, as it began to require that any office staff employed by its agents who had "any customer contact" become licensed by the state insurance department. *See* March 11, 2004 American Family Memorandum to Agents regarding Agency Staff Licensing Program Guidelines and Agency Staff Appointment Standards, attached as **Exhibit C**. That also meant that all staff employed by American Family's agents had to sign a contract with American Family called an "Agent Licensed Office Employee Contract." *Id.* Agent-employees who did not comply with these requirements were told they were placing their "license and their agency" at risk. *Id.*

- (2) American Family required its Agent-employees to follow American Family's "Agency Appointment Standards" when the Agent-employees selected and hired their office staff. *See* American Family Agency Staff Appointment Standards, attached as **Exhibit D**. Agents had to ensure that any applicants met American Family's Agency Appointment Standards ("the Standards") for that applicant to even remain "eligible to continue through the [application] process." *Id.* After ensuring compliance with the Standards, office staff hiring decisions had to be approved by not only the agent, but by an American Family District Manager ("DM"), Sales Manager ("DX"), and Sales Vice-President ("SVP"), who retained a veto power over any Agency-employee hiring decision. *Id.* The Standards set forth restrictions on office staff in many areas such as education levels, felony convictions, credit history, and driving violations. *Id.* American Family requires its agents to strictly adhere to the Standards.
- (E) *Control over Firing.* American Family also retains the authority to fire an Agent-employee's office staff. Indeed, American Family requires the Agent-employee's office staff to sign an agreement that expressly grants American Family the right to terminate an Agent-employee's office staff "at any time and for any reason." *See* American Family Agreement to License Agent's Office Employee, attached as **Exhibit E**.
- (F) *Dictates Over Location of Agent's Business.* When an Agent-employee opens an American Family office, the exact location of that office must be approved by American Family and American Family has a right to veto the office location chosen by the Agent-employee. Furthermore, an Agent-employee may not change the location of his or her business without American Family's approval.
- (G) *Required Office Hours.* American Family requires Agent-employees to staff the office from 8:30 or 9:00 in the morning until 5:00 p.m., five days a week, without exception. If the Agent-employee fails to strictly adhere to this required policy,

American Family may reprimand, take adverse employment actions and/or terminate the Agent-employee.

- (H) *Control over compensation rates or method.* American Family retains the right to change the Agent-employee's compensation without prior notice or consent. Ex. A at Section 6(d).
- (I) *Required computer hardware and software.* American Family requires that the Agent-employees use computers provided by American Family, which run the American Family software. Among other things, this policy allows American Family to control all policyholder information, because Agent-employees must maintain the information using this software. It also permits American Family to monitor the Agent-employees' and their staffs' computer usage. American Family provides and installs the hardware and software.
- (J) *Monitoring of all Agent-employee activity.* American Family has complete and absolute control of all information that relates to policyholders and can and does monitor Agent-employees' activities with respect to policyholder information. In fact, American Family retains the ability to monitor every type of report relating to policyholders which Agent-employees view, copy or import to another system. American Family also has the ability to monitor, and does monitor, the email correspondence of its Agent-employees and their office staff.
- (K) *Monitoring and termination for "undesirable performance."* American Family has the right to monitor Agent-employees' daily work and terminate agent for "undesirable performance." Ex. A at Section 6(h).
- (L) *Non-Competes.* American Family requires a one year non-compete in the event the Agreement is terminated by either American Family or the Agent-employee. The non-compete precludes the Agent-employee from trying to solicit any of his/her current customers, no matter how long the Agent-employees have provided services to such customers. Ex. A at Section 6(k). If American Family unilaterally determines that an Agent-employee has violated the non-compete or any other provision of the Agreement, then American Family will deem the Agent-employee to have forfeited all rights to benefits owed under the Termination Benefits Plan regardless of whether those benefits vested under the terms of the Agreement (not to mention applicable law). Ex. A at Section 6(u).
- (M) *Production Requirements and Close Monitoring of Production.* American Family sets production requirements and closely monitors whether Agent-employees are meeting these requirements. See Ex. A at Section 4(h). On information and belief, American Family sets these production requirements on a per Agent-employee basis.
- (N) *Mandatory Document Retention Policy.* American Family has a document retention policy to which Agent-employees are required to adhere. Ex. B at 5.

- (O) *Monitoring of Computer Use.* American Family monitors its Agent-employees' and their staffs' use of electronic resources, including what information is stored in, sent through, or deleted from the American Family provided and installed system. Ex. B at 5. In fact, on information and belief, American Family recently attempted to block its Agent-employees' access to the website for the United States Court of Appeals for the Eighth Circuit so that the Agent-employees could not view an opinion holding that Termination Benefits owed to a former American Family Agent-employee constituted wages under the Iowa Wage Payment Collection Law. *See Am. Family Mut. Ins. Co. v. Hollander*, 8<sup>th</sup> Cir. No. 11-2719, 2013 WL 375704 (Feb. 1, 2013).
- (P) *Email Policy.* American Family bars Agent-employees and their staffs from accessing personal email accounts using equipment issued by company. Ex. B at 6.
- (Q) *Regulates In-Office Behavior.* American Family regulates the conduct of Agent-employees and their staff in offices. For example, off-color jokes are prohibited and are grounds for American Family to terminate the Agent-employee or staff member. Ex. B at 7.
- (R) *Advertising Approval.* American Family controls all Agent-employee advertising and must approve all advertising. Ex. B at 9.
- (S) *Required Training.* American Family requires all Agent-employees and their staff to complete online training on the Code of Conduct. Ex. B at 11.
- (T) *Mandatory District Meetings.* Agent-employees are required to attend district meetings, and failure to comply with this requirement triggers the "undesirable performance" flag and can be a basis for termination.

54. At all times relevant, American Family asserted control over virtually all aspects of Plaintiffs' and Class members' businesses.

55. At all times relevant, American Family and its Agent-employees enjoyed a continuing employment relationship unlimited in time period where both American Family and its Agent-employees had the right to terminate the employment relationship. Ex. A at Section 6(h).

56. At all times relevant, American Family provided employee benefits to its Agent-employees in the form of its Termination Benefits Plan.

57. At all times relevant, American Family Agent-employees were integrated into American Family's business of selling insurance.

58. Nonetheless, American Family misclassified and continues to misclassify Agent-employees as independent contractors.

59. As a result of American Family's misclassification of all Agent-employees as independent contractors, Plaintiffs and the Class members were deprived of the rights and protections guaranteed by state and federal law to employees, including their rights under ERISA.

#### **The Termination Benefits Plan Is An ERISA Plan**

60. American Family promises its Agent-employees that they will qualify for a benefit plan, *viz.*, the Termination Benefits Plan, that initially vests after 10 years of employment (or longer if an agent participates in American Family's Advance Compensation Program)<sup>2</sup> and that provides Agent-employees with benefits after their relationships with American Family end.

61. The Termination Benefit Plan is designed to provide benefits to employees whose relationship with American Family ends for any reason, including retirement. Indeed, the Termination Benefits Plan is the mechanism by which American Family provides lifetime benefits in the form of an annuity to its Agent-employees who retire from the company at or after the age of 60.

62. The Termination Benefits Plan provides benefits to Agent-employees based on age, years of service, and the size of the in-force books of business the Agent-employees created during their career at American Family.

---

<sup>2</sup> In determining years of service for eligibility for Termination Benefits, American Family excludes the time period an Agent-employee participates in American Family's Advance Compensation Program. As a result, many Agent-employees are deemed ineligible for Termination Benefits even if they have 10 years of employment, as set forth in the Agreement.

63. In the event of a former Agent-employee’s death, his/her Termination Benefits are paid to that Agent-employee’s designated beneficiary or legal representative. *See, e.g.*, Ex. A at Sections 6(s) and (t).

64. Moreover, if an Agent-employee dies before eligibility for Termination Benefits, American Family will pay the Agent-employee’s legal representative a lump sum death benefit of \$50,000. Ex. A at Section 6(v).

65. The Termination Benefits American Family offers increase commensurate with the Agent-employees’ years of employment with American Family and reward the company’s long-time agents with greater benefits when they retire or leave the company for any reason.

66. At all times relevant, American Family promised to pay Termination Benefits to its Agent-employees when the Agent-employees entered into the Agreement they signed to become employed by American Family. For example, the Agreement in place during the 1990s set the Termination Benefits for renewal fees on policies sold for American Family Mutual Insurance Company (“Mutual”) as follows:

The percentage of such Mutual renewal service fees payable under this section shall be based on the total years in the period set forth in Sec. 6.l. 2) as shown in the following table:

<b>Total Years</b>	<b>Percentage</b>
At least 10 years but less than 11 years	50%
At least 11 years but less than 12 years	70%
At least 12 years but less than 13 years	90%
At least 13 years but less than 14 years	110%
At least 14 years but less than 15 years	130%
15 years or more	150%

67. Termination Benefits for renewal fees on policies sold for American Family Standard Insurance Company of Wisconsin (“Standard”) were:

The percentage of such Standard renewal service fees payable under this section shall be based on the total years in the period set forth in Sec. 6.I. 2) as shown in the following table:

<b>Total Years</b>	<b>Percentage</b>
At least 10 years but less than 11 years	25%
At least 11 years but less than 12 years	40%
At least 12 years but less than 13 years	55%
At least 13 years but less than 14 years	70%
At least 14 years but less than 15 years	85%
15 years or more	100%

68. Termination Benefits due on policies sold for American Family Life Insurance Company (“Life”) were:

- t. When this agreement is terminated, Life will pay any remaining compensation applicable to the first policy year of any policy written by you. In addition, if you have represented the Company for at least 24 consecutive months immediately preceding termination, you will be paid extended earnings in the same manner and at the same time as otherwise would have been payable in compensation had this agreement remained in effect according to the following schedule:

<b>In-force Paid for Premium ( except annuity premiums) Computed on an Annualized Basis</b>	<b>Number of Years Payable</b>
\$ 5,000 to \$24,999	3
\$25,000 to \$49,999	7
\$50,000 or more	11

If Mutual and Standard extended earnings are paid for your lifetime and you qualify for 11 years of Life extended earnings, you shall be paid Life extended earnings for your lifetime.

In the event you die while receiving extended earnings, your legal representative shall be entitled to those payments which you would have received had you not died but in no event shall such payments continue beyond a period of 11 years following termination of this agreement.

69. The Agreement was later amended to provide to provide even greater Termination Benefits to Agent-employees who had long careers with American Family:

**AMENDMENT TO AMERICAN FAMILY AGENT AGREEMENT  
AMERICAN FAMILY MUTUAL - TERMINATION BENEFITS**

This amendment is an agreement between the Company and you and becomes a part of the American Family Agent Agreement (Edition: January 1993) or the Corporate Agent Agreement (Edition: April 1995).

It is agreed between the parties of the American Family Agent Agreement that:

The table in Section 6. m. (paragraph 2) of the Agent Agreement (Edition: January 1993) or the Corporate Agent Agreement (Edition: April 1995) is amended as follows. All other terms and conditions of the American Family Agent Agreement remain unchanged.

Total Years	Percentage	Total Years	Percentage
At least 10 years but less than 11 years	50%	At least 20 years but less than 21 years	150%
At least 11 years but less than 12 years	60%	At least 21 years but less than 22 years	155%
At least 12 years but less than 13 years	70%	At least 22 years but less than 23 years	160%
At least 13 years but less than 14 years	80%	At least 23 years but less than 24 years	165%
At least 14 years but less than 15 years	90%	At least 24 years but less than 25 years	170%
At least 15 years but less than 16 years	100%	At least 25 years but less than 26 years	175%
At least 16 years but less than 17 years	110%	At least 26 years but less than 27 years	180%
At least 17 years but less than 18 years	120%	At least 27 years but less than 28 years	185%
At least 18 years but less than 19 years	130%	At least 28 years but less than 29 years	190%
At least 19 years but less than 20 years	140%	At least 29 years but less than 30 years	195%
		30 years or more	200%

70. Not only does American Family increase Termination Benefits with years of service, but the Termination Benefit Plan provides an annuity lifetime retirement benefit for Agent-employees who retire or end their employment with American Family at or after the age of 65:

- q. If at the time of termination you are 65 years of age or older, extended earnings shall be paid in the following monthly installments:

<b>Months After Termination</b>	<b>Applicable Percentage of Sec. 6.o. Monthly Installment</b>
1 through 60	66.7%
61 through 120	33.3%
121 and thereafter for your life	33.3%

71. The Termination Benefit Plan also provides an annuity lifetime retirement benefit for Agent-employees who retire or otherwise terminate their employment with American Family when they are between 60 and 65 years old:

- p. If at the time of termination you are between ages 60 and 65, you shall be entitled to payments set forth in Sec. 6.q. except that monthly installments payable 121 months after termination and thereafter shall be the following percentage of the payment that you would have received under Sec. 6.q. 121 months after termination and thereafter if you had terminated at age 65.

Age at Last Birthday Prior to Termination	Applicable Percentage of Monthly Installments
64	96.1%
63	92.4%
62	88.9%
61	85.7%
60	82.7%

72. The Termination Benefits Plan provides real and meaningful benefits to Agent-employees who spend their careers working for American Family.

73. Using real world examples, a 58-year-old Agent-employee who was employed by American Family for 32 years earned benefits that American Family was obligated to pay over a period of years in one of the following ways: (1) an initial payment of \$10,297.86 and 35 subsequent monthly payments of \$10,298.04; (2) an initial payment of \$7,723.35 and 47 subsequent monthly payments of \$7,723.53; or (3) an initial payment of \$6,178.88 and 59 subsequent monthly payments of \$6,178.82. *See Exhibit F.* American Family calculated the lump sum equivalent of these benefits at \$370,729.26. *Id.*

74. Another 58-year-old Agent-employee who was employed by American Family for 26 years earned benefits that American Family was obligated to pay over a period of 60 months as follows: an initial payment of \$5,632.72 and 59 subsequent monthly payments of \$5,632.60. *See Exhibit G.* American Family calculated the lump sum equivalent of these benefits at \$337,956.12. *Id.*

75. An Agent-employee who was employed by American Family for 10 years earned benefits of \$819 per month for 60 months. *See Exhibit H.* American Family calculated the lump sum equivalent of these benefits at \$49,153.43. *Id.*

76. By its terms, and regardless of American Family's misclassification of its Agent-employees as independent contractors, the American Family Termination Benefits Plan is an employee benefit plan as defined by ERISA. *See* 29 U.S.C. § 1002(2)(A) (defining "employee pension benefit plan" and "pension plan" under ERISA to mean any plan, fund, or program established or maintained by an employer that by its express terms or as a result of surrounding circumstances "provides retirement income to employees").

77. In fact, had Plaintiffs or Class members died while employed with American Family, their legal representatives would have received a lump sum benefit of \$50,000 under the Termination Benefit Plan, thereby demonstrating that the Plan is an employee benefit plan under ERISA. *See* 29 U.S.C. 1002(1) (defining "employee welfare benefit plan" and "welfare plan" under ERISA to "mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries ... benefits in the event of ... death...").

78. Yet by its misclassification, American Family avoids the mandatory requirements of ERISA and has been allowed to create and maintain a Plan with benefits that do not accrue or vest in compliance with ERISA. Indeed, benefits under the Termination Benefits Plan at a minimum do not vest until 10 years of employment, and often 12 or 13 years based on an Agent-employee's participation in the Advanced Compensation Program, instead of vesting at 3 or 5 years as ERISA requires. 29 U.S.C. § 1053.

79. American Family has created a benefit plan under which it can avoid paying its Agent-employees benefits altogether in direct contravention of ERISA's employee protections.

80. Had American Family complied with ERISA, Plaintiffs would have been provided vested, non-forfeitable rights to benefits under the Termination Benefits Plan.

81. Upon information and belief, American Family routinely and systemically employs Agent-employees, uses them for years to build a book of business that belongs to American Family, and then terminates the Agent-employees either before their eligibility for Termination Benefits or for lifetime benefits under the Termination Benefits Plan.

**Agent-Employees Are Excluded From All Other American Family Plans**

82. American Family also provides benefits to current employees through the American Family Plans. Specifically, American Family provides a retirement plan, a 401(k) plan, a group health care plan, a group dental plan, a group life plan, and a long term disability plan to current employees, all of which are employee benefit plans subject to ERISA. *See Exhibits I to N.*

83. All of Defendants' employees are eligible to participate in American Family's 401(k) plan, group health care plan, group dental plan, group life plan, and long term disability plan.

84. Plaintiffs and the Class members, had they been properly recognized as employees during their terms of service, would or could have been Participants and therefore have colorable claims for vested benefits under ERISA.

85. By their mischaracterization of Plaintiffs and Class members as "independent contractors," however, Defendants AFMIC, the American Family Employee Benefit Plan Defendants, the 401K Plan Administrative Committee, and The Committee of Employee and District Manager Retirement Plan have systematically excluded Plaintiffs and Class members from the definition of an "employee" covered by the American Family retirement plan or eligible

to participate in the American Family 401(k) plan, group health care plan, group dental plan, group life plan, and long term disability plan, thereby denying Plaintiff and Class members benefits they are entitled to receive.

86. American Family's conduct is exactly the type of conduct Congress intended to remedy by enacting ERISA and the Agent-employees are the individuals entitled to ERISA's protections.

**It Is Futile For Plaintiffs And The Class To Exhaust Administrative Remedies, If Any.**

87. American Family has for decades maintained that its agents, Plaintiffs and the Class, were independent contractors even when agents challenged that designation.

88. Indeed, American Family has taken the position in previous litigation against former agents proceeding *pro se* that ERISA and Title VII of the Civil Rights Act are inapplicable to current and former agents such as Plaintiff and the Class because no employment relationship existed and they were independent contractors.

89. Accordingly, to the extent Plaintiffs' claim are construed to be directed to the interpretation of the plans and not their legality, and to the extent any administrative remedies were available, it would have been futile for Plaintiffs and the Class to pursue them.

**CLASS ALLEGATIONS**

90. Plaintiffs bring this action as an individual case and as a class action pursuant to Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure. The Class is defined as *all signatories to the American Family Agent Agreement as "the Agent" during the Class Period*, as further defined and limited below (the "Class").

91. The “Class Period” is the time period beginning on the date established by the Court’s determination of any applicable statute of limitations, after consideration of any tolling and accrual issues, and ending on the date of entry of judgment.

92. Subject to additional information obtained through further investigation and discovery, the Class definition may be expanded or narrowed by amendment or amended complaint. Specifically excluded from the Class are Defendants and their officers, directors, agents, trustees, parents, children, corporations, trusts, representatives, employees, principals, servants, partners, joint-venturers, or entities controlled by Defendants, and their heirs, successors, assigns, or other persons or entities related to or affiliated with Defendants and/or their officers and/or directors, or any of them, the Judge assigned to this action, and any member of the Judge’s immediate family.

93. **Numerosity.** The Class is so numerous that joinder of all members in this action is impracticable. Plaintiffs are informed and believe, and on that basis allege, that the proposed Class contains hundreds, if not thousands, of similarly situated current and former American Family Agent-employees scattered throughout at least nineteen states. Upon information and belief, these Agent-employees were parties to substantially similar, if not identical, American Family Agent Agreements and were also subject to the same common scheme depriving them of employee benefits, including, but not limited to Termination Benefits.

94. **Existence and Predominance of Common Questions of Law and Fact.** Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting only individual Class members. These common legal and factual questions, each of which yield a common answer, include, but are not limited to, the following:

- (A) Whether Plaintiffs and Class Members have the requisite independence and discretion of independent contractors;

- (B) Whether, based on the conduct of Defendants, Plaintiffs and the Class are, as a matter of law, employees;
- (C) Whether Plaintiffs and the Class are entitled to American Family's benefits plans because they are, in fact, employees;
- (D) Whether Plaintiffs and the Class are entitled to reimbursement for benefits they should have been receiving as employees during their terms of employment, but which they were improperly denied based on Defendants' misclassification of the Class as independent contractors and not employees;
- (E) Whether the Termination Benefits Plan is a qualified employee pension benefit plan under ERISA, 29 U.S.C. §1002(1) & (2)(A);
- (F) Whether benefits owed under the Termination Benefits Plan have been improperly denied based on the failure of American Family to comply with ERISA's vesting and accrual provisions;
- (G) Whether Plaintiffs and Class Members are entitled to reformation of the Termination Benefits Plan under ERISA § 502(a)(3) and corresponding recalculation and restitution of benefits improperly withheld by American Family, in order to comply with ERISA's requirements;
- (H) Whether Plaintiffs and Class Members are entitled to an accounting of the Termination Benefits Plan surcharging the American Family defendants for their failure to comply with ERISA and preventing their unjust enrichment;
- (I) Whether the terms of the Termination Benefits Plan complies with the applicable laws and regulations, including but not limited to laws and regulations that prevent impermissible backloading plan benefits. *See* 29 U.S.C § 1054 (setting forth rules to prevent impermissible "backloading");
- (J) Whether Plaintiffs and Class members are entitled to benefits under the various benefit plans American Family extends to all other employees;
- (K) Whether, if Plaintiffs and the Class are "employees," that these employees represent a significant percentage of the total workforce such that American Family would be required to include them within any employee benefit plan subject to ERISA and offered to all other employees;
- (L) Whether the actions of American Family are applicable to the Class as a whole, entitling Class Members to injunctive relief;

- (M) Whether Plaintiffs and Class Members are entitled to reformation of American Family's various benefits plans under ERISA § 502(a)(3) and corresponding recalculation and restitution of benefits improperly withheld by American Family, in order to comply with ERISA's requirements;
- (N) Whether Plaintiffs and Class Members are entitled to an accounting of the American Family Benefit Plans surcharging AFMIC, the American Family Employee Benefit Plan Defendants, the 401K Plan Administrative Committee, and The Committee of Employee and District Manager Retirement Plan for their failure to comply with ERISA and preventing the their unjust enrichment.

95. **Typicality.** Plaintiffs' claims are typical of the claims of the Class members in that Plaintiffs and each member of the Class all are or have been "agents" pursuant to an American Family Agent Agreement, and they have suffered and will continue to suffer financial hardship and other damages as a result of Defendants' conduct.

96. **Adequacy of Representation.** Plaintiffs will fairly and adequately protect the interests of the Class members. Plaintiffs have retained counsel experienced in complex class action litigation, and Plaintiffs intend to prosecute this action vigorously. Plaintiffs have no adverse or antagonistic interests to those of the Class.

97. **Superiority.** A class action is superior to all other available means for the fair and efficient adjudication of this controversy. Given the investments that Class members made to become American Family Agent-employees, it would now be virtually impossible for the members of the Class, on an individual basis, to obtain effective redress for the wrongs done to them. Furthermore, even if Class members could afford such individualized litigation, the court system could not sustain it. Individualized claims brought by members of the Class would create the danger of inconsistent or contradictory judgments arising from the same set of facts. Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised by this action. By contrast, the class action device provides the

benefits of adjudication of these issues in a single proceeding, economies of scale, and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

**FIRST CAUSE OF ACTION**

**DECLARATORY RELIEF UNDER ERISA**

98. Plaintiffs restate and re-allege the above paragraphs as if fully set forth in this cause of action.

99. Plaintiffs, for themselves and on behalf of all Class members, seek a declaration pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and 28 U.S.C. §§ 2201 and 2202, of their rights under federal law and Defendants' Agreements and plans and the rights and liabilities of the parties herein. Specifically, Plaintiffs, for themselves and on behalf of all Class members, seek a declaration:

- (A) That they are "employees";
- (B) That Defendants' Termination Benefits Plan is a "plan" under ERISA subject to, among other things, ERISA's vesting and benefit accrual requirements;
- (C) That Plaintiffs and Class members are "employees" eligible for benefits under the plan or plans Defendants offer to other employees;
- (D) That certain Plan provisions violate ERISA; and
- (E) That Plaintiffs and the Class are entitled to reformation of the contracts and restitution of benefits improperly withheld by American Family, in order to comply with ERISA's requirements.

**SECOND CAUSE OF ACTION**

**INJUNCTIVE RELIEF**

100. Plaintiffs restate and re-allege the above paragraphs as if fully set forth in this cause of action.

101. Defendants have been withholding benefits properly due to its Agent-employees for decades.

102. That practice continues today and has damaged, and is currently damaging, Plaintiffs and Class members.

103. Plaintiffs and Class members therefore request that this Court issue an injunction prohibiting Defendants from continuing to misclassify the Agent-employees as independent contractors; prohibiting Defendants from continuing to withhold employee benefits from the Agent-employees; prohibiting Defendants from implementing benefits plans which do not comply with ERISA; ordering American Family to comply with ERISA requirements governing the company's Termination Benefit Plan; and ordering Defendants to recalculate and pay benefits under the proper calculation of benefits as provided by ERISA.

### **THIRD CAUSE OF ACTION**

#### **CLAIM FOR BENEFITS UNDER ERISA § 502(a)(1)(B) TERMINATION BENEFITS PLAN**

104. Plaintiffs restate and re-allege the foregoing paragraphs as if fully set forth in this cause of action.

105. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), authorizes a participant or beneficiary of a plan to bring a civil action to recover benefits due under the terms of the plan, to enforce his rights under the terms of the plan, and to clarify his rights to future benefits under the plan.

106. ERISA defines an "employee pension benefit plan" and "pension plan" as "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program (i) provides retirement income

to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond.” 29 U.S.C. §1002(2)(A).

107. The Termination Benefits Plan that American Family offered to all agents in their Agreement meets the definition of an “employee pension benefit plan” under ERISA.

108. Beginning in 2002, ERISA defined benefit plan benefits vest either: 100% after at least five years of service; or 20% after three years of service, and 20% each year thereafter, fully vesting after seven years. 29 U.S.C. § 1053. In either case, ERISA plan benefits vest and are non-forfeitable prior to the ten years or more years set forth by American Family in the Termination Benefits Plan.

109. American Family’s refusal to recognize the benefits as vested and non-forfeitable for Plaintiffs and those Class members whose Agreements were terminated prior to ten years or more of service was unlawful.

110. American Family’s refusal to pay vested and non-forfeitable Termination Benefits to those Class members Defendants’ deemed to be in breach of the Agent Agreement after termination was also a violation of ERISA.

111. ERISA requires an employee benefit plan to satisfy at least one of three rules designed to prevent backloading of benefit accrual rates, which occurs when a plan awards benefits to employees in later years of service at a rate disproportionately higher than the rate for employees in earlier years of service. 29 U.S.C. § 1054. The three rules are the 3% rule, the fractional rule, and the 133 1/3% rule. *Id.*

112. The Termination Benefit Plan accrues 0% for 10 years, 50% in year 11, 10% per year for years 11-20, and 5% per year for year 20 onward.

113. Accordingly, the Termination Benefit Plan fails to satisfy any of the three rules designed to prevent anti-backloading of benefit accrual rates and violates 29 U.S.C. § 1054.

114. American Family's refusal to implement benefit accrual provision in compliance with ERISA was unlawful.

115. American Family's ERISA violations have damaged Plaintiffs and the Class, including but not limited to benefits due and owing had the Termination Benefits Plan complied with ERISA.

116. American Family's conduct is the cause of injury and damage to Plaintiffs and Class members in an amount to be proven at trial.

#### **FOURTH CAUSE OF ACTION**

##### **CLAIM FOR OTHER APPROPRIATE RELIEF UNDER ERISA § 502(a)(3) TERMINATION BENEFITS PLAN**

117. Plaintiffs restate and re-allege the foregoing paragraphs as if fully set forth in this cause of action.

118. The Termination Benefits Plan that American Family offered to all agents in their Agreement meets the definition of an "employee pension benefit plan" under ERISA.

119. The American Family Defendants are fiduciaries as such term is defined by ERISA. 29 U.S.C. § 1002(21).

120. ERISA requires that a fiduciary "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and – with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use..." 29 U.S.C. § 1104(a)(1)(B).

121. The American Family Defendants' refusal to recognize the Termination Benefits Plan benefits as vested and non-forfeitable for Plaintiffs and those Class members whose

Agreements were terminated prior to ten years or more of service, and the Defendants' refusal to follow ERISA's accrual and vesting requirements, were unlawful and a breach of their fiduciary duties.

122. The American Family Defendants' refusal to pay vested and non-forfeitable Termination Benefits to those Class members Defendants' deemed to be in breach of the Agent Agreement after termination was also a violation of ERISA and a breach of their fiduciary duties.

123. The American Family Defendants' refusal to implement benefit accrual provision in compliance with ERISA was unlawful and a breach of their fiduciary duties to administer a plan in accordance with ERISA. *See* 29 U.S.C. § 1104(a)(1)(D) ("a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.").

124. Moreover, by dealing with the assets of the Termination Benefits Plan in its own interests by improperly causing forfeitures of plan assets under the illegal vesting and accrual provisions, the American Family Defendants engaged in transactions prohibited by ERISA. *See* 29 U.S.C. § 1106(b)(1) ("A fiduciary with respect to a plan shall not--(1) deal with the assets of the plan in his own interest or for his own account.")

125. The Plaintiffs and Class members are entitled to equitable relief under ERISA § 502(a)(3), including retroactively reforming the Termination Benefits Plan to comply with ERISA's vesting and benefit accrual provisions and requiring Defendants to pay restitution in the form of a surcharge or otherwise credit Plaintiffs and Class Members for all ERISA benefits to

which they are retroactively entitled under the Termination Benefits Plan in order to be made whole and to prevent Defendants' unjust enrichment.

126. The American Family Defendants' conduct has caused actual harm to Plaintiffs and Class members in an amount to be proven at trial.

**FIFTH CAUSE OF ACTION**

**CLAIM FOR BENEFITS UNDER ERISA § 502(a)(1)(B)  
DEFENDANTS' BENEFITS PLANS  
OFFERED TO OTHER EMPLOYEES**

127. Plaintiffs restate and re-allege the above paragraphs as if fully set forth in this cause of action.

128. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), authorizes a participant or beneficiary of a plan to bring a civil action to recover benefits due under the terms of the plan, to enforce his rights under the terms of the plan, and to clarify his rights to future benefits under the plan.

129. The Defendants provide a retirement plan, a 401(k) plan, a group health care plan, a group dental plan, and group life plan, and a long term disability plan to current employees, all of which are employee benefit plans subject to ERISA. See Exs. I to M.

130. American Family's retirement plan covers substantially all of the Defendants' employees who have attained age 21 and completed one year of service.

131. All of Defendants' employees are eligible to participate in American Family's 401(k) plan, group health care plan, group dental plan, group life plan, and long term disability plan.

132. As employee benefit plans subject to ERISA, the American Family retirement plan, 401(k) plan, group health care plan, group dental plan, group life plan, and long term

disability plan must comply with 26 U.S.C. § 410(b) and § 105(h), including the minimum coverage requirements. *See also* 29 U.S.C. § 1202(c) (explicitly incorporating Treasury regulations promulgated under 26 U.S.C. §§ 410(a), 411 & 412).

133. A plan that fails to comply with the requirements of 26 U.S.C. § 410(b) and § 105(h), including the minimum coverage requirements, must be brought into retroactive compliance. *See e.g.*, 26 C.F.R. § 1.410(b)-8(a)(1) (“A plan must satisfy section 410(b) for a plan year... [A]mendments retroactively correcting a plan in accordance with § 1.401(a)(4)-11(g) are taken into account as plan provisions in effect as of the last day of the plan year.”).

134. Relying on their mischaracterization of Plaintiffs and Class members as “independent contractors,” however, Defendants AFMIC, the American Family Employee Benefit Plan Defendants, the 401K Plan Administrative Committee, and The Committee of Employee and District Manager Retirement Plan have systematically excluded Plaintiffs and Class members from the definition of an “employee” covered by the American Family retirement plan or eligible to participate in the American Family 401(k) plan, group health care plan, group dental plan, group life plan, and long term disability plan.

135. Plaintiffs and Class members are “employees” under ERISA and the Class represents a significant percentage of Defendants’ workforce that Defendants had to cover under the terms of the American Family Plans to comply with 26 U.S.C. § 410(b) and § 105(h), including the minimum coverage requirements.

136. By excluding Plaintiffs and Class members from the definition of an “employee” covered by the American Family Plans, Defendants have, upon information and belief, violated 26 U.S.C. § 410(b) and § 105(h), including the minimum coverage requirements. Indeed, upon information and belief, the Class represents at least 25% of Defendants workforce.

137. Defendants' refusal to implement American Family Plans in compliance with ERISA and 26 U.S.C. § 410(b) and § 105(h), including the minimum coverage requirements, was unlawful.

138. Defendants' ERISA violations have damaged Plaintiffs and the Class, including but not limited to benefits due and owing had the retirement plan, a 401(k) plan, a group health care plan, a group dental plan, and group life plan, and a long term disability plan offered to all other current employees complied with ERISA.

139. Defendants' conduct has caused actual harm to Plaintiffs and Class members in an amount to be proven at trial.

### **SIXTH CAUSE OF ACTION**

#### **CLAIM FOR OTHER APPROPRIATE RELIEF UNDER ERISA § 502(a)(3) DEFENDANTS' BENEFITS PLANS OFFERED TO OTHER EMPLOYEES**

140. Plaintiffs restate and re-allege the above paragraphs as if fully set forth in this cause of action.

141. ERISA Section 502(a)(3) empowers a plan participant or beneficiary to bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan" 29 U.S.C. § 1132(a)(3).

142. Relying on their mischaracterization of Plaintiffs and Class members as "independent contractors," Defendants have systematically excluded Plaintiffs and Class members from the definition of an "employee" covered by the American Family retirement plan

or eligible to participate in the American Family 401(k) plan, group health care plan, group dental plan, group life plan, and long term disability plan.

143. Plaintiffs and Class members are “employees” under ERISA and the Class represents a significant percentage of Defendants’ workforce that Defendants had to cover under the terms of the American Family Plans to comply with 26 U.S.C. § 410(b) and § 105(h), including the minimum coverage requirements.

144. By excluding Plaintiffs and Class members from the definition of an “employee” covered by the American Family retirement plan, 401(k) plan, group health care plan, group dental plan, group life plan, and long term disability plan, Defendants have, upon information and belief, violated 26 U.S.C. § 410(b) and § 105(h), including the minimum coverage requirements. Indeed, upon information and belief, the Class represents at least 25% of Defendants workforce.

145. Defendants AFMIC, the American Family Employee Benefit Plan Defendants, the 401K Plan Administrative Committee, and The Committee of Employee and District Manager Retirement Plan refusal to implement the American Family retirement plan, 401(k) plan, group health care plan, group dental plan, group life plan, and long term disability plan in compliance with ERISA and 26 U.S.C. § 410(b) and § 105(h), including the minimum coverage requirements, was unlawful and a breach of their fiduciary duties to administer a plan in accordance with ERISA. *See* 29 U.S.C. § 1104(a)(1)(D) (“a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.”).

146. The Plaintiffs and Class members are entitled to equitable relief under ERISA § 502(a)(3), including reforming the American Family Plans to include Plaintiffs and the Class and to comply with ERISA and 26 U.S.C. § 410(b) and § 105(h), including the minimum coverage requirements, and requiring Defendants to pay restitution in the form of a surcharge or otherwise credit Plaintiffs and Class Members for all ERISA benefits to which they are retroactively entitled under the American Family Plans in order to be made whole and to prevent Defendants' unjust enrichment.

147. Defendants' conduct has caused actual harm to Plaintiffs and Class members in an amount to be proven at trial.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs individually, and on behalf of all other similarly situated, demand judgment against the Defendants and relief from this Court as follows:

- A. An order certifying the Class as described with the named Plaintiffs as Class Representative(s) and appointing undersigned counsel as Lead Counsel for the Class;
- B. A declaration that Plaintiffs and Class Members are legal "employees," for all purposes, including, but not limited to, ERISA;
- C. A declaration that the Termination Benefits Plan is an employee benefit plan subject to ERISA;
- D. A declaration that the Termination Benefits Plan fails to comply with ERISA's vesting and benefit accrual provisions;
- E. Payment to Plaintiffs and the Class of all amounts due under the Termination Benefits Plan had it complied with ERISA's vesting and benefit accrual provisions;
- F. an order retroactively reforming the Termination Benefits Plan to comply with ERISA's vesting and benefit accrual provisions and requiring Defendants to pay restitution in the form of a surcharge or otherwise credit Plaintiffs and Class

Members for all ERISA benefits to which they are retroactively entitled under the Termination Benefits Plan in order to be made whole and to prevent Defendants' unjust enrichment;

- G. A declaration that because Defendants excluded Plaintiffs and the Class from participating in the American Family Plans, the American Family Plans are not in compliance with ERISA and 26 U.S.C. § 410(b) and § 105(h), including the minimum coverage requirements;
- H. Payment to Plaintiffs and the Class of all amounts due under the American Family Plans had the plans complied with ERISA;
- I. an order reforming the American Family Plans to include Plaintiffs and the Class and to comply with ERISA and 26 U.S.C. § 410(b) and § 105(h), including the minimum coverage requirements, and requiring Defendants to pay restitution in the form of a surcharge or otherwise credit Plaintiffs and Class Members for all ERISA benefits to which they are retroactively entitled under the American Family Plans in order to be made whole and to prevent Defendants' unjust enrichment;
- J. An injunction barring Defendants from continuing to misclassify the Class as "independent contractors" and to classify them as "employees";
- K. An award of attorneys' fees, plus the costs and expenses of this action;
- L. Pre- and post-judgment interest, as afforded by law;
- M. All such other legal and equitable relief to which Plaintiffs and Class are entitled.

Respectfully submitted,

*s/* Jack Landskroner

---

Jack Landskroner (0059227)

Drew Legando (0084209)

**LANDSKRONER GRIECO MERRIMAN, LLC**

1360 West 9<sup>th</sup> Street, Suite 200

Cleveland, Ohio 44113

T. (216) 522-9000

F. (216) 522-9007

E. jack@lgmlegal.com

drew@lgmlegal.com

Charles J. Crueger, Esq.

Erin K. Dickinson, Esq.

**HANSEN REYNOLDS DICKINSON CRUEGER LLC**

316 N. Milwaukee Street, Suite 200

Milwaukee, Wisconsin 53202  
P. 414 / 455-7676  
F. 414 / 273-8476  
E. ccrueger@hrdclaw.com  
edickinson@hrdclaw.com

Gregory F. Coleman, Esq.  
Mark Silvey, Esq.  
**GREG COLEMAN LAW PC**  
Bank of America Center  
550 Main Avenue, Suite 600  
Knoxville, Tennessee 37902  
P. 865 / 247-0080  
F. 865 / 522-0049  
E. greg@gregcolemanlaw.com  
mark@gregcolemanlaw.com

Edward A. Wallace, Esq.  
Kara A. Elgersma, Esq.  
Dawn M. Goulet, Esq.  
**WEXLER WALLACE LLP**  
55 W. Monroe Street, Suite 3300  
Chicago, Illinois 60603  
P. 312 / 346-2222  
F. 312 / 346-0022  
E. eaw@wexlerwallace.com  
aek@wexlerwallace.com  
dmg@wexlerwallace.com

*Counsel for Plaintiffs and the Class*