IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

EVERETT CASH MUTUAL INSURANCE COMPANY, Plaintiff	:	NO. 01-01,640
	:	CIVIL ACTION - LAW
vs.	:	
BONNIE SUE GIBBLE, Defendant	:	

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BONNIE SUE GIBBLE and JOHN A. GIBBLE, a minor, by BONNIE SUE GIBBLE, his Guardian, Counterclaim Plaintiff:	:	NO. 01-01,640
	:	CIVIL ACTION – LAW
vs.	:	
EVERETT CASH MUTUAL INSURANCE COMPANY, Counterclaim Defendant	:	
vs.	:	
DENNIS A. PERRY and KERRY L. PERRY, t/a PERRY & PERRY, Additional Defendants	:	Motion to Preclude Expert Testimony

OPINION IN SUPPORT OF ORDER DATED MAY 11, 2004

Before the court is Plaintiff's Motion to Preclude Expert Testimony of Patrick Cassidy, Defendants' proposed expert witness, filed April 22, 2004. Argument on the motion was heard May 11, 2004. By Order dated May 11, 2004, this Court granted the motion, and this Opinion is filed in support of that Order.

By way of background, this matter was precipitated when Defendants' furnace emitted soot into Defendants' home and the claim made with Defendants' homeowner's insurance company, Plaintiff herein, was not handled to Defendants' satisfaction. Defendants then sought the assistance of Mr. Cassidy, a public adjustor, and to that end, signed a "Public Adjustor Contract", retaining Cassidy Public Adjustment "to advise and assist in the adjustment of the

insurance claim", agreeing to pay a contingent fee comprising a certain percentage "of the amount paid by the insurance companies in settlement of [the] loss and necessary expenses." After making several payments, including one which it offered as payment in full satisfaction of the claim, which payment Defendants refused to accept, Plaintiff filed the instant action, seeking a declaratory judgment that it had fulfilled all of its obligations under the insurance contract. Defendants counter-claimed for breach of contract, negligence, intentional infliction of emotional distress, unfair trade practices act violations and bad faith, and also joined the adjustors brought in by the insurance company as additional defendants. In support of their claims, Defendants plan to introduce the testimony of Mr. Cassidy as an expert witness, and in that regard have provided Plaintiff with a copy of his report, in which he opines, inter alia, that Plaintiff and Additional Defendants "did not follow proper claims practice."

Plaintiff argues that Mr. Cassidy must be precluded from testifying as an expert in this case inasmuch as the contingent fee arrangement gives him a pecuniary interest in the outcome of the proceedings and to allow his testimony would be against public policy, citing Belfonte v. Miller, 243 A.2d 150 (Pa. Super. 1968). Defendants attempt to distinguish Belfonte on the grounds that in Belfonte the contingent fee agreement was entered into after litigation (in that case, eminent domain proceedings) had commenced whereas, in the instant matter, the contingent fee agreement was entered into several months prior to the commencement of litigation. Defendants also argue Mr. Cassidy is acting as an expert in his role as a consultant, at the rate of $75 per hour, and only his work as a public adjustor is subject to the contingent fee agreement. The Court believes, after analysis of several cases addressing the issue, that Mr. Cassidy must be precluded from testifying as an expert.

In Belfonte v. Miller, supra, the Court refused to enforce a contract between a realtor and a homeowner who hired the realtor "to make a complete appraisal of the damages caused by the eminent domain proceedings and, if necessary, to testify in court, in order to obtain damages from said eminent domain proceedings." The contract provided for payment to the realtor of a certain percentage of the sums received by the homeowner either through settlement or through litigation. The court noted the "long established rule of law" that "a special contract to pay more than the regular witness fees in ordinary cases is void for want of consideration

and as being against public policy", Id., 243 A.2d at 152 (emphasis in original), and Section 552 of the Restatement of Contracts, which provides, in subsection (2): [a] bargain to pay an expert witness for testifying to his opinion a larger sum than the legal fees provided for other witnesses is illegal *only if the agreed compensation is contingent on the outcome of the controversy."* Id. at 153 (emphasis in original). While the Court found the contract before it distinguishable on its face from the type of contract referred to in both the cases and authorities upon which it was relying,[1] it nevertheless extended the application of the rule governing contingent compensation of witnesses to invalidate the subject contract. The Court reasoned:

> It could be argued that the contract involved in the instant case is distinguishable from the normal contingent fee-witness contract since it segregates the services of appellee, the objectionable contingency arising only from his duties involved in the preparation of the appraisal and not from his contractual duties as a potential witness. Such an approach, however, does not in fact address itself to the actual concern of the courts in prohibiting enforcement of such contracts, for the segregation here is merely one of form, the bias feared in the preparation of the appraisal inevitably coloring, if not constituting the sole basis for, the testimony which the parties assume will follow. It is impossible to conclude, after reading the contract, that anything other than judicial proceedings were in the minds of both parties when the contract was executed, for the eminent domain proceeding had already been initiated. In a real sense, it is that fact plus the inference from the contract itself that the objective of appellant was to influence those proceedings in her favor that primarily establishes the objectionable circumstances.

Id. at 153-154.

In In re Mushroom Transportation Co., Inc., Debtor, 70 B.R. 416 (E.D. Pa. 1987), the reasoning of Belfonte led the court therein to preclude an expert witness from testifying at trial because of a contingent fee arrangement whereby the expert had been hired to assist the debtor in a bankruptcy proceeding in collecting monies allegedly due the debtor from a certain party. The court also rejected an attempt at distinguishing the case before it from Belfonte on the grounds the litigation did not commence until sometime subsequent to entry of the arrangement, finding it more likely than not that the debtor and the expert had at least contemplated litigation at the time of the arrangement.

[1] The contract in Belfonte provided for a witness fee of $50 per day and the contingent fee was payable for preparation of the appraisal.

The holding of Mushroom was impliedly approved by the Court in Creative Dimensions in Management, Inc. v. Thomas Group, Inc., 1999 U.S. Dist. LEXIS 2757 (E.D. Pa. Mar. 11, 1999). The Court there allowed the testimony of a fact witness in spite of a contingent fee arrangement, acknowledging Belfonte and Mushroom, but distinguishing a fact witness from an expert witness:

> The testimony of interested lay witnesses about historical facts generally does not pose a risk of the same proportion as that of an expert with a contingent financial interest. The concealment of a contingent financial arrangement with a witness would be unconscionable. With the disclosure of such an arrangement, an opinion proffered by an expert would likely be so undermined as to be deprived of any substantial value. See Gediman v. Sears, Roebuck & Co., 484 F. Supp. 1244, 1248 (D. Mass. 1980) ("an agreement to give an opinion on a contingent basis, particularly on an arithmetical scale, attacks the very core of expert testimony"). Jurors, however, routinely take and assess the testimony of parties and persons related to them who have a direct financial interest in the outcome of a case. "With many witnesses and, of course, parties, interest is unavoidable. An expert, however, whose only relevance is his expertise, should not have that expertise flawed." Id.

Creative Dimensions in Management, Inc. v. Thomas Group, Inc., supra at 5-6 (footnote omitted).

In the instant matter, the Court finds Defendants' attempt to segregate Mr. Cassidy's work as an expert witness from his work as a public adjustor "merely one of form". It is also of no consequence that the public adjustor contract was entered into prior to the commencement of litigation. What does matter is that Mr. Cassidy's preparation of the expert report followed the commencement of litigation and, as Defendants admit, Mr. Cassidy will be entitled under the contingent fee agreement to a percentage of any damages awarded for their loss. The Court cannot help but conclude, therefore, that the opinion rendered in the report is "so undermined as to be deprived of any substantial value". While he may testify as a fact witness with respect to his adjustor role, Mr. Cassidy must be precluded from giving any opinion as an expert witness.

BY THE COURT,

Dudley N. Anderson, Judge

Dated: May 14, 2004

cc: Tammy Avery Weber, Esq.
Richard Vanderlin, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson