IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

MILLER, et al	:	**CIVIL TRIAL DIVISION**
	:	
	:	**FEBRUARY TERM, 2001**
	:	
VS.	:	**NO. 3592**
	:	
CONTINENTAL CASUALTY COMPANY	:	
JONATHAN D. HERBST, ESQ.	:	
MARGOLIS EDELSTEIN	:	

F I N D I N G S

The findings and conclusions instantly rendered by this Court are the third and final parts of a proceeding tried before the Court sitting with a jury and concurrently without a jury. Plaintiff Miller filed a legal malpractice action against Jonathan D. Herbst, Esquire and his firm Margolis Edelstein. Plaintiff also brought within the Complaint an action for "common law bad faith" against Continental Casualty Company (referred to as C.N.A. here). These were tried before a jury. The matter tried before the Court without a jury was a claim for "statutory bad faith" under 42 Pa. C.S.A. § 8371.

These three actions arise out of two defamation actions which were consolidated for purposes of trial in the underlying litigation.

The first defamation action was filed by American Financial Mortgage Corporation,
(hereinafter, American Financial or AFMC) against Commonwealth Land Title Insurance Co., Frank J. Cozzo, Jr., and Jeffrey A. Tischler. (October Term, 1995, No. 0312). The Miller Defendants were not in this first action and this action is not the subject of these findings.

The second defamation action was filed on November 7, 1995. This action was against First American Title Insurance Co., Frank A. Merchiar, T.A. Title Insurance Co., Barbara A. Park, Marie Miller and Murray Shore, (hereinafter, Miller Defendants)

(November Term, 1995, No. 0478). Commonwealth Land Title Insurance Company was joined as an additional defendant by Jonathan D. Herbst, Esquire, who had entered his appearance for Marie Miller on December 8, 1995. The action proceeded separately until consolidated for trial by Order of Court of March 5, 1997. The October 1995, #0312 case was designated as the lead case, to be governed by the Case Management Order entered on March 18, 1996. The Miller defendants were one of multiple defendants in this underlying consolidated action. They were represented by Jonathan D. Herbst and his law firm, Margolis Edelstein in the underlying action, while Continental Casualty provided representation and indemnity under a one million dollar Errors and Omissions liability insurance policy.

The underlying trial resulted in a verdict for Plaintiff American Financial, with damages found to be $15,000,000. The Miller Defendants were allocated 70% of liability for compensatory $8,400,000 against the Miller Defendants for compensatory damages. The other components of the award were a $2,000,000 punitive damages award against Marie Miller Century 21 and $1,000,000 punitive damages against Murray Shore. Continental ultimately settled with the Plaintiff, indemnifying the Miller defendants for the excess verdict.

The issue now before this Court, sitting without a jury, is whether Continental Casualty Company's handling of the case, through its chosen trial counsel, Jonathan Herbst, and its decision not to settle prior to verdict, constituted statutory bad faith.

After weighing the evidence and the applicable law, this Court finds that Continental's
actions were not in bad faith.

In support thereof, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff, AFMC, filed a defamation action against Commonwealth Land Title Insurance Company, Frank J. Cozzo, Jr., and Jeffrey A. Tischler on October 2, 1995. (October Term, 1995, No 0312). This action revolved around a memo circulated, regarding

the issue of having "good funds" available to a mortgage lender. (See Exhibit DH 240, 241.)

2. Plaintiff, AFMC, filed a second defamation action against First American Title Insurance Company, Frank A. Merchior, T.A. Title Insurance Company, Barbara A. Park, Marie Miller, and Murray Shore on November 7, 1995.

3. Jonathan D. Herbst, entered his appearance for the Miller Defendants on December 8, 1995. [1]

4. Christine Richards, a claims adjuster for C.N.A. in the Real Estate Errors and Omissions section was assigned the Miller file in late November 1995 and selected Mr. Herbst as trial counsel. (N.T. 1/6/2004, at pgs. 97-99).

5. Ms. Richards had prior experience with Mr. Herbst and knew him to be a very experienced litigator. (N.T. 1/6/2004 at 99-100; 1/7/2004 at pg. 52).

6. Mr. Herbst began the practice of law in 1970 and throughout his career specialized in insurance defense litigation.

7. He has had extensive experience in handling and litigating cases. He has tried to verdict in excess of 150 cases and settled many more. (N.T. 12/31/2003 AM Session at pgs.132-149).

8. Mr. Herbst had been counsel in over three thousand cases and settled approximately 2850 cases or 95%. (N.T.12/31/2003 AM Session at pgs. 149-151).

9. Mr. Herbst had handled 16-20 defamation cases in his career. (N.T. 12/31/2003 A.M. Session at pg. 144).

10. Mr. Herbst was familiar with the tripartite relationship between an insurer, insured and defense counsel and knew his duty was to the insured and that he also had an ethical obligation to the insurance company to render to them an honest opinion on what was occurring

1. There is no docket entry for when service was made on Miller Defendants.

in the case. (N.T. 12/31/03 A.M. Session at pg.147; 1/2/04 at pgs. 14-15).

11. Upon being assigned the case to defend the Miller parties, Mr. Herbst, met with Mrs. Miller and Mr. Shore at her place of business and during the course of a four (4) hour meeting, discussed all aspects of the case and outlined extensively all issues in the case and potential issues. (N.T. 1/2/04 at pgs.16-26). Mr. Herbst further advised Mrs. Miller and Mr. Shore the availability and parameters of the defense of conditional privilege. (N.T. 1/2/04 at pgs.25-26).

12. At the meeting, Mrs. Miller and Mr. Shore provided factual information to Mr. Herbst which he used to form an initial evaluation of the case against them. (N.T. 1/2/04 at pgs. 27-34).

13. On 12/22/95, shortly after his meeting with Mrs. Miller and Mr. Shore, Mr. Herbst sent extensive letters to the insurance adjuster, Christine Richards, outlining his analysis of the case based upon his knowledge up to that point in time.

14. The letter of 12/22/95, advised the insurance carrier that Defendant Shore believed the information about the Plaintiff was based upon "reliable " sources and that the information may in fact be truthful and that the potential for damages might be minimal because there had been little or no business conducted with the Plaintiff mortgage company. (See Exhibit.D-40).

15. In relieance upon the information received from the Miller defendants, Mr. Herbst believed the Complaint to be inaccurate and the factual premise for certain allegations in the Complaint to be erroneous as the Miller Defendant never did business with Plaintiff, American Financial . (N.T. 1/2/04 at pgs. 39-40).

16. Upon review of the Complaint and after review of the circumstances contemporaneous to Miller's actions in the underlying case, it became apparent to Mr.

Herbst that the Commonwealth Land Title Company had issued an earlier memorandum and that such memorandum may have been a source for the alleged defamatory information in addition to a Mr. Bateman of Eastern Abstract Title Company, whom the Miller Defendants deemed to be reliable. (N.T. 1/2/04 at pgs. 38-39).

17. Mr. Herbst prepared a joinder Complaint to join Commonwealth Land Title which the Miller Defendants verified and signed. (N.T. 1/2/04 at pgs. 41-43).

18. It was later learned that a separate Complaint had been filed earlier by American Financial against Commonwealth Land Title. (N.T. 1/2/04 at pgs. 43-45).

19. During the initial period of this claim, Ms. Richards considered this case to be complex because it involved both financial and punitive damages. It also contained allegations of intentional acts, which would affect the Miller Defendants' insurance coverage. After assessing the Miller Defendants' degree of exposure, Ms. Richards chose an experienced competent trial litigator to handle the legal aspect of the claim on behalf of C.N.A. (N.T. 1/7/04 at pgs. 57-63).

20. In March of 1997, the Miller file was transferred from Ms. Richards to Lea Frank of C.N.A.

23. The legal representation continued to be handled by Mr. Herbst after the file was transferred to Ms. Frank of C.N.A.

24. During the discovery phase of the case, it was learned by Mr. Herbst that the original allegedly defamatory statement had been authored by Defendant Commonwealth Land Title on 11/9/1994 as an inter-office memo in which American Financial was identified as a company that there should be some concern about regarding its financial stability. (N.T. 1/2/04 at pgs. 46). This was the first of (4) memos issued.

25. The others memos issued were by First American Title (2nd memo), Pa. Title (3rd memo), with the fourth memo issued by the Miller Defendants. All of the memos in some fashion reflected the same financial concern as stated in the first memo issued by Commonwealth. (N.T. 1/2/04 at pgs. 45).

26. The concern about the financial stability of American Financial, arose over a mortgage transaction being handled by Commonwealth Land Title. A check issued by American Financial had not cleared and American Financial was required to wire the necessary funds to cover the check on November 8th but did not do so until November 9th. This was the basis for the Commonwealth Land Title memo. (N.T. 1/2/04 at pgs. 48-49).

27. As a further part of discovery, the Miller Defendants were served with interrogatories. Mr. Herbst met with Murray Shore at the Miller Defendants' offices for approximately four hours to prepare answers to the interrogatories. Mrs. Miller declined to participate in preparing the answers and relied upon the answers by Mr. Shore to be her answers. (N.T. 1/2/04 at pgs. 53-55).

28. In March of 1996, Mr. Herbst advised the Miller Defendants' and C.N.A. of his initial conclusions as to the status of the case at that time and what he perceived to be issues of damages and the need to obtain an accounting expert to assist in evaluating the claimed damages. (N.T. 1/2/04 pgs. 56-58).

29. In further pursuit of information relevant to the claimed damages, Mr. Herbst requested Plaintiff, American Financial to produce all documentation of loans performed by American Financial to determine if Miller Defendants had been involved in any of the

loans. The information was forwarded to the Miller Defendants for verification. It was determined that the Miller Defendants had done no business with American Financial or had interfered with any contracts with American Financial, or any loan was not performed. (N.T. 1/2/04 at pgs. 62-65).

30. C.N.A. was copied on all correspondence which stated that American Financial was not involved in any transactions with the Miller Defendants Financial transactions that it was (N.T. 1/2/04 at pgs. 65).

31. It was initially believed by the Miller Defendants that the memo produced by Mr. Shore, which was the only alleged defamatory document that the Miller Defendants had authored, had limited circulation within the Miller real estate associates. It was later learned that the memo was in the possession of a part-time sales agent for Miller. This agent forwarded it to an appraiser, who sent it to H.U.D. (Housing Agency). Someone from H.U.D. then faxed it to Mr. Flatly, who was the President of American Financial. (N.T.1/2/04 at pgs. 66-68).

32. Although this information was learned on the eve of trial, it did not change the evaluation of the case because there was no evidence that it had been responsible for a single loss of a loan by American Financial. (N.T. 1/2/04 at pgs. 68).

33. During the course of discovery, there were approximately 17 days of depositions. The Miller Defendants were not considered the primary Defendants and Mr. Herbst often did not take the lead role in witness examinations. This lead role was often assumed by counsel for Commonwealth Land Title, who had been the primary Defendant and the first to circulate the allegedly defamatory information. Notwithstanding this secondary role, at all times the Milller Defendants' interests were competently and adequately represented by Mr. Herbst or other members of his law firm. (N.T. 1/2/04 at pgs. 68-77).

34. Karen McGurn who was an employee of American Financial at the time of the issuance of the original memorandum by Commonwealth Land Title, was deposed and she testified that she received information regarding the negative impact of the original Commonwealth Land Title memo prior to the issuance of the Miller Defendant s' memo. This was critical to the issue of damages allegedly caused by the Miller Defendants' memo. (N.T. 1/2/04 at pgs. 81-87).

35. In a series of letters addressed to the Claims specialist for C.N.A who was supervising the case, and either addressed to or copied to Marie Miller and Murray Shore, Jonathan Herbst outlines in detail the progress of the case from the initial response to an exhaustive analysis of the information learned from discovery. The analysis includes Mr. Herbst well-reasoned, professionally knowledgeable and competent explanation of the then known facts regarding liability and damages and the law applicable to these specific areas. C.N.A. was completely justified and entirely reasonable in relying upon this information in assessing its clients' exposure and its exposure to a negative verdict and damages. (See Exhibit Letters: DH-5, 3/6/96-5 pgs.; DH-7, 8/18/97-10 pgs.; DH-8, 10/27/97-6 pgs.; DH-9, 10/27/97-3pgs.; DH-10, 10/27/97-3 pgs.; DH-11, 11/26/97-2 pgs.

36. Mr. Herbst met with Murray Shore, the author of the alleged damaging memo, during discovery and prior to his deposition. From Mr. Shore's testimony it was developed that the information that he had relied upon in writing the memo came from a Mr. Bateman of Eastern Abstract Title Company. Mr. Shore had known Mr. Bateman for a number of years and had had substantial financial dealings with him and considered him to be a reliable source. This circumstance, along with other relevant factors were outlined at length by Mr. Herbst in the letter of 10/27/97 to Ms. Frank of C.N.A. with copies to Marie Miller and Murray Shore. The facts as established by this evidence created the defense of conditional privilege which was relied upon by the Defendants in working up their trial strategy and in evaluating the extent of their liability. (N.T. 1/2/2004, at pgs. 90-94 and 95-97. Also, see Exhibit DH-8, pg 5).

37. As part of their pre-trial preparation, C.N.A., through its legal representative, Mr. Herbst, was made aware of its position regarding its exposure to damages or special harm to the Plaintiff. This evidence was developed through deposition testimony and other pleadings. The evidence demonstrated that there was no direct financial harm in the form of lost loans to American Financial resulting from the Miller Defendants' memo because there was no evidence that Miller Real Estate business entities ever had any loans placed or made any other financial transactions with American Financial. The evidence further developed the Defendants' position that there were only two mortgage loans that were not executed after various Defendants' memoranda were circulated and that the withdrawal of these loans had nothing to do with the Miller Defendants' memorandum. (N.T. 1/2/04 at pgs. 102-105 and DH-8).

38. The investigation done by C.N.A.'s legal representation, Jonathan Herbst, Esquire, in an attempt to analyze American Financial's claimed damages, was critical to the position C.N.A. would later take during settlement negotiations in the underlying trial.

39. Plaintiff had selected an economist, Dr. Verzilli, to offer evidence of Plaintiff's alleged losses. The witness offered an expert report dated 2/17/1996 and would testify in the underlying trial. (See Exh. P-5).

40. The method used for calculating Plaintiff's economic loss was based upon reported income for the period leading up to the date of the issuance of the memo and the projected income after the date of the issuance of the memo. The projected income was used in contrast to the actual income of American Financial in the post-memo period. The methodology relied upon in major part accepted accounting methods of expressing concepts of gross revenue less expenses to arrive at net income. This is significant because of the model of financial analysis adopted by Defendant.(N.T. at pgs. 103-104. Exhibit P-5).

41. C.N.A., through its legal representative, Mr. Herbst, planned to present, through

expert evidence via an accounting firm selected to do its financial analysis. This accounting firm, Cooper & Lybrand, would present evidence in certain categories as follows:

A. The original financial transaction of American Financial, which precipitated

the original memo of Commonwealth Land Title dated 11/9/1994.

B. The financial condition of American Financial on 12/31/1994.

C. The condition of the mortgage lending market during 1994 and its impact on American Financial.

D. The effect of the Miller Defendants' memo on American Financial's transactions with its customers.

E. Analysis of the Verzilli and Ungerleider Reports. (Exh. DH-194 and DH-8).

42. The Coopers and Lybrand Report designated DH-194, is a ninety-one (91) page document which is a comprehensive forensic accounting analysis, complete with source documents and annotations. This document and the expert testimony which would be offered in support of the report was to be offered by the four (4) defendants issuing memos. (Exhibit DH-194). The report cost was $175,000 and all four defendants shared the expense equally. N.T. 1/2/2004 at pg. 131.

43. The document is a powerful refutation of all of the damage claims of American Financial and, if believed by the jury, would be the basis for an award of minimal, if any, damages.

44. CNA reasonably relied upon the expert report and was reasonable in its belief

that it provided the basis for a defense to the claimed damages of AFMC. Exhibit DH-8, DH-194.

45. Throughout the pretrial preparation, the Miller/Shore Defendants were advised in detail of the progress of the case by copies of letters addressed to CNA. The letters authored by Mr. Herbst, were professional as well as a reasonable, and a common sense analysis of the Plaintiff's claims. Mr. Herbst also extended the same analytical expertise to zealously advocate Defendant's position in both their defenses available to them and in impeaching Plaintiff's claims. (Exhibits DH-5, DH-8, DH-9, DH-10, DH-11, DH-12, DH-14).

46. The last of these letters, designated DH-14, was drafted on 8/11/98, in preparation for trial and, was copied to the Miller Defendants. The letter advises the Defendants of the current recommended offer of settlement, and, upon failing to settle, the need to prepare for trial.

47. Miller Defendants never responded to this communication or any of the other communications advising them of the pretrial developments and the upcoming trial. (N.T. 1/2/04, pgs. 122-123).

48. After numerous attempted trial listings and continuances, the trial was listed as a February 1999 trial pool case, subject to a 24-hour notice for call to trial.(N.T. 1/2/04, pgs. 123-129).

49. The Miller Defendants were contemporaneously advised of all scheduling issues. The Defendants never contacted Mr. Herbst during this time period to request that the case be settled and that they not go to trial. (N.T. 1/2/04, pg. 126).

50. Prior to trial, the parties engaged in settlement negotiations before a professional arbitrator which were scheduled on two (2) separate days. Much criticism was leveled at Mr. Herbst and indirectly at CNA because Mr. Herbst was not there on the first day. The criticism is misplaced and failed to give full consideration to the facts. On the first

day, Mr. Herbst, was called before the Court in another county. This Court takes judicial notice of the fact that a matter called before the Court takes precedence over an arbitration matter. The decision not to continue the arbitration was reasonable because of the difficulty in the original scheduling. The Miller Defendants' interests were more than adequately represented by CNA. In Mr. Herbst's stead, was a trial lawyer from his firm with twenty-plus years of trial experience. Also, accompanying him were Lea Frank, the CNA adjuster assigned to the file, and her supervisor from CNA, Donna Mongello.

Because of the extensive pretrial discovery and analysis prepared by Mr. Herbst, (See Exhibits DH-5, DH-8, DH-9, DH-10, DH-11, DH-12, DH-14), which were contemporaneously communicated to the CNA file, these three representatives of the Miller Defendants, competently represented the Defendants' interests, and took positions during the arbitrations that were reasonable and supported by the facts developed heretofore in the case. (N.T. 1/2/04 at 152-153).

51. The owner of American Financial and the chief executive officer who was actually bringing this action, did not appear for the Plaintiff on the first day of mediation.

52. None of the four (4) Defendants readied a settlement on the first day of mediation.

53. On the second day of mediation, it was learned that the Defendant, Pa. Title, who issued the 3rd memo, was going to settled for $100,000 and did ultimately settle for this amount. (N.T. 1/2/04 at 157).

54. Defendant CNA, through its legal representative, Mr. Herbst, did not reevaluate the Miller Defendants' exposure because the Pa. Title memo had been widely circulated within the mortgage/real estate industry, whereas the Miller Defendant memo had a much more restricted distribution. CNA's decision not to amend its existing offer to settle was done in good faith and based upon the facts known at that time, which included the fact that evidence showed that only one "outside" person at "HUD" had seen the Miller Defendant memo. (N.T. 1/2/04 at 157-158, 161).

55. Shortly after the Pa. Title settlement, it was learned that Defendant, First American Title, who issued the 2nd memo, had settled with the Plaintiff. Because the Miller Defendants' memo was not as widely disseminated as the memo of First American Title, CNA's decision not to increase its settlement offer was reasonable and in good faith. (N.T. 1/2/04 at 159-161).

56. Eight days prior to trial it was learned that Defendant, Commonwealth Land Title, had settled with Plaintiff for $225,000. (N.T. 1/2/04 at 162).

57. CNA, on behalf of the Miller Defendants, increased its offer to settle to $35,000 on 2/16/99, three days before trial. This offer was rejected. (N.T. 1/2/04 at 166).

58. The underlying trial commenced on 2/19/99 in American Financial vs. Miller, Shore, Guerra, Inc., et al., October Term, 1995, No. 0312. At the time of trial, the other three defendants had executed joint tort-feasor releases. They would not be presenting a defense, but would still be on the verdict sheet. (N.T. 1/2/04 at 157-163). [2]

59. CNA was aware of these developments through Mr. Herbst and Lea Frank. (N.T. 1/2/04 at pg. 165).

60. The decision by CNA not to settle at this point, was based in part on two central positions. The Plaintiff's demand had risen to one million dollars and, under CNA's assessment of the case,they valued the case at $75,000, which was rejected by Plaintiff. (N.T. 1/2/04 at pgs. 165-169).

61. The Miller Defendants were made aware of this on the first day of trial. (N.T. 1/2/04 at pg. 169).

62. Prior to trial beginning, CNA, through Mr. Herbst, completed a comprehensive

2 Any reference to the Notes of Testimony of October Term 1995, #312 are

review of their proposed evidence, reviewed the relevant law, filed and answered motions in limine, reviewed the depositions and,otherwise prepared for trial. (N.T. 1/2/04 at pgs. 171-177).

63. Mr. Herbst articulated his trial strategy based upon the facts developed (or not developed) prior to trial. The strategy on behalf of the Miller/Shore Defendants was reasonable and had a proper evidentiary basis. In addition, the strategy was a professionally competent assessment of the Plaintiff's chances for showing that the Miller/Shore Defendants'memo was true, not defamatory, and that limited circulation of the memo did not cause any damages. N.T. 1/4/04 at pgs. 177-185.

64. As part of its opening statement in the underlying matter, Plaintiff American Financial described at length the underlying financial issues attendant to American Financial's financial health. They also described at length the details of the "Marshall Mortgage" and the initial check for $96,250, which was issued on an American Financial account that did not have sufficient funds to cover the check:

> Now, American Financial is a large company and as any large business,would have many accounts and the accounts were controlled by the company's controller. He would issue the check, his name is Scott Egelkamp. And, Mr. Egelkamp is going to testify in this courtroom for you within a few days. And he will tell you in 1994, American Financial was a financially stable company. In fact,the way you determine if a company is financially stable, you would look at its financial stability, its auditors come in and everything like that. We will show you the company had worth, equity of almost two million dollars as of the time in issue in this case. That would mean if it did close up shop, sold everything, they would have twenty million dollars. Scott Egelkamp will tell you that they had used thirty-two million dollars, they had warehouse lenders they would borrow money from, lent to other people, that the company had right to audit them, that was fine. They had
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> a seven and a half million dollar credit line with the main

designated as DH-232.

warehouse lender, but we don't have to prove a negative.

On November 3,1994, American Financial provided the mortgage funding, mortgage loan to Sandra Marshall. She lived in Montgomery County and she went to American Financial and got a $96,250.00 mortgage loan from American Financial. She went to settlement, American Financial provided the check of $96,250.00, went to settlement and everything went through, everything went fine. She went in, she moved into her house and, again, hopefully, is living happily ever after. Never had any other involvement with anything that's going on in this case. The internal problems, bank problems that happened after that, that was November 3, 1994.

A few days later on November 8, 1994, Scott Egelkamp, the controller of the company, had his computer screen up, was looking at the accounts. Now these accounts, the way they work is, there's an account, and they would move money in and out of different accounts, and that's what he would do. He'll testify it was a zero balance account. So when he came in on November 8, he saw that he had an extra $96,000.00 in this account. So he set out to find out what was up. He will testify that he traced it back to the Marshall loan and he tracked it down and found that there was a Marshall settlement, it looked like about the same amount that he had extra in the account, and he will tell you that he called the title clerk, settlement happened, and he said to the title clerk, will you please check to see if there's a problem with our check, or did you deposit it, the check. And you will hear testimony the clerk said, "I checked with the bank and there's a problem with the check." They looked into it and by the afternoon of the 8th, Scott Egelkamp will tell you that he asked the clerk how do you want me to get you the funds, because there's a problem with that check.

As this happens fairly frequently, there are mistakes by title companies, real estate agents, everybody makes mistakes, the clerk said. 'Will you wire the money to us?' At that time it was late in the afternoon, he stated, 'I'll wire it to you, first thing in the morning.' Within twenty-four hours – the first thing in the morning, Scott Egelkamp on behalf of American Financial, wired $96,250.00. The title clerk got the money within twenty-

four hours from when they were told of the problem.

> Now, Scott Egelkamp told the clerk, 'I'm going to wire you the money, don't redeposit the check.' The check was paid. The check cleared. American Financial paid twice, over $180,000.00. Now they got the check, the check came back out of that account, the bank corrected their mistake, it went back into American Financial's account. You'll hear Scott Egelkamp say yeah, it was a mistake there, apparently I goofed. I wrote the check, apparently I transferred money out of that account. I should have seen what I did. I made a mistake calculating, but that's what it was. And we know it was. Because he paid it twice the next day. If you don't have money, if there's financial problems, we all make mistakes, maybe not everybody here, but I know many of us have written checks where your bank didn't clear a check you had deposited, they put a hold on it for so many days or you miscalculated your check book, you get notice from the bank there's a problem with the check, they charge you a fee and they take care of it. They don't send out a memo to everyone in the world, every credit agency, saying you're a deadbeat, saying you're going out of business, and that's what happened here. (N.T pgs. 27-31. Exhibit DH-232).

65. During this same opening argument, Plaintiff specifically put into issue the question of whether the funds were present at the time the check was drawn and the fact that the Miller/Shore Defendants were going to make it an issue in the case.

> You will hear Mr. Herbst argue that the check bounced. The check bounced – well, if you want to call it that. Let's say the check bounced, but the problem was discovered, they didn't know that at the time, number one; and, number two, the check was good. When you think about bounced checks, you think about checks that are not made good. (N.T. pg. 32, Exhibit DH-232).

66. Plaintiff repeatedly raised the issue of sufficient funds being available at the time

the check was issued and further raised the issue that it was on the basis of this transaction that Defendant Commonwealth Land Title became concerned and issued the original memo.

> Now, what you're going to hear is that on November 8, when Scott Egelkamp called the title clerk to tell him about the check, because of the panic in the industry that the title clerk, instead of just waiting twenty-four hours to see if it all got cleared up, because it takes a little bit of time to make sure what he was saying was correct, you just don't send someone $96,000.00, you've got to check it out. So what happened was, that the title clerk called its title company, which is Commonwealth Land Title, and said to them, because they were advised by that company, 'Let us know if there's any problem,' and they themselves, we would submit to you, panicked and they called the title company and said, 'We have a problem with this check.' Now the check was covered twice the next day, they never called Commonwealth back to tell them that it was covered, everything's okay. And then what happened was, Commonwealth Land Title Insurance Company issued a memo and this is that memo. It's P-26. Frank Cozzo, November 9, 1994: 'We have just received information regarding potential problems in dealing with the following lender:' (N.T. pgs. 32-33, Exhibit DH-232).

Plaintiff made its financial stability a central fact in its case and dismissed any contrary claim thus putting the issue prominently in the minds of the jurors.

> Upon further investigation, we now know that any concerns that we may have had about American Financial Mortgage Corporation were unfounded. This firm should be dealt with no differently than any other financially stable lending organization. (N.T. pg.35, Exhibit DH-232).

In anticipation of the defendants' evidence, plaintiff tells the jury that defendants will be presenting an accountant who will be presenting accounting evidence as to the financial stability of plaintiff, clearly opening the door to such evidence and making it an

issue to be resolved by the jury.

> Now, to add insult to injury, these defendants hired an accountant for this lawsuit and what they are going to try to do, several years after the event, try to have that accountant construct a financial problem for American Financial. But American Financial was not having a financial problem, and I will submit to you not to be fooled by that. (N.T. pg 37, Exhibit DH-232).

67. Defendant Miller/Shore outlined in their opening statement that they would be presenting the accounting information to show that "good funds" were not available as required by the law of Pennsylvania. This was relevant to the issue of the financial stability of plaintiff, American Financial, which was the gravamen of the Shore memorandum, that any losses the company claimed were due to its behavior. Thus, making plaintiff's financial accounting practice a primary issue in the case as did the plaintiff in its own opening statement.

> MR. HERBST: Murray Shore and Marie Miller are victims of American Financial's shoddy financial dealings and shoddy financial practice. When Murray Shore got word from a reliable source, Bill Bateman of Eastern Abstract, that American Financial was in financial difficulty, Mr. Shore had an obligation to Marie Miller and to their customers, those people who would be relying upon them, they had an obligation to notify his sales people, and he sent that memorandum we just saw only to in-house, Marie Miller franchise, her own agency, to her forty to forty-nine in-house sales people, and nobody else.
>
> And it said, "We have got some information that these companies are in trouble." And you know what? At that time, eight to nine of those companies were in trouble. The reliable source, aside from the fact that this was common knowledge that these companies had problems throughout the Philadelphia area and everybody was talking about it at seminars and meetings and in newspapers. Aside from that, Mr. Shore relied upon Bill Bateman, who had thirty years in the industry, as his reliable source. And he sent his memorandum to a limited number of people, his employees.

Well, we are here today, ladies and gentlemen, because Mr. Flatley and his company broke the law of Pennsylvania, which requires good funds at settlement. And what was happening was, the mortgage companies were breaking the laws of Pennsylvania and the title companies were breaking the laws of Pennsylvania, because as a group the three co-defendants in this case, including those three title companies that are defendants in this case, ladies and gentlemen, because they know they did wrong, they won't be here. They went along with the mortgage companies and they didn't require that good funds be there at settlement. They accepted corporate checks. Corporate checks are the kind you hear Mr. Flately's company had bounced. Mr. Shore and the realtors have no control over what the bankers do, and the title companies do. But Mr. Shore is responsible for that settlement going through. He's responsible when a person sells a home to make sure that every 'I' is dotted and every 'T' crossed. So when that settlement company, if that seller, for example, has another home he wants to buy, needs money from that third home, it's not going to upset the apple cart, he's not going to have to tell the moving van don't come. He's not going to have to put his belongings in storage while the money comes late. So Mr. Shore has, as Director of Sales for Marie Miller, had the obligation to look after his clients. And he got the word from Bill Bateman. He said American Financial, we don't have anything in the pipeline with American Financial, so it's unlikely that it's going to be a problem, but put them on the list just in case. Just in case one of our sales people has a closing where they're involved, they'll call me and then I'll have an opportunity to find out.

But in the midst of '94, when the interest rates were rising and some companies were going under, what was Mr. Flately doing with his money? Mr. Flately had an agreement with State Street Bank in Massachusetts, his warehouse lender as it's termed in the industry. When he got a mortgage to be signed up, his company, they would borrow money from State Street Bank. State Street Bank would then wire that money to the escrow settlement account at Mellon Bank. Under the agreement, the warehouse agreement, that money was not supposed to be used for anything else. If it was borrowed for the Marshall settlement, it wasn't supposed to be co-mingled with everybody else's money and sent elsewhere.

But what Mr. Flatley was doing was, he was working the float; instead of providing a certified check at settlement or wired funds or what's called good funds as required by the law of Pennsylvania. Then and now, instead of doing that, he was taking the money that he got for settlement and he was spending it elsewhere. He was sending it to a resort he owns called Queen's Bay London Bridge out in Arizona.

October 31, of 1994, just four days before the Marshall settlement, Mr. Flatley took $200,000 out of his company. So that when the Marshall settlement check came in the day of the settlement, there was $28,000 in the settlement account. Money had been sent from State Street Bank for that account. Not for Mr. Flatley to take $200,000 out of it. It was earmarked for the Marshall settlement.

And its because of that, ladies and gentlemen, that we are here today. And it's because in spite of their promises and in spite of their marketing, American Financial did not maintain the highest ethical standard and professionalism. And it's because of that, ladies and gentlemen that Toll Brothers canceled them.

Now, there's a dispute as to whether Toll Brothers canceled American Financial because of these memos that these title companies sent out, or just because of the rates, or maybe it's because Karen Magurn was let go at the end of '94, and she was their main contact and they no longer had somebody they could trust.

But it was highly irresponsible, ladies and gentlemen, in this climate of other companies going belly-up for Mr. Flatley to take that money that was earmarked for a specific settlement out of a trust account, out of his company's account and not make sure that that money was there.

But what else was happening there at that company at the time? 1992 they had salaries of $530,000. 1994 their salaries were 1.5 million dollars. Company's growing, right? Wrong. 1994, in spite of the fact that they had salaries three times higher than two years before in 1994, they had 60% less gross revenue. So they got this high overhead and this big drop in income because of

the mortgage market and the interest rates.

Mr. Flatley's going to tell you, I wasn't in financial trouble. That's why he laid off Karen Magurn, ladies and gentlemen, because he was losing money and he lost 1.2 million dollars in 1994, unrelated to any of these memos that were sent out.

I submit to you, ladies and gentlemen, that when you understand the parties involved, when you understand how Murray Shore is trapped by what's going on in the market place with no control over what Mr. Flatley does, with no way to tell Mr. Flatley you must obey a law of Pennsylvania that required good funds, that he acted reasonably, professionally, ethically, properly and that we are here because of irresponsible activity of American Financial Corp.

I also submit to you, ladies and gentlemen, that they haven't lost a lot of money because of these memos. They lost a lot of money because of the mortgage industry itself, not because of what these memos did. They did a lot of damage control. They called up their main clients. They said, we're going to make it and they still had many of those main clients.

In conclusion at this time, however, there will not be one loan, one loan or one customer that Mr. Flatley or Mr. Morris or anybody can point to and they say we lost that business because of Mr. Murray Shore's memo. And at the close of this case, after we have heard the evidence, I'm going to ask you to find in favor of Marie Miller and Murray Shore and against Mr. Flatley and American Financial and against these three title companies that are responsible for any loss that Mr. Flatley might have made because of any memorandum. Thank you. (N.T. pgs 40-47, Exhibit DH-232).

68. Through opening statements and prior to the beginning of plaintiff 's evidence in the underlying trial, CNA on behalf of its insured, articulated its position and strategy through its legal representative, Mr. Herbst, as including the following:

a. American Financial was not a financially stable company.

b. The three title companies, who would not be presenting a defense at trial, had greater liability than its insured, who was a real estate company that had never done business with the plaintiff and had issued its memorandum with distribution restricted to its employees and agents.

c. American Financial's decrease in revenue was a result of its financial practices and not from the Miller/Shore memo. (See Findings 67 above).

69. This position taken by CNA and its decision not to settle with plaintiff, in light of its one million dollar demand, was reasonable, professionally competent and supported by its understanding of the evidence that would be offered against the insured as well as the evidence that would be offered by its insured.

70. During the course of the underlying trial, plaintiff, American Financial presented Andrew G. Verzilli as an expert in the field of economics. (N.T. 2/25/99 at p.4).

71. Although the witness's stated field of expertise was economics, his testimony further explained that broad discipline as being one which "affect[s] the incomes of businesses and corporations." (N.T. 2/25/99 at p.9).

72. He further explained this concept in accounting terms and accounting concepts:

> "So we look at the determinant of what the revenue is, so we get a sense of the profit. And general business profit is to find as net income, and we look at that also in terms of potential,
> the capabilities here." (N.T. 2/25/99 at p.9).

73. Dr. Verzilli conceded that he also teaches accountants who also serve as consultants:

> Q: Now, Doctor, let me just go back for a second. In your teaching of courses, you mentioned that you taught MBA courses and even higher education courses; is that correct?
>
> A: Yes, sir, MBA's, Ph.D's now Executive MBA's.
>
> Q: And during that time, did you also teach accountants as

well?

A: Many.

Q: Accountants that would actually do consulting in cases such as this?

A. Oh, yes. Over the years, I've taught all sorts of majors at the University level and at the graduate level. Many of those majors were Accounting Majors, who subsequently have gone on and worked in accounting firms and worked as consultants, sure. (N.T. 2/25/99 at pgs 10-11).

74. The Court in the underlying case, asked Dr. Verzilli questions regarding the nature of his study and report:

THE COURT: I have one question, though, on the qualifications. You indicated that you had performed business valuations. How many?

THE WITNESS: What I have indicated is that I've been involved in estimating income relative to business. Business valuation is a different question.

THE COURT: So the Income Analysis that –

THE WITNESS: The Income Analysis. (N.T. 2/25/99 at p. 13)

75. The income analysis used by the expert focused on the prior income history of the company, in the period prior to the alleged defamatory statement. The income history attempted to explain the concepts of the company's Net Income. (Although, not particularly elucidating. e.g.).

Q: When you say Net Income, what do you mean?

A: Well, we are concerned here with the returns of the business. Net Income is normally defined as Total Revenue. My total sales, minus my costs. And again, evaluate what's left over is profit or we call that Net Income. (N.T. 2/25/99 at p 20).

The testimony did establish the fundamental accounting concepts of sales, minus costs, equals net income. The costs were further broke down along accounting principles to show both fixed and variable. (N.T. 2/25/99 at pgs 16-22).

76. After plaintiff's counsel asked Dr. Verzilli a particularly long and complicated hypothetical question, Mr. Herbst, counsel for Defendants Miller/Shore, objected on the basis that the witness failed to include sufficient data regarding the actual interest rates used by the plaintiff. The Court resolved the issue as follows:

> The Court: And, you have an expert too?
>
> Mr. Herbst : I do, Your Honor, and he will speak to this issue.
>
> The Court: Well, your objection is overruled. (N.T. 2/25/99 at p.31).

77. Dr. Verzilli's testimony concerning the lost profit of the Plaintiff in the underlying case was based on regression analysis which is a statistical tool for calculating a range in values with stated degrees of variability. The example used to demonstrate the applicability of the procedure was determining the range of height of all people in Philadelphia. (N.T. 2/25/99 at pgs 33-51).

78. Prior to the witness's testimony, counsel for the Defendants objected to the testimony on the grounds that it lacked scientific reliability and that data, which was necessary to the opinion, was not provided or evaluated by the witness, rendering the opinion incompetent as a matter of law. (N.T. 2/25/99 at p.24).

79. The basis of defense counsel's objection was the witness's assumption as to a critical element of his regression analysis, when the actual data was available:

> "Mr. Herbst: . . .
>
> The second reason is, in the hypothetical question, Dr. Verzilli was asked to assume that the interest rates of American Financial remained competitive, and there's been no proof submitted of that." (N.T. 2/25/99 at pgs 24-25).

80. During the cross-examination of the expert witness, defense counsel again pressed the issue of the failure of the expert to look at the available data underlying the analysis performed:

> Q. What data did you see that verified that assumption, sir?
>
> A. I didn't look at data, that was information that was provided to me by the company. I asked how do you charge,

what's the basis of your profit and that's what they told me. I did not look at data. I didn't do calculations. That was imputed to me along with the 1.5%.

Q. And the 1.5% was what?

A. The 1.5% is the re-sale of the loan or the selling of the loan, and 1.5% of the value of the loan – of the mortgage, rather.

Q. So if that information you were given by American Financial I is not correct, then your calculations are not correct, right?

A. Well, I would, if you don't mind, the word correct I think is inappropriate. If in fact the information that they gave me is not right, then this, then these estimates are inappropriate, not that they're incorrect, because the procedure that I've used here and everything, the conceptual basis is all sound. So it just may not be appropriate to this issue because the facts are not correct.

Q. Well –

A. And I have no way of judging that.

Q. Well, we are talking about a variable, aren't we, potential variable if we said thirty-five basis points per loan and 1.5% value of the mortgage?

A. That's possible. And I'd keep trying to get information if that changed.

Q. Well, did you ask to see that data?

A. No, I didn't look at the data, I asked for the information.

Q. You didn't ask for data?

A. No. I may have had the data, but I took the information from them . (N.T. 2/25/99 at pgs 56-57).

81. During cross-examination, defense counsel again raised the issue of the witness's failure to obtain certain data. (N.T. 2/25/99 at pgs 66-70).

82. At the conclusion of the witness's testimony, defense counsel

again moved to strike the testimony in its entirety as scientifically unreliable. (N.T. 2/25/99 at pg 89).

83. The witness vouched for the procedure as being 99% reliable but never responded to the issue of whether the figures that he utilized in his procedure were reliable. (N.T. 2/25/99 at pgs 89-98).

84. The issue of the failure of the plaintiff to produce certain data were raised throughout the underlying trial with the plaintiff's witnesses. (N.T. 2/25/99 at pgs 254-269).

85. The Court overruled the defendant's objection made prior to the testimony. (N.T. 2/25/99 at pg 31).

86. The Court overruled the defendant's objection to the expert testimony again after the witness had completed his testimony. The objection was the subject of a long discussion and was ultimately overruled. (N.T. 2/25/99 at pgs 88-99).

87. Up to this point, the defense raised the appropriate and timely objections and took appropriate and reasonable issue with the trial court. This was necessary to create and protect the record for appellate purposes.

88. The scope of testimony allowed to Dr. Verzilli was a critical element of the plaintiff's case and was unrestricted in any manner by the court notwithstanding the objections of defense counsel. This issue will take on added significance in light of the limitations imposed upon the defendant's expert which was a critical part of the defense's case.

89. The court in the underlying case severely limited the defense expert based upon the designation of plaintiff's expert as an economist and defense's expert as an accountant. This had the effect of disallowing an expert comment on Dr. Verzilli's report, leaving it uncontradicted in its most critical area, which was projected lost future

income.

THE WITNESS: We actually audited the financial statements of entities such as brokers, banks, which is primarily what I did at the time. Rendered opinions on financial statements on entities as to their fairness to generally accepted accounting practices.

THE COURT: You oversaw other people who did that?

THE WITNESS: And I actually did some of it myself.

THE COURT: Well, he certainly is qualified as an auditor, but he's not an economist. He cannot be qualified as an expert in this case except as an auditor. His opinion as to auditing would be accepted to this Court, but for no other reason.

MR. HERBST: Let me ask this question.

BY MR. HERBST:

Q. Mr. McCabe, what experience, if any, do you have in evaluating business profits and future projections of profits and methodology do you use?

A. I've done a lot of projections and budgets when I was with Butcher & Singer. For example, one of my responsibilities was to project or budget next year's operations, and the data you would use is what happened last year, what's likely to happen next year and you factor all the factors in and create a budget or forecast for the next year. In looking at many of my client's audits, we had to do that in many cases where the client, for example, had financial problems. We would ask them to project what's going to happen in the future, we would review their projections for the future, so I have had experience.

Q. What factors did you review for your determination?

A. Depends upon the nature of the company. We looked back to see what has happened in the past, what have their profit margins been, what have their manpower levels been, how many people have they had, what are their salary levels, fixed costs, variable costs.

What's likely to happen with their revenue stream going forward based on what's happening in the marketplace, and what share of the

marketplace they now have and are expected to have in the future. There are a myriad of factors which are utilized.

Q. You did that for what purpose?

A. In many cases, some of our audit clients may have financial problems. We were sure they were going to be around in the future, and there's an accounting or auditing consent called subject to opinion which says if we are not sure they are going to be there we have to tell the reader they might not be in existence for another year. So the client would have to prove to us that in fact all the factors are there and in place to indicate that yes, they can last for another year. And so, we would review their projection, make sure that their assumptions are appropriate.

Q. Did their projections include profits?

A. Absolutely.

Q. And did you make a determination as to whether those profit projections were realistic?

A. Yes, we had to.

MR. HERBST: That's the area, Your Honor, that I wish Mr. McCabe to testify about.

THE COURT: But he said – let me ask you, how many years were you at Butcher & Singer?

THE WITNESS: Two years.

THE COURT: You only did that two years?

THE WITNESS: The other stuff I did with other companies was while I was with Coopers & Lybrand for 30 years. We had many client projections.

THE COURT: Let me ask you this. I wrote down you said earlier that you evaluated businesses and their losses, that you used an economist that was in the firm to do your evaluations.

THE WITNESS: In some cases we did discuss with the economist the

factor or methodology that was being used .

THE COURT: The factor or methodology that was being used to do what?

THE WITNESS: Project future losses. In other cases we did not use n economist, we had to use our common sense, factual information that we were given.

THE COURT: So the companies that the client would give you their projection-

THE WITNESS: That's right.

THE COURT: -- for the future, you would then take those, sometimes you would then go to the economist with those?

THE WITNESS: In certain cases if we had questions as to the factor or methodology used by my client, yes.

THE COURT: When you didn't have questions about factors of methodology used, you would use the common sense approach?

THE WITNESS: We would do it – we would look at the historical data and common sense approach, kind of realized approach, if you will.

THE COURT: You have questions?

MR. MORRIS: Just argument in response to that. Common sense approach does not indicate that he's an expert to testify in response to Dr. Verzilli, who is an economist. In his report, we have heard, and I know that ten different people at this company worked on this matter, and I think based on this witness's statement of qualifications, he's certainly not qualified to offer an expert opinion on the issues of which the defendants are limited at this time.

THE COURT: Well, I would agree that, as I said earlier, he's an expert obviously in auditing and accounting, but he's not an expert in economics, nor is he qualified to comment on reports of an economist.

MR. HERBST: I submit that he is.

THE COURT: You are offering him as a factual witness as to what data he requested, what data Coopers & Lybrand requested from American Financial, what he was able to do with the information that was provided, what projections, if any, he was able to make, if not, why not, and also to comment on Dr. Verzilli and –

THE COURT: He can't comment on Dr. Verzilli's report because he's not an economist.

MR. HERBST: I submit he can.

THE COURT: What basis would you have for that?

MR. HERBST: He knows enough about economists, how they make their projections.

THE COURT: No, the answer is no, he cannot comment on Dr. Verzilli's report because he is not an economist and he has not indicated any experience and actually performing the function and forming the analysis that accountants – excuse economists use in particular the regression analysis used by Dr. Verzilli.

So my decision is that he is qualified as an expert in accounting and auditing practices and procedures and he can tell us what he did to evaluate American Financial in this case, but he cannot comment on Dr. Verzilli's report. He is not an economist. (N.T. 3/2/99 at pgs 52-57).

90. The position of defense counsel at trial, as to the judicial rulings and their impact on the issues, both short and long term, were laid out by the defendant at the instant trial.

BY MR. VINCI:

Q. Did the Court also make a ruling with respect to the testimony of your damages expert, Mr. McCabe?

A. Yes. Mr. Morris had filed the motion before we even selected a jury. Again, he agreed that he would hold that motion in abeyance, pending how the -- how the evidence went in. At the close of his case, he renewed his motion; and we argued his motion to limit Mr. McCabe's testimony at that time.

We -- I had actually agreed not to present two portions of Mr. McCabe's testimony. One portion dealt with the turmoil in the mortgage industry at the time. And as it turned out, there was no dispute. Plaintiff and plaintiff's witnesses had agreed that the mortgage rates were rising; that mortgage companies – some mortgage companies were going out of business; and it wasn't necessary to have Mr. McCabe testify to that, because it was already in evidence, and nobody disagreed with it.

The other area that I agreed that I wasn't going to call Mr. McCabe on

was, he was defending the other – again, he was a shared expert witness, and he was defending the other three defendants in the case, and he made arguments based upon statements from some of the people from Conrail, Allan Domb, Toll Brothers and Mercy Health, that he had not stopped doing business because of the Commonwealth memorandum.

Well, I had no intention of defending Commonwealth or its memorandum; so that we – there would be no reason for me to have Mr. McCabe talk about that part of his report. So I told Mr. Morris that I'm not going to have him talk about Conrail, Mercy Health, Allan Domb, because – I didn't say this to him, but my decision was based upon the fact that the evidence was, that his business was lost – was lost because of the Commonwealth memorandum. So I'm certainly not going to have Mr. McCabe testify to the Commonwealth memorandum.

Mr. McCabe also had a section of his report where he concluded that he had reviewed records and financial data, and that he could find no evidence that the company had lost any business as a result of any of the memoranda, including Mr. Shore's memorandum. Judge Brinkley ruled that he could testify to that portion of his report.

In another portion of his report, Mr. McCabe had testified that in November of '94, American Financial was, Quote, "Closing its doors," end Quote. He did say that they were in financial difficulty.

I thought that that was relevant on the issue of substantial truth, as to whether or not this memorandum, although they were clearly closing their doors, whether it was substantially true. Judge Brinkley ruled that in her opinion, and her ruling, which was the law at that time, in the case we were trying, was that since he could not say that they were closing their doors, he could not testify about the financial condition of American Financial Mortgage Corporation.

I also thought that his testimony about the financial condition was relevant, because all of plaintiff's witnesses had testified that they were in sound financial shape; it was a good company; everything was going very well, and that his testimony would put some of that testimony in doubt, that it may be a credibility factor for the jury to determine.

And I also thought that it was relevant on damages. You know,could this company, if it had these problems Mr. McCabe saw in 1994, some of which had been testified to by Mr. McCabe in cross-examination, could that company really have made as much money as Dr. Verzilli was claiming they could have? I thought it was relevant for that issue, also.

Judge Brinkley ruled that Mr. McCabe could not talk about the financial condition of the company in his financial analysis. I -- you know,

you never like a ruling that goes against you during trial. And Mrs. Miller was there. And my comment to her was that I thought that these were strong appealable issues; that we have a system where we have a Superior Court that can review rulings that judges made. Sometimes, Judges have difficult, close questions. Judge Brinkley had made a call here against us; that we certainly had an appealable issue in the event that the case --that we lost the case.

And I also explained that in rare occurrences, even the Supreme Court of Pennsylvania sometimes gets involved on some of these issues. Although it's -- you have a direct way to the Superior Court, the Supreme Court, you have to file what's called a Petition for Allocatur, explaining the reasons, and hope they will see this as a unique situation that they want to get involved in.

I did explain that there's an appellate system; that the rulings of the trial court are reviewed at a higher level. And I also told her that I still didn't think that these rulings meant we're going to lose this case, because I thought we had proved our case on cross-examination of plaintiff's witnesses. Sure, might Mr. McCabe have been able to testify about the financial conditions -- but I didn't think it was --you know, a time to conceal or yield or give up at that point.

I was not permitted by the ruling to argue, in closing argument, that the memo was substantially true; and I was not allowed to argue in closing argument about anything that Mr. McCabe might have said about the financial condition of the company, because he wasn't permitted to testify about it.

Q. Did you reassess the case following the court's ruling on those issues?

A. I did. And I think I just explained that to Mrs. Miller and Mr. Shore at the time. (N.T. 1/5/2003 at pgs 60 to 65).

91. As a result of the Court's rulings on the limitation of the defense evidence,Mr. Herbst reassessed his client's position and advised her accordingly. (N.T. 1/5/2003, pgs 69-72).

92. CNA also was aware of the developments in the Courtroom both as a result of the communication from counsel, and from having a representative in the Courtroom. (N.T. 1/5/2003 ,pgs 69, 75-78).

93. Defendant CNA presented the testimony of Henry Spencer who was the Supervisor of the Real Estate Claims Unit and was the upper level management person in the chain of command of the CNA personnel handling the underlying defamation action.(N.T. 12/23/03, pgs 8-13).

94. Below Mr. Spencer, in the reporting of claims chain of command, were two (2) field adjusters, Lea Frank and Christine Richards; one claims supervisor, Donna Mongello; one claims manager/director, Scott Luschenat. (N.T. 12/23/03, pgs 11-12).

95. When the underlying trial began, the matter was being monitored up through CNA's chain of command to Mr. Spencer. (N.T. 12/23/03, pgs 19-20).

96. It was recognized by CNA, because the matter was in litigation, it was necessary to treat the case differently from non-litigation cases, primarily because attorneys were now involved and the potential for experts existed. (N.T. 12/23/03, pgs14-17).

97. On or about the fourth day of trial, a phone conference took place between the CNA claims directors, supervisors, adjuster and trial counsel, to evaluate the status of the trial, including verdict potential and any settlement potential. It was the considered judgment of the claims adjuster and legal counsel that the verdict potential was significantly less than the policy limits and that some settlement potential existed. (N.T. 12/23/03, pgs. 22-25).

98. The information relied upon by CNA was competent, informed and the product of direct observation at trial by the claim adjuster and legal counsel.

99. Plaintiff presented Barbara J. Sciotti as an expert on insurance claims handling. (N.T. 12/11/2003, pg 73).

100. Ms. Sciotti is a professional expert in the area of insurance claims conduct. She has been employed in this capacity since 1994. (N.T.12/11/2003, pgs 73, 82).

101. Ms. Sciotti's educational background consists of a B.A. degree in English with

a minor in pre-med type courses. Her education in the insurance industry is primarily from "on the job training" with her various employees. (N.T. 12/11/2003, pgs 73-82).

102. Ms. Sciotti has lectured mostly to the Pennsylvania Trial Lawyers Association and has assisted in a faculty presentation for the Pennsylvania Bar Institute. (N.T. 12/11/2003, pgs 73, 84).

103. Ms. Sciotti has no formal legal training; has neither taught any accredited courses on the Pennsylvania Insurance Statutes nor participated in any legal or administrative proceedings where enforcement of such statutes were at issue. (N.T. 12/11/2003, pgs 87-93).

104. In all of the cases Ms. Sciotti testified in Court, it was for Plaintiff against an insurance carrier. (N.T. 12/12/2003, pgs 172-177).

105. Ms. Sciotti rendered an opinion that was critical of CNA's handling of the underlying case. (N.T. 12/22/2003, pg 165-177).

106. Ms. Sciotti testified that her opinion was based upon a review of the entire 3000-plus page, CNA claims file. (N.T.12/12/2003, pg 191).

107. On cross-examination, it was developed that Ms. Sciotti actually focused on a subset of documents identified collectively as P-28, which was limited to 161 documents. (N.T. 12/23/2003, pgs 189-204).

108. On cross-examination of Ms. Sciotti, it was established that the Defendant in the underlying case, Marie Miller, never communicated to CNA until the last day of trial that she was unsatisfied with the handling of the case by CNA or her attorney. (N.T.12/12/2003, pgs 204-207).

109. In arriving at her opinion criticizing CNA for the handling of the underlying case, Ms. Sciotti accepted the contested deposition of Marie Miller that, she kept asking for the case to be settled, over and over and that she begged CNA to settle from day one. On

cross-examination it was established that the only independently verifiable time this occurred was on the morning to the last day of trial. (N.T.12/12/2003, pgs 204-207).

110. Ms. Sciotti was not aware of a critical time frame regarding the publication of the Commonwealth Land Title Memo and the discussion of the Memo at a realtor luncheon prior to the issuance of the Shore/Miller Memo. (N.T. 12/12/03, pgs 208-210).

111. The witness adopted an unrealistic and unsupported interpretation of the insurance regulations (UIPA/UCSP) regarding the requirement to record events in the file. (N.T. 12/12/03, pgs 211-218).

112. Ms. Sciotti, reviewed the deposition testimony of the four (4) CNA insurance personnel in preparation for her report. However, she omitted reading the deposition testimony of the Plaintiff Marie Miller and her daughter, Kathy Opperman,even though these materials would have been made available upon reasonable inquiry. (N.T. 12/12/03, pgs 219-226). Further, at the time of issuing her report, she had not interviewed the Plaintiff, Mrs. Miller or her daughter. (N.T. 12/12/03,pg 230).

113. The witness was not familiar with this venue's local practices and customs and never had any personal experience handling or supervising claims in Philadelphia. (N.T. 12/12/03, pgs 234-235).

114. Ms. Sciotti had no personal experience handling defamation cases and had no substantive knowledge of the State requirements for a defamation claim. (N.T. 12/12/03, pgs 237-247).

115. The witness erred by assuming that the CNA claim file was not duplicated to the home office until February of 1999, when in fact, uncontradicted evidence showed it had been duplicated to the home office in November 1997. (N.T. 12/12/03, pgs 248-252).

116. In the witness' direct testimony, she chose to focus on approximately 160 pages of the 3000 total pages contained in the CNA claims file. (N.T. 12/15/03, pgs 6-7). On cross-

examination by counsel for CNA, it was repeatedly established, that the witness chose to ignore documents in the CNA file that clearly contradicted her position, that CNA failed to competently and adequately document the claim and the trial progress and that CNA lacked appreciation for the exposure of its insured as well as its own derivative exposure. (N.T. 12/15/03, A.M. Session, pgs 8-166); N.T. 12/15/03, P.M. Session, pgs 3-23).

117. Ms. Sciotti had very limited experience with cases that went into litigation. (N.T. 12/15/03, A.M. Session, pgs 26-32).

118. Defendant CNA, presented Richard Jordan as an expert. Mr. Jordan graduated from Dartmouth College in 1968 and from Law School in 1978. (N.T. 1/7/2004, pgs 1-7).

119. Mr. Jordan had a career history as an insurance adjuster as well as various executive positions in the claims handling side of insurance. Specificially, he served in the following positions:

General Liability Home Office Supervisor for the Firemen's Fund
(18th Largest Insurer in U.S.)

Director of Claims Training-Firemen's' Fund

Vice President for Claims- Alliance Insurance- (Top 5 Worldwide

Vice President-Asbestos Claims Facility

Senior Vice President of Claims for Commercial Union Insurance

(N.T. 1/7/04, pgs 8-17).

120. Prior to his testimony in this case, Mr. Jordan never testified in any Court as an expert. (N.T. 1/7/04, pg 17).

121. Mr. Jordan was well qualified to testify to the standard of care of insurance claims handling and industry practice. (N.T. 1/4/04, pg 30).

122. The witness demonstrated a professional familiarity with the understanding of both the UIPA (Unfair Insurance Practices Act) and USCA (US Code Annotated). Mr. Jordan opined that these Acts are aimed at regulating business practices and not at any individual claim. (N.T. 1/7/04, pgs 32-36).

123. Mr. Jordan testified that once a lawsuit is commenced, the responsibility shifts to legal counsel to do further investigation within the discovery process and that adjusters are not permitted to contact represented parties. Jordan also opined that Defendant CNA's actions in this area were within the standard of care for the insurance industry. (N.T. 1/4/04, pgs 38-40).

124. This expert found that the reservation of rights letter, initially sent to the Miller Defendants in the underlying case was standard in form and complied with the standard of care in the insurance industry. This directly contradicted Ms. Sciotti's testimony that the letter constituted bad faith. Mr. Jordan's opinion is accorded greater weight on this issue. (N.T. 1/7/04, pgs 41-48).

125. The witness reviewed the pretrial activity of CNA which involved the filing of various motions and pre trial discovery and, found that CNA, through its employees, behaved properly in their capacity as support of legal counsel. (N.T. 1/7/04, pgs 49-53). The witness' reasoning was found to be sound and credible by this Court.

126. Mr. Jordan reviewed the communication between counsel and the insurance company adjusters in the underlying case. He concluded that the fact the insureds were given copies of the correspondence between counsel and the adjusters was an immaterial consideration. This conclusion was in direct contrast to the opinion of Plaintiff's expert, Ms. Sciotti. The witness further concluded that the reports authored by Mr. Herbst, were **"...** concise, they were well written, they summarized the pertinent information in an understandable fashion. They weren't flamboyant. They were appropriate from a timing standpoint to convey the necessary information. I got a good overall feeling for the case without reading any other documents than those letters. Though I did read the other documents." (N.T. 1/7/04, pgs 52-56). Mr. Jordan's analysis and reasoning was accorded significant weight.

127. Mr. Jordan further reviewed the acts of CNA beginning just prior to trial up until the verdict. He concluded that CNA acted in good faith in handling the case and met their responsibility to its clients. (N.T. 1/7/04, pgs 58-67).

128. Mr. Jordan was exhaustively cross-examined, however his opinion was never diminished and is accorded great weight. (N.T. 1/7/04, P.M. Session, pgs 67-98; N.T. 1/8/04, A.M. Session, pgs 1-91; N.T. 1/8/04, P.M. Session, pgs 1-16).

129. The Plaintiff in this case, Marie Miller, the Defendant in the underlying case, testified in support of her case and was cross-examined. (N.T. 12/17-19/2003).

130. Marie Miller began selling real estate in 1972 and advanced in the real estate business to eventually become a full partner in a real estate brokerage firm. She then bought out her partners to become the sole owner of the brokerage firm. (She sat for and passed the brokerage exam to obtain her brokerage license). She eventually joined the Century 21 Group on her own terms and became the most successful Century 21 brokerage office in Montgomery County, Pennsylvania. (N.T. 12/17/03, pgs 79-104).

131. Mrs. Miller was revealed to be a very sophisticated business woman, who had used attorneys in complex negotiations and conducted complex negotiations with her own agent employees, builders, vendors and other business persons. (N.T.12/18/03, pgs 29-48).

132. In attempting to support her claim that the underlying trial was going against her, that CNA was aware of this and, therefore, should have settled the case prior to verdict, Mrs. Miller testified that co-defendant in the underlying trial, Murray Shore, was not a good witness for the defense. (N.T. 12/18/03, pgs 42-44). On cross-examination, it was established that Mrs. Miller had altered her testimony from an earlier deposition in order to be more convincing before the jury. Her trial testimony was not credible. (N.T. 12/18/03, P.M., Session, pgs 98-101).

133. Mrs. Miller testified at trial that during the underlying trial, she was so upset at the failure of CNA to settle the case that she called Lea Frank in the evening at Ms. Frank's home. Ms. Frank's recall of the length and depth of the call differed dramatically with Ms. Miller's version of the call. It was uncontradicted that Ms. Frank was bathing two (2) young children at the time of the call and was otherwise engaged in fulfilling her domestic responsibilities. Taking this into account along with other issues regarding the nature of the

circumstances of the testimony, the issue of credibility is resolved in favor of Ms. Frank and against Mrs. Miller. Mrs. Miller greatly exaggerated the nature of the conversation to assist her claim and to make it appear that CNA's decision not to settle the case at that stage of the trial was unreasonable. (N.T. 12/18/03, pgs 105-110).

134. Mrs. Miller testified on direct regarding certain emotional injuries and physical distress related to the verdict in the underlying trial. (N.T. 12/18/03, pgs 88-91, 122). On cross-examination it was developed that, although Mrs. Miller was treating medically for cardiac issues related to a 1991 heart attack, no mention of any of these complained of symptoms appeared in any of Mrs. Miller's medical records. (N.T. 12/18/03, P.M. Session, pgs.49-58). Mrs. Miller's impeachment on this issue negatively affected her credibility in general.

135. On direct, Mrs. Miller made an emotional presentation to the jury about how difficult it was for her to stop using her name "Marie Miller" as a result of her name being "stained." (N.T. 12/18/03, A.M. Session, pgs 105-108). Her testimony was impeached on this issue when it was established on cross-examination that her name, "Marie Miller" prominently appears in searches for Century 21 Alliance real estate. (N.T. 12/18/03, P.M. Session, pgs 59-63). Mrs. Miller's general credibility was negatively affected by this impeachment.

C O N C L U S I ON S OF L A W

These findings and conclusions are made by the Court sitting without a jury in a claim for bad faith under the provisions of 42 Pa. C.S.A .§ 8371, which is otherwise known as the "bad faith statute."

The trial of these issues was conducted simultaneously before a jury, which had the responsibility of rendering a verdict on the consolidated legal malpractice claim which a consolidated claim for "common law" bad faith.

A jury returned a verdict in favor of Plaintiff on the "common law" bad faith claim as well as the legal malpractice claim. Plaintiff states in her "Proposed Findings of Fact and Conclusions of Law at Paragraph 8 that:

> "The jury, sitting as the fact finder has found by 'clear and convincing' evidence that CNA acted in bad faith. As such, it is respectfully submitted that Plaintiffs have met their burden of establishing bad faith pursuant to 42 Pa. C.S.A. .§ 8371."

The implication of Plaintiff's suggested finding is that the Court should only consider the remaining issues under §8371, which concerns the award of interest on the claim, punitive damages, and court costs and attorney's fees. (See § 8371 (1),(2) and (3).

The Court declines Plaintiff's invitation to defer to the jury's verdict on the issue of CNA's alleged bad faith.

In Mishoe v. Erie Insurance Company, 573 Pa. 267, 824 A.2d 1153, the Supreme Court had the issue of whether a claim of bad faith brought under § 8371 was a matter for a jury to resolve or whether the statute meant what the state legislature said it meant when it enacted this section.

Originally, the Superior Court had held that Mishoe was entitled to a jury trial on his bad faith claim. In a per curiam decision, the Supreme Court remanded the matter to the Superior Court to reconsider its decision, in light of Wertz v. Chapman Township, 559 Pa. 630, (741 A.2d 1272 (1999). 561 A.2d 604, 752 A.2d 401 (2000)). Reconsidering the matter, the Superior Court reversed its prior decision and held that neither § 8371 nor the Pennsylvania Constitution provide for the right to a jury trial in claims arising under this same section. The Supreme Court affirmed Mishoe, supra.

Given the unequivocal direction from our Supreme Court, this Court will independently render its findings and conclusions..[3]

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3 This Court acknowledges the obvious conflict created where a jury sitting as a fact finder, and judge sitting as a fact finder in a bad faith claim, viewing the same evidence, arrive at completely opposite conclusions. Clearly, the Legislature and our Supreme Court have spoken on the issue of who should hear bad faith insurance claims brought under § 8371. The only guidance this Court has found on who should hear the "common law" bad faith contract claims may be gleaned from the Supreme Court's opinion in Mishoe, supra and in Justice Nigro's concurring opinion in Birth Center v. St. Paul Companies, 567 Pa. 386 787 A.2d 376(2001):

> Mishoe, and Hamer argue to the contrary that section 8371 merely codified the common law right of an insured to enforce an insurer's contractual obligations and that the section simply adds remedies for an insurer's breach of the contractual duty of good faith. We disagree. Even assuming arguendo that at least some aspect of section 8371 claims sound in contract, common law bad faith contract claims against insurers are of a relatively

The primary issue presented to this Court is whether CNA should have settled this case within the Plaintiff's policy limits before trial or once trial commenced or during the trial prior to verdict.

It must first be noted that Plaintiff is not seeking any part of the $11.4 million verdict against it in the underlying matter. This is because CNA indemnified Plaintiff for the amount of the verdict and settled with the Plaintiff in the underlying action. The Court takes this into consideration because,in their decision not to settle prior to verdict, CNA was placing its own assets at risk far in excess of the one million dollars, represented by the Defendants' insurance policy.

The question of what standard should be used in evaluating an insurance carrier's conduct in fulfilling its responsibility to its insured, (under these circumstances), first arose in Pennsylvania, in the seminal case of Cowden v. Aetna Casualty and Surety Company, 389 Pa. 459, 134 A.2d 223 (1957). In **Cowden**, our Supreme Court had before it the issue of whether an insurance carrier should be liable for the amount of the verdict against its insured in excess

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recent vintage and thus did not exist at the time the Constitution was adopted. See Cowden v. Aetna Casualty & Surety Co., 389 Pa. 459, 134 A.2d 223, 227 (1957) (whether common law rule exists regarding bad faith "has never before been passed upon by this [C]ourt"); see also Birth Ctr. V. St.Paul Cos., 567 Pa. 386,787 A.2d 376,390 (2001) (Nigro,Jr., concurring) (citing Perkoski v. Wilson, 371 Pa. 553, 92 A.2d 189 (1952), as genesis of contract action for bad faith); Johnson v. Beane,541 Pa. 449, 664 A.2d 96, 101 (1995) (Cappy, Jr., concurring) ("for almost four decades, we have recognized a common law action for bad faith sounding in contract"). Indeed, the authorities offered by Mishoe and Hamer that date to 1790 do not support the notion that bad faith claims were recognized at that time. Rather, they merely stand. (Mishoe, 824 A.2d 1153 at 1161).

Although historically the case law in this Commonwealth has been less than clear as to the nature of the common law "bad faith" claim against an insurer, i.e., whether it sounds in tort or contract, I believe that any ambiguity in that regard was settled by D'Ambrosio, which explicitly stated that there is no common law bad faith tort claim. 431 A.2d at 970. D'Ambrosio, however, didnot address the viability of the bad faith contract claim, which has its roots in the 1952 case of Perkoski v. Wilson, 371 Pa. 553, 92 A.2d 189 (1952)(first recognizing assumpsit action for bad faith), and was reaffirmed by this Court in Gray. Accordingly, D'Ambrosio left the long recognized contractual bad faith claim undisturbed. Emphasis supplied. BirthCenter, 787 A.2d 376 at 409.

Considering that this issue is not presently before the Court, for purposes of these findings, that matter is not formally addressed.

of its policy of indemnification.[4]

The facts in **Cowden** are briefly outlined here to set a foundation for further review of the instant matter. In **Cowden** the underlying auto accident case was tried three times. The first resulted in a mistrial, the second in a $100,000 verdict against its insured and the other tort feasor jointly, and the third in a $90,000 verdict against the same joint tortfeasors. The insurance

carrier Aetna, constantly refused to tender its policy of $35,000. This position was maintained by Aetna even though personal counsel hired by its insured, Cowden, who was attending the third trial, advised in writing that it was his opinion that the verdict would go against its insured and be in excess of the policy. As predicted, the jury returned a verdict of $90,000. Cowden then commenced the bad faith action against Aetna for the amount of the judgment in excess of the policy for which he was personally liable. The jury in this bad faith action found for Cowden and awarded the full amount of his claim. The trial judge (en banc), entered judgment N.O.V. for the Defendant, "on the grounds that the evidence was insufficient to support the jury's verdict." **Cowden**, supra.

> In reviewing the Trial Court's opinion, the Supreme Court noted: As the late Judge Columbus, who was the trial judge in the instant case, sagely observed in the opinion for the court en banc, "The backwash of the Phillips-Cowden litigation, and the adversity encountered by Cowden, has the unfortunate tendency to obscure, magnify and distort out of proper proportion the behavior and actions of the defendant and its agents in defending the Phillips claim. The jury's verdict confirmed the fears of Cowden and his private counsel, and verified the basis of their concern as expressed in the letters sent Schmidt. However, it
>
> does not of itself lend substance to the charge of bad faith, proof of which is essential to the plaintiff 's recovery. *It is merely proof that the results of Saturday's contest are more certainly stated on the following Monday than they are predictable on the preceding Friday.* (Emphasis added). To obtain the proper perspective that will enable us to appraise the attitude of the insurer in handling the Phillips claim, we must focus our attention on the facts and circumstances in appearance at the time the requests for settlement were made." **Cowden**, 134 A.2d 223 at 229.

4 This differs factually from the instant matter because here, the insured has been completely indemnified.

In establishing this bad faith cause of action, the Supreme Court, in **Cowden**, further establish that the required evidence must be also "clear and convincing."

In affirming the trial court decision to grant Judgment N.O.V., the Supreme Court was again moved to quote from the trial court's opinion:

> "In conclusion we cannot do better than quote from Judge Columbus's opinion for the court below as follows: 'A careful review of all the circumstances in this case leads inevitably to the conclusion that the defendant's decision not to compromise was the result of the honest, considered judgment of its trial lawyer, claims manager and associate counsel. . . It was a judgment well founded and one clearly justified by the facts, notwithstanding the adversity subsequently encountered by Cowden as a result of this decision. . . **Cowden**, supra.

In its review of the evidence in the instant case, this Court was further guided by the

Superior Court in Shearer v. Reed, 286 Pa. Super. 188, 428 A.2d 635 and Birth Center v. St. Paul Companies, Inc. 727 A.2d 1144.

The Superior Court in **Birth Center** summarized the law as it understood it to be when it filed its opinion in 1999 and it is not within the power of this Court to improve upon this recitation, it is therefore set out in full.

> [3] ¶ 23 Generally, the duty to act in good faith in representing the interests of its insured compels the insurer to accord the interests of its insured the same faithful consideration it gives its own interests. ***Cowden,*** *supra* at 470, 134 A.2d at 228. The insurer must treat a claim against its insured as if the insurer alone were liable for the entire amount. ***Id.*** The insurer must also assess the impact upon its insured of the insurer's decision to settle or to litigate the claim against its insured. *Gray, supra.* This duty is said to arise not under the terms of the contract, but because of the contract, and to flow from

the contract. ***Id***.

> [4][5][6][7][8] ¶ 24 In the context of the insurer's decision to litigate or settle a third party claim brought against its insured, this Court has explained:
>
> [A] decision not to settle must be a thoroughly honest intelligent and objective one. It must be a realistic one when tested by the necessarily assumed expertise of the company. This expertise must be applied, in a given case, to a consideration of *all the factors* bearing upon the advisability of a settlement for the protection of the insured. *While the view of the carrier or its attorney as to liability is one important factor, a good faith evaluation requires more.* It includes consideration of the anticipated range of a verdict, should it be adverse to the strengths and weaknesses of all of the evidence to be presented on either side so far as known; the history of the particular geographic area in cases of similar nature; and the relative appearance, persuasiveness, and likely appeal of the claimant, the insured, and the witnesses at trial. ***Shearer,*** *supra* at 638 (citations omitted) (emphasis in original). *Accord* ***Brown***, *supra;* ***Hall***, *supra.* The *Shearer* standard ***1156** compels an insurer to make an intelligent and objective appraisal of the case by considering all the factors bearing upon the advisability of settlement. ***Id.*** An insurer does not satisfy the good faith standard merely by showing that it acted with sincerity. ***Id***. Likewise, when an insurer decides to litigate the claim, it is not automatically liable to its insured simply because the outcome of the litigation is adverse to the insured. ***Cowden,*** *supra* at 472, 134 A.2d at 229. Thus, the insurer does not have an absolute duty to settle a claim just because it is possible that a judgment against the insured may exceed the policy limits. ***Id.*** At 470, 134 A.2d at 228. *See* ***Cowden***, *supra.*

The underlying case began with a defamation action against Commonwealth Land Title because of its circulation of a memo, which American Financial claimed was defamatory.

The basis of the action was the so-called "Marshall Mortgage Transaction" in which it was alleged that American Financial did not have "good funds" available at the time of the closing. (See DH-194).

A subsequent action was filed against other parties including the Miller/Shore

defendants for a subsequent memo, the contents of which questioned the financial stability of American Financial.

Miller/Shore insurance carrier, CNA, was duly notified and assigned claims adjuster, Christine Richards, who selected Jonathan Herbst as trial counsel. He was a highly experienced trial litigator in all phases of insurance defense.

It was Mr. Herbst who joined Commonwealth Land Title as an additional defendant in the case where Miller/Shore were defendants because the Commonwealth memo was the first communication to create some doubt about American Financial;s fiscal status.

After being assigned to represent the Miller/Shore defendants, Mr. Herbst met extensively with his clients and formed a reasonable opinion that there might be some truth to

the information that American Financial was having some financial difficulties. These impressions were forwarded in a letter of 12/22/95 and copied to the clients. There was no response from the clients to this letter. Mr. Herbst also reasonably believed that the memo would have caused little damage to American Financial because Miller Realtor Company had never used American Financial for a mortgage transaction.

Throughout the period leading to the trial, CNA, Mr. Herbst, and the Miller Shore defendants continued to reasonably believe that they had the least exposure to American Financial and that Miller/Shore were not the "target" defendants.

Both Mr. Herbst and CNA continued to keep the clients/insured appropriately informed by letter and the progress toward litigation was appropriately documented in the claims file and in Mr. Herbst's litigation file. There was no credible evidence that the Miller/shore defendants ever expressed any concern about how the case was proceeding or about their exposure to a verdict even close to their insurance coverage limits in the underlying trial.

In the instant case, much was raised during trial about Mr. Herbst's conduct during discovery. The claim by Plaintiff was that he "read golf magazines" during the phase of the pretrial process. There was no credibility to the claim and it appeared to have been used as a means to inflame the passions of the jury against Mr. Herbst and, therefore, against CNA. It appears that the claim was precipitated by Mr. Morris, counsel for Plaintiff in the underlying case as a result of a personal animus between he and Mr. Herbst. The record in the

underlying case as competently established by counsel in the instant case, showed that the Miller defendants' actions appeared to be the least culpable in causing any harm to American Financial and that the other defendants, particularly Commonwealth Land Title, had issued earlier memoranda which had a more clearly demonstrable effect on American Financial. This was because there was an ongoing business relationship between American Financial and these entities. However, there was no demonstrable business relationship between the Miller defendants and American Financial in the underlying case.

Within the framework of these circumstances, it would be appropriate for Mr. Herbst not to take the lead counsel role during discovery depositions. Notwithstanding this, it appears that Mr. Herbst did interject into the depositions of some witnesses in a way to create some heated exchanges between he and Mr. Morris. From this and the other testimony of

Mr. Morris and Mr. Herbst, this animus is inferred.

There was also much made at trial about the failure of CNA to settle the underlying

case either during an arbitration or prior to trial and about Mr. Herbst's failure to personally attend on the first day of trial.

The overwhelming evidence establishes that CNA acted consistent with its good faith belief that it had very limited exposure, that American Financial's damages were substantially unprovable or highly speculative. The first day of arbitration was attended by competent and informed counsel, who adequately represented the Miller defendants' interests.

The Plaintiff's focus on this issue at trial in the instant case, was intended to inflame

and evoke a negative, emotional response from the jury and was not considered to be an issue of any merit by this Court.[5]

Just prior to trial, the three other defendants executed joint tort feasor releases. The highest settlement was for $225,000 by Commonwealth Land Title who was the author of the

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5 The Honorable Arlin Adams and (ret) James Schwartzman, Esq., who testified for Plaintiff as experts and were critical of Mr. Herbst and CNA for not attending and settling with Plaintiff at this opportunity. Despite the great respect this Court has for both witnesses, this Court cannot accord great weight to their opinions as they are not supported by what this Court finds to be the more credible and believable evidence in the case.

first memo circulated and the first entity against whom suit was brought. Mr. Herbst and CNA reasonably believed that this could benefit the Miller defendants because the settling defendants would not be presenting a defense nor would they be represented at trial, although they would remain on the verdict sheet.

Jury selection was accomplished and the matter was set to try. Trial began on Friday, February 19,1999, and continued throughout February 22, 23,24,25. After a short recess the trial resumed on March 1st and concluded on March 3, 1999.

Plaintiff 's counsel's opening argument set the stage for what appeared to be a trial over the issues of American Financial's general financial stability, specific issues raised as to the "Marshall Mortgage" transaction and the issue of having sufficient funds available to cover the check issued as part of the mortgage transaction. Plaintiff's counsel further made issue of the defendant's position that American Financial was in fact having financial difficulties, and that defendant would be presenting an accountant to support its claim of financial instability.

In keeping with what the Plaintiff outlined in its opening statement, the Miller defendants in the underlying case, planned their defense and trial strategy as one in which they viewed the Plaintiff as actually having financial difficulties as substantiated by the failure to have the funds available as required by the law of Pennsylvania. In a very detailed opening statement, Mr. Herbst told the jury what evidence they would be presenting in support of their defense. Both the Miller defendants and CNA had no reason to believe that the defense that they had painstakingly laid out would later be substantially precluded by the trial Court just prior to the defenses presentation of its case in chief.

In the underlying trial, CNA took the position that little, if any, damages flowed from the Miller/Shore memo. This was based upon a two-prong approach. The first prong was based upon the uncontradicted evidence that Miller/Shore Realty had never done any business with American Financial and that the memo issued by Mr. Shore was intended for a limited, in-house distribution. The second prong of the defense strategy was based upon what they believed to be a successful impeachment of American Financial's damages expert, Andrew Verzilli, through both cross-examination and successful presentation of their own expert, Mr. McCabe which would contradict Mr. Verzilli's findings.

The Court ruled in the underlying case to allow the unrestricted testimony of Plaintiff's expert Dr. Verzilli. The Court also ruled to considerably limit Mr. McCabe's testimony, the

Defendant's expert). Taken into account the devastating effect this would have on the defense of the case, CNA took the position that the trial judge may have committed reversible error and that they would pursue their appellate rights post-trial. If CNA had settled prior to verdict it would have waived any such appellate rights.

It was not unreasonable or in bad faith for CNA to take this position at trial. Further, even with the dramatic limitation of their expert, CNA reasonably believed that the evidence supporting the projected lost revenue was highly speculative and would not have supported a verdict in excess of the Defendant's insurance coverage.

In summary, CNA's behavior, through its claims adjusters, claims supervisors and legal representatives during the underlying defamation action was reasonable, informed, professional
and in good faith under its contract of insurance and under its implied duty of good faith. A verdict exceeding even the underlying Plaintiff, American Financial's wildest expectation could not have been reasonably anticipated under any circumstances.

In light of the completion of these findings and conclusions, the requisite finality of the action has occurred and time for filing post trial motions, both to the verdict of the jury and the finding of this Court, will commence upon the docketing of same.

BY THE COURT:

_____ _____

Date **ALLAN L. TERESHKO, J .**

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