

1989

# Home Savings and Loan, a Utah corporation v. The Aetna Casualty and Surety Company : Brief of Appellant

Utah Court of Appeals

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**BRIEF**

UTAH  
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DOCKET NO.

**89-101 CA**

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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|  |   |                      |
|--|---|----------------------|
| HOME SAVINGS AND LOAN, a Utah corporation, | ) |                      |
|  | ) | Docket No. 890101-CA |
|  | ) |                      |
| Plaintiff/Respondent                       | ) | [Priority 14(b)]     |
| and Cross-Appellant,                       | ) |                      |
|  | ) |                      |
| vs.  | ) |                      |
|  | ) |                      |
| THE AETNA CASUALTY AND SURETY COMPANY,     | ) |                      |
|  | ) |                      |
|  | ) |                      |
| Defendant/Appellant.                       | ) |                      |

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DOCUMENT ADDENDUM  
TO APPELLANT'S BRIEF

---

Appeal From Rulings and a Final Judgment Entered  
in the Third District Court  
Salt Lake County, State of Utah  
The Honorable Michael R. Murphy

---

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Salt Lake City, Utah 84133  
Telephone (801) 530-7300

**FILED**

DEC 28 1989

Mary T. N. [unclear]  
Clerk of Court

DOCUMENT ADDENDUM

|  | RECORD  |
|--|---|
| A. Stipulated Pretrial Order   | 719-771   |
| B. Selected Jury Instructions<br>(Nos. 15, 20, 26-30)  | 1313-1316,<br>1321, 1327-<br>1331   |
| C. Special Verdict   | 1347-1350   |
| D. Special Interrogatories   | 1351-1354   |
| E. Special Verdict Form <u>Armitage v. Home Savings</u>  | 210.70-.76  |
| F. Defendant's Proffered Jury Instructions<br>(Nos. 2, 4, 5, 8, 9, 14, 28, 29<br>32, 35, 37, and 42)               | 1227, 1229,<br>1230, 1233,<br>1234, 1240,<br>1209, 1210,<br>1213, 1216,<br>1191, 1196 |
| G. Summary of Exhibit 378  | Ex. 378   |
| H. Proffered Special Verdict Form  | 1218-1223   |
| I. Order and Minute Entry: Discovery of Loss<br>(8/25/87)  | 344-347   |
| J. Juror Affidavits  | 2032-2053,<br>2055-2057   |
| K. Selected <u>Armitage</u> Jury Instructions,<br>Securities Law Violations  | 210.48-.69  |
| L. Francis X. LeMunyon Affidavit (7/27/87)   | 210.10-.12  |
| M. Minute Entry Re: Trading Exclusion (8/19/87)  | 329-332   |
| N. Francis X. LeMunyon Letter (7/27/87) with<br>enclosed filing letter with Utah<br>Insurance Department (10/2/79) | 210.45-.47  |
| O. William Cox trial testimony<br>(selected portions)  | 2914.1 et seq.<br>2905.1 et seq.  |
| P. Elaine Reese trial testimony<br>(selected portions)   | 2903.1 et seq.  |

Tab A



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Attorneys for Plaintiff  
Home Savings and Loan Association

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

\* \* \* \* \*

|                               |   |                           |
|-------------------------------|---|---------------------------|
| HOME SAVINGS AND LOAN         | ) |                           |
| ASSOCIATION, a Utah           | ) |                           |
| corporation,                  | ) |                           |
|                               | ) | STIPULATED PRETRIAL ORDER |
| Plaintiff,                    | ) |                           |
|                               | ) |                           |
| vs.                           | ) |                           |
|                               | ) | Civil No. C86-2257        |
| THE AETNA CASUALTY AND SURETY | ) |                           |
| COMPANY,                      | ) |                           |
|                               | ) | Judge Michael R. Murphy   |
| Defendant.                    | ) |                           |

\* \* \* \* \*

A pretrial hearing on this matter was held October 20, 1987, pursuant to Rule 16 of the Utah Rules of Civil Procedure. The plaintiff, Home Savings and Loan Association, was represented at the hearing by its counsel Gary R. Howe, P. Bryan Fishburn and Wallace R. Bennett, Of Counsel. The defendant, The Aetna Casualty & Surety Company, was represented

by its counsel Lynn S. Davies, and Russell C. Fericks and Michael A. Peterson. The following determinations were made by the Court:

I. JURISDICTION.

The jurisdiction of the Court is not disputed and is hereby determined to be present.

II. VENUE.

Venue is proper in the Third Judicial District Court of Salt Lake County, State of Utah.

III. GENERAL NATURE OF THE CLAIMS OF THE PARTIES.

The following constitutes the parties' claims which have not been stipulated by counsel.

A. Plaintiff's Claims:

Plaintiff claims that defendant, The Aetna Casualty and Surety Company, should indemnify plaintiff under Aetna's

employee fidelity bond for losses which resulted directly from one or more dishonest or fraudulent acts of its employees, in particular, Larry Glad. The losses include, (i) the loss sustained as a result of a jury verdict entered against Home on the 14th day of August, 1984 in the case of Victor W. Armitage, et al., Plaintiffs v. Home Savings and Loan Association, Defendant, Civil Action Nos. C82-0670K in the United States District Court for the District of Utah, Central Division; (ii) attorneys fees and costs incurred in defending, appealing and settling the aforesaid action; (iii) prejudgment interest; and (iv) court costs and attorneys fees incurred in the present action.

B. Defendant's Claims:

Defendant claims: (i) the loss sustained by plaintiff is not covered by the terms and conditions set forth in Aetna's bond; (ii) the plaintiff has not complied with the condition precedent to coverage under the bond of supplying defendant with timely notice of its discovery of employee dishonesty or fraud; (iii) plaintiff's own mismanagement, misfeasance, misconduct, negligence and/or failure to follow safe and sound lending practices directly resulted in plaintiff's losses; (iv)

plaintiff's discovery in December, 1981, of a fee received by its employee, Larry Glad, voids coverage under the bond for loss resulting from dishonest or fraudulent conduct of Larry Glad; (v) plaintiff's discovery just before or shortly after hiring Larry Glad of Glad's embezzlement of funds at Sandy State Bank voids coverage under the bond for any loss resulting from the fraudulent or dishonest conduct of Larry Glad; (vi) plaintiff has failed to mitigate its damages; (vii) plaintiff did not rely upon Larry Glad's knowledge of Afco's financial circumstances in deciding to loan money either directly to Afco or indirectly to Afco through second mortgage loans to Afco investors; (viii) Home's losses in the Armitage judgment resulted from the nature of the transaction -- a security -- rather than from any dishonesty or fraud on the part of Larry Glad; (ix) Home's losses in the Armitage judgment from the acts or misrepresentations of Home's officers, Board of Directors, and/or General Counsel which constituted common law fraud; and (x) Home's losses in the Armitage judgment resulted from the acts of Home's employees which were not dishonest or fraudulent as defined by the terms of the bond.

IV. UNCONTROVERTED FACTS.

The following facts are established by admissions in the pleadings or by stipulations of counsel:

1. Home is a Utah corporation with its principal place of business in Salt Lake County, State of Utah.

2. Aetna is a surety and casualty insurance company licensed to issue savings and loan blanket bonds in the State of Utah.

3. Larry Glad, was an employee of Home Savings & Loan from April 30, 1981 until terminated effective December 29, 1981.

4. From mid-November 1981 through the first week of January 1982, Home made a total of 42 loans to individuals ("Afco investors"), who invested the proceeds in several inter-related companies ("Afco") controlled by Grant C. Affleck. The loans were secured by trust deeds on the borrowers' homes.

5. On November 25 and 30, 1981, Home obtained commitments from Rocky Mtn. Federal Savings & Loan of Cheyenne, Wyoming, to purchase a total of \$775,000 second mortgage loans made by Home to Afco Investors.

6. On or about December 20, 1981 it became known to the management of Home that Larry Glad had received a \$15,000 payment from Robert Mitchell. The \$15,000 payment was part of a \$31,000.00 fee received by Robert Mitchell from Afco.

7. On December 23, 1981, First Federal Savings & Loan Association of Great Falls, Montana committed to purchase ninety-five percent (95%) of a \$500,000 block of second mortgage loans made by Home to Afco investors.

8. On February 26, 1982, First Federal Savings and Loan purchased \$388,399.00 worth of Afco investor second mortgage loans and it purchased an additional \$45,118.00 worth of Afco investor second mortgage loans on March 3, 1982.

9. On March 7, 1982, Afco filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Utah.

10. On March 17, 1982, Rocky Mtn. Federal Savings & Loan purchased the Afco investor second mortgage loans from Home for the amounts of \$455,448.00 and \$288,386.00, respectively.

11. On March 26, 1982, April 7, 1982, and April 29, 1982, Home was sued by Afco investors who had taken out second mortgages with Home and invested the loan proceeds in Afco.

12. Home Savings repurchased the Afco investor's second mortgage loans from Rocky Mtn. Federal Savings & Loan on April 20, 1982.

13. Aetna issued to Home on the 14th day of July, 1982 a Savings and Loan Blanket Bond, Standard Form 22, with coverage made retroactive to June 21, 1982. The Bond provided for coverage in a principal amount of up to \$1,135,000.00.

14. The term of the Bond was for three years, i.e. running through June 20, 1985.

15. On July 22, 1982 a lawsuit was filed in Federal Court (Abbott v. Shaffer, C82-0628K) in which several hundred

borrowers sought relief from 17 different local financial institutions including Home Savings. The action was later severed for trial as to each financial institution. The severed portion relating to Home involved 36 husband-and-wife borrowers and was designated Armitage vs. Home Savings, (C82-0670K).

16. On December 9, 1982 and December 21, 1982 Home sent letters to Aetna to inform Aetna of the pending Armitage v. Home Savings litigation and other related cases involving the Afco investor second mortgage loans.

17. Home Savings repurchased the Afco investor second mortgage loans from First Federal Savings & Loan Association on December 30, 1982.

18. On or about May 6, 1983, Aetna retained the law firm of Suitter, Axland, Armstrong & Hanson to represent Aetna's interests with respect to Armitage v. Home Savings. (Aetna concurs with this paragraph, subject to verification by Home of the indicated date of retention.)



19. On September 30, 1983 Aetna wrote to Home stating that it elected not to assume defense of the Armitage v. Home Savings litigation, as was its option under general Agreement C of the Aetna Bond.

20. On August 14, 1984 the jury in the Armitage v. Home Savings trial rendered special verdicts against Home.

21. In August, 1985, and pursuant to Home's request, Aetna extended coverage under the bond through August 20, 1986.

22. The court entered a final judgment in the Armitage v. Home Savings case on February 24, 1986, except for a judgment for attorneys fees which was rendered on March 21, 1986.

23. The Armitage judgment rescinded 36 separate loans with a net principal amount (face value of loans minus direct benefit to borrowers) of \$998,623.00. This net principal amount includes \$10,000.00 of punitive damages.

24. The March 21, 1986 judgment for the Armitage plaintiff's attorneys fees and costs was \$381,294.00. Home

settled this claim for \$190,647.00. (Aetna accepts the representation of amounts indicated in the paragraph, subject to reasonable proof and documentation by Home.)

25. Home paid attorneys fees and costs of \$336,647.00 to the law firm of Ray, Quinney & Nebeker and \$13,573.00 to the law firm of Backman, Clark & Marsh for the primary defense of the Armitage lawsuit. In addition, Home paid \$45,464.00 to the law firm of Callister, Duncan & Nebeker for the appeal and settlement of the Armitage judgment, plus \$9,728.00 to Intermountain Court Reporters for the costs of trial transcripts to support the appeal. (Aetna accepts the representation of amounts indicated in this paragraph, subject to reasonable proof and documentation by Home.)

V. CONTESTED ISSUES OF FACT.

The contested issues of fact remaining for determination are:

1. Did Larry Glad commit dishonest or fraudulent acts or omissions relating to the Afco investor loans which are covered by the Aetna Bond?

2. Did Home Savings' repurchase of the Afco investor second mortgage loans from Rocky Mtn. Savings & Loan and First Federal Savings & Loan Association constitute a failure by Home to mitigate its damages?

3. Did Larry Glad cause the Afco investor second mortgage loan documents to be backdated before closing so as to deny to borrowers their three-day right to rescind?

4. Was the loss sustained by plaintiff covered by the terms and conditions set forth in Aetna's bond?

5. Did the plaintiff comply with the condition precedent to coverage under the bond by supplying defendant with timely notice of "discovery" as such term is defined in Rider 6091 of the bond.

6. Was plaintiff's own mismanagement, misfeasance, or other negligence and/or failure to follow safe and sound lending practices the ~~sole sufficient~~ cause of plaintiff's losses?  
J.D.

7. Did plaintiff discover just before or shortly after hiring Larry Glad that he had embezzled funds at Sandy State Bank?

8. Did plaintiff rely upon Larry Glad's knowledge of Afco's financial circumstances in deciding to loan money either directly to Afco or indirectly to Afco through second mortgage loans to Afco investors?

9. Did Home's losses in the Armitage judgment result from the nature of the transaction -- a security -- rather than from any dishonesty or fraud on the part of Larry Glad?

10. Did Home's losses in the Armitage judgment result from acts or misrepresentations of Home's Board of Directors and General Counsel which constituted fraud?

12. Did Home's losses in the Armitage judgment result from the acts of employees which were not dishonest or fraudulent as defined by the terms of the bond?

13. Was Aetna prejudiced by a failure to receive timely notice of a potential loss covered under the bond?

14. Did Larry Glad, or any other Home employee, manifestly intend to cause Home to lose money by any action or conduct taken in the course of Home's lending to Afco investors?

VI. CONTESTED ISSUES OF LAW.

Contested issues of law, in addition to those implicit in the foregoing issues of fact, are:

1. If causation from an act, event or procedure not covered under the bond is alleged as a defense in an action on a fidelity bond, must that act, event or procedure be a sole, independent cause of loss or must the loss only directly result from the act, event or procedure in order to bar recovery?

2. Under the bond, must employee dishonesty or fraud constitute the sole independent cause of the loss in order to establish coverage?

3. Under the Aetna bond, is the plaintiff entitled to attorneys fees and costs incurred in appealing the Armitage judgment?

4. Does prejudgment interest, if any, run from the date of the jury verdicts in Armitage v. Home Savings (August 14, 1984) or from the date of the judgment in Armitage v. Home Savings (February 24, 1986)?

5. Under the Aetna bond, is Home entitled to recover the punitive damages imposed on Home in the Armitage judgment?

6. Under the Aetna bond, are the attorneys fees awarded to a party (i.e. the Armitage plaintiffs) who prevails against the insured a compensable loss?

7. Are plaintiffs entitled to their attorneys fees and court costs incurred in the present action?

8. Is defendant estopped to assert lack of timely notice as a defense to plaintiffs claim?

9. Is failure to provide information not requested on a bond application form a bar to recovery in an action on the bond?

10. Is defendant estopped, by virtue of its failure to accept Home's tender of the defense in the Armitage litigation, to challenge the reasonableness of the attorneys fees incurred by Home in that litigation?

11. The Court pursuant to a motion filed by the plaintiff has previously addressed the evidentiary/burden of proof issue regarding the subject matter of whether or not the plaintiff must show dishonesty or fraud as defined under the bond as to each individual Afco investor loan or whether plaintiff can show a common scheme that permeated the entire program of loans to borrowers who then invested in Afco. The Court reserves determination of such issue until the evidence has been presented for the purpose of establishing plaintiff's claim of "permeation".

12. Did plaintiff's discovery in December, 1981, of a fee received by its employee, Larry Glad, void coverage under the bond for any loss resulting from dishonest or fraudulent conducted of Larry Glad?

13. Did plaintiff's discovery just before or shortly after hiring Larry Glad of Glad's embezzlement of funds at

Sandy State Bank (assuming the jury answers Contested Issue of Fact No. 8 in the affirmative) void coverage under the bond for any loss resulting from any fraudulent or dishonest conduct of Larry Glad. (Plaintiff does not stipulate that this is a contested issue of law.)

14. Do forgeries of signatures and alterations to information contained in loan applications and employer verifications or directions given to another to engage in such forgeries, or alterations relative to loans intended to be sold on the secondary market, constitute dishonesty as covered by the Bond as a matter of law?

VII. ISSUES RESERVED FOR COURT:

The parties reserve the following issues for determination by the court after jury verdicts have been returned.

1. Does the Aetna bond's \$5,000 per loss deductible provision apply separately to each Afco investor second mortgage loan, or just once to the loss sustained by virtue of the Armitage judgment?



2. Is the amount of attorneys fees and costs expended by Home in defense of the Armitage lawsuit reasonable?

VIII. MOTIONS IN LIMINE.

The Court denies plaintiff's first motion in limine. The Court finds that the documents identified relative to plaintiff's first motion are relevant, subject to the condition that Defendant must show that it would have interceded to halt the repurchase from First Federal Savings & Loan of Great Falls on or about December 30, 1982 of approximately \$500,000 in Afco investor second mortgage loans. In addition, the Court finds that defendant's assertion of Section 11 of the bond as does not provide an independent basis for the introduction of "discovery" evidence.

The Court grants in part and denies in part plaintiff's second motion in limine. The Court grants plaintiff's second motion with respect to evidence offered to show: (1) that because of inadequate procedures Home failed to discover dishonest acts of Larry Glad; or (2) that Home's loss resulted from its negligent supervision of Larry Glad. The Court denies plaintiffs' second motion with respect to evidence offered to

show that procedures in place at Home and/or acts or omissions of Home's directors, officers or employees, apart from any dishonesty of Larry Glad, resulted in the loss Home sustained as a consequence of the Armitage verdict.

IX. EXHIBITS.

Exhibits have been designated separately by the parties. The designations are attached hereto as Exhibits "A" and "B."

A. The parties are to prepare conformed sets of exhibits, premarked and numbered consecutively, and accepted as to authenticity and foundation except with regard to those specifically identified in Exhibit "B."

B. The parties may, by stipulation, prepare a one (1) volume binders of copies of selected stipulated exhibits for use by each of the jurors.

C. The parties stipulate that the transcripts of testimony from the Armitage v. Home Savings trial are admissible for use in this trial under the same standard

[U.R.Civ.P. 32(a)(3)] which governs admissibility of depositions taken in this case.

X. WITNESSES.

Witnesses have been designated separately by counsel. The designations are attached hereto as Exhibits "C" and "D." The parties shall prepare written lists of the order in which they intend to call designated witnesses. At the close of each day of trial, the parties shall designate which witnesses they expect to call on the following day of trial, and the order in which they will be called.

XI. REQUEST FOR INSTRUCTIONS.

Inasmuch as the case is to be tried to a jury, requests for jury instructions and proposed Special Verdict forms shall be submitted to the Court by 12:00 noon on November 9, 1987. However, this shall be without prejudice to modify or augment such instructions before the close of trial.

XII. AMENDMENT TO PLEADINGS.

The Court has ordered that defendant shall be allowed to reassert the Twelfth and Thirteenth Defenses of its Answer. The Court has also indicated that it will entertain a motion by either party to amend to add a claim for attorneys fees incurred in this action.

XIII. DISCOVERY.

1. Defendant may take the deposition of any employee of the Utah Department of Financial Institutions who is designated by the plaintiff as a witness, so long as the designation, if any, is made by 9:00 a.m. on Tuesday, October 27, 1987.

XIV. TRIAL SETTING.

This case is set for trial before a jury to commence on the 27th day of October, 1987 at the hour of 9:00 o'clock a.m. and to continue thereafter as needed on October 28, 29 and 30, November 3, 4, 5, 6, 9, 10, 12, 13, 17, 18, 19, 20, 23 and 24, 1987. Trial days shall begin at 9:00 o'clock a.m. and recess

at 12:00 o'clock noon, be reconvened at 1:30 o'clock p.m. and recess at 5:00 o'clock p.m. subject to modification by the Court.

XV. STATEMENT OF THE CASE.

The parties shall stipulate to a concise statement of the case to be read to the jury at the commencement of the case.

XVI. POSSIBILITY OF SETTLEMENT.

Possibility of settlement of this action is considered poor.

DATED: October \_\_\_\_, 1987.

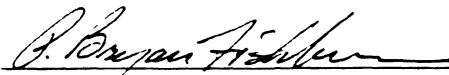
BY THE COURT:

By \_\_\_\_\_  
Michael R. Murphy  
District Court Judge

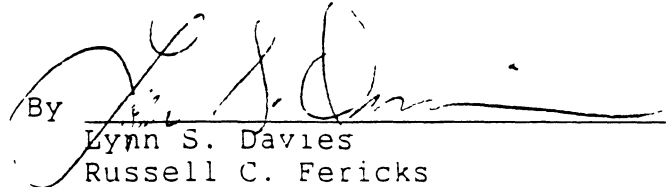
CDN9113H

The foregoing Proposed Pretrial Order is hereby adopted  
this 23<sup>rd</sup> day of October, 1987.

CALLISTER, DUNCAN & NEBEKER  
RICHARD H. NEBEKER  
GARY R. HOWE  
P. BRYAN FISHBURN  
WALLACE R. BENNETT, Of Counsel

By   
P. Bryan Fishburn  
Gary R. Howe  
Attorneys for Plaintiff

RICHARDS, BRANDT, MILLER & NELSON

By   
Lynn S. Davies  
Russell C. Fericks  
Michael A. Peterson  
Attorneys for Defendant

THE AETNA CASUALTY AND SURETY  
COMPANY

By \_\_\_\_\_

CDN9113H

EXHIBIT "B" TO PRE-TRIAL ORDER

Defendant hereby designates those documents which it may submit as exhibits at trial.

1. All Deposition Exhibits received to date in this action, marked as Trial Exhibits 1 through 144.

2. Afco investor loan file documents, marked as Trial Exhibits 145 through 180.

3. All documents produced by the Federal Home Loan Bank Board on July 17, 1987, pursuant to defendant's request, marked as Trial Exhibits 181 through 191.

4. All documents produced by the Utah Department of Financial Institutions on October 22, 1987, pursuant to defendant's subpoena and plaintiff's consent, marked as Trial Exhibits 192 through \_\_\_\_.

5. All documents produced by plaintiff pursuant to Defendant's various Requests for Production of Documents, marked as Trial Exhibits \_\_\_\_ through \_\_\_\_.

Plaintiff and defendant have stipulated as to authenticity and foundation for all of the above-referenced documents with the exception of the following Trial Exhibits: 1, 2, 5, 6, 7, 13, 14, 15, 16, 17, 18, 27, 28, 38, 47, 55, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 84, 86, 87, and 92. Both parties are entitled to submit those documents subject to proper authentication and foundation being established during or before trial. In addition, defendant will submit a number of demonstrative exhibits to assist the

Court and jury in organizing the factual information relating to investor loans and the loan processing and closing procedures at Home Savings & Loan.

HOME/EX.B/RCF

jml02487



EXHIBIT "C" TO PRE-TRIAL ORDER

The plaintiff will call the following witnesses in the order designated to the extent reasonably practical:

| <u>Name and Address<br/>and Telephone Number</u>  | <u>General Nature of Testimony</u>  |
|---|---|
| 1. Fred A. Smoka<br>Home Savings & Loan<br>130 East 3300 South<br>Salt Lake City, Utah 84115      | Mr. Smoka will testify regarding all aspects of the Home Savings-AFCO involvement and in particular the role of Larry Glad therein.   |
| 2. Valerie Costa Parker<br>4253 West Yorkshire Circle<br>South Jordan, Utah 84120                 | Mrs. Parker will testify as an employee of AFCO pertaining to her involvement with the AFCO investor loans, and in particular the modification and alteration of the home loan documentation  |
| 3. Steve Casull<br>2459 Cardinal Way<br>Salt Lake City, Utah 84106<br>943-2843<br>350-6406 (work) | In November 1981 through January 1982 Steve Casull was a runner with AFCO. Casull will testify as to his activities and his personal knowledge that employer verifications and other documents were altered by Valerie Parker at Larry Glad's direction |
| 4. Elaine Reese<br>7897 South 2940 West<br>West Jordan, Utah                                      | Ms. Reese will testify as an employee of Home Savings regarding her role in the AFCO investor loans and in particular the closing of said loans.  |

5. Cindy Mitchell  
Lawson Construction  
583 West 3560 South #7  
Salt Lake City, Utah  
262-7719

Ms. Mitchell will testify as an employee of AFCO about her involvement in the initial stages of the Home Savings-AFCO relationship, and in particular, conversations and instructions from Grant C. Afleck, Larry Glad, and Robert Mitchell; and her personal involvement in the alteration and modification of loan documents.

6. William Cox  
Mountainwest Savings  
40 East South Temple  
Salt Lake City, Utah  
532-4848

Mr. Cox will testify as to the operation of the real estate mortgage department of Home Savings, his association with Larry Glad, his part in the decision to loan \$100,000 to AFCO and to loan money to borrowers who wished to invest in AFCO, the processing and closing of said loans, and his learning that Glad had accepted \$15,000 from Bob Mitchell for his handling of the AFCO loan

7. Laura Timm  
Home Savings & Loan  
130 East 3300 South  
Salt Lake City, Utah 84115

Laura Timm is a former as well as current, Home Savings employee. Timm will testify as to her working relationship with Larry Glad, both at Home Savings and, before that, at Miller & Viehle. Timm will testify as to her knowledge that applications of the second mortgage borrowers were being altered and Larry Glad's drug use.

8. Sue Pewtress  
Box 1482  
Aspen, Colorado  
303-923-4812 (home)  
303-925-6117 (work)  
  
Pewtress was a teller.  
Pewtress will testify  
concerning Glad's cocaine  
use; closing of the AFCO  
loans; and acts of Glad  
she regarded as dishonest.
9. Chris Woolf  
5538 Brookridge Drive Apt. 18-N  
Murray, Utah 84107  
  
Woolf was Larry Glad's  
wife. She will testify  
concerning the problems he  
encountered and changes in  
behavior for the time  
period 1981-82. She will  
also testify regarding his  
solicitation and handling  
of the AFCO loans.
10. Karen Iverson  
1850 South 300 East  
Ivy Court Place #1  
Basement S.E. Unit  
Salt Lake City, Utah  
  
Discussions with Robert  
Mitchell re: Larry Glad
11. Dr. Gary Q. Jorgenson  
1979 Tartan  
Salt Lake City, Utah  
581-1909  
  
Dr. Jorgenson will  
testify as an expert  
in the field of drug  
and alcohol abuse and  
rehabilitation, and in  
particular, the behavior  
modification attendant to  
cocaine addiction.
12. Merrill Norman  
Peat, Marwick & Main  
60 East South Temple  
Salt Lake City, Utah  
328-3000  
  
Mr. Norman will testify  
regarding his findings  
adduced as accountant for  
the trustee in the AFCO  
bankruptcy matter,  
including the insolvency  
of AFCO and the nature of  
the fraudulent scheme  
pursued by AFCO.
13. O. Stanley and Kerry Cullimore  
3720 S.W. Marshall Place  
Pendleton, Oregon 97801  
(503) 278-2267  
  
Events and manner of  
closing the loans

- |  |   |
|--|---|
| 14. Jerome Chandler<br>3862 Bingham Creek Road<br>West Jordan, Utah 84084<br>561-3846  | Events and manner of<br>closing the loans |
| 15. Orrin T. and Judy T. Farnsworth<br>9514 So. David St.<br>Salt Lake City<br>566-9578 (?)  | Events and manner of<br>closing the loans |
| 16. Orrin Faye and Vea B. Farnsworth<br>1554 East 3045 South<br>Salt Lake City, Utah<br>467-9767                                     | Events and manner of<br>closing the loans |
| 17. Virgil W. Gleed<br>581 Isgreen Circle<br>Tooele, Utah 84074<br>882-4714  | Events and manner of<br>closing the loans |
| 18. Joye Pratt<br>221 South 1st West<br>Tooele, Utah 84074<br>882-0067   | Events and manner of<br>closing the loans |
| 19. R. Fred Pehrson and Gayle Pehrson<br>1420 East 9300 South<br>Sandy, Utah 84092<br>571-3609<br>539-8559 (husband's work)          | Events and manner of<br>closing the loans |
| 20. Donald J. and Shirley Penrod<br>576 North 100 East<br>Brigham City, Utah 84302<br>723-2163                                       | Events and manner of<br>closing the loans |
| 21. Arthur E. and Mary Lou Phippen<br>95 Poplar Drive<br>Brigham City, Utah 84302<br>723-6238  | Events and manner of<br>closing the loans |
| 22. LeRoy and Kristene Reese<br>858 South 300 West<br>Brigham City, Utah 84302<br>Disconnected number<br>No listing with information | Events and manner of<br>closing the loans |

- |  |  |
|--|--|
| 23. Dennis Rosenlof<br>5324 Trident Circle<br>Kearns, Utah 84118<br>969-4593                                       | Events and manner of<br>closing the loans  |
| 24. Francis Witt<br>807 Linden Drive<br>Brigham City, Utah 84302<br>723-6242                                       | Events and manner of<br>closing the loans  |
| 25. Marvin P. and Betty L. Drummond<br>121 West 4773 South<br>Ogden, Utah 84403                                    | Events and manner of<br>closing the loans  |
| 26. Kenneth D. and Doris B. Richards<br>4758 West 4290 South<br>West Valley City, Utah 84120<br>968-6757           | Events and manner of<br>closing the loans  |
| 27. Don Bradshaw<br>American States Insurance Corp.<br>450 South 900 East, Suite 200<br>Salt Lake City, Utah 84102 | Mr. Bradshaw will testify<br>as to why Home switched<br>its bond coverage from<br>F & D of Maryland to Aetna.                                |
| 28. Robert W. Mitchell<br>c/o Ivell Construction<br>4740 South 200 West<br>Salt Lake City, Utah                    | Mitchell will testify as to<br>his role vis-a-vis AFCO,<br>Grant Affleck, and Larry<br>Glad  |
| 29. Gary Weston<br>36 South State #1100<br>Salt Lake City, Utah  | Attorney for Armitage<br>Plaintiffs. Will testify<br>regarding preparation and<br>prosecution of the Armitage<br>v. Home Savings litigation. |
| 30. Grant C. Afleck<br>Larry Glad  | From Answers to<br>Interrogatories and<br>Depositions  |
| 31. LeRoy Axland<br>175 South West Temple #700<br>Salt Lake City, Utah 84101<br>532-7300                           | Mr. Axland will testify to<br>the involvement of the law<br>firm of Suitter, Axland,<br>Armstrong & Hanson                                   |

In addition to the above-enumerated witnesses the plaintiff may call, as rebuttal witnesses, the following:

1. Howard C. Bradshaw  
Home Savings & Loan  
130 East 3300 South  
Salt Lake City, Utah 84115
2. Wallace R. Woodbury  
Home Savings & Loan  
130 East 3300 South  
Salt Lake City, Utah 84115
3. Franklin D. Richards, Jr.  
Home Savings & Loan  
130 East 3300 South  
Salt Lake City, Utah 84115
4. David K. Richards  
Home Savings & Loan  
130 East 3300 South  
Salt Lake City, Utah 84115
5. Orrin R. Woodbury  
Home Savings & Loan  
130 East 3300 South  
Salt Lake City, Utah 84115
6. Don Bradshaw  
American Insurance & Investment Corp.  
450 South 900 East, Suite 200  
Salt Lake City, Utah 84102
7. Nanci Walker
8. Robert W. Mitchell  
(address unknown)
9. Brian O. Casper  
(fact and expert witness)
10. A designated expert witness

As yet undesignated  
witness from the savings  
and loan industry

CDN/9247H

EXHIBIT "D" TO PRE-TRIAL ORDER

The defendant will call the following witnesses in the order designated to the extent reasonably practical:

| <u>NAME</u>   | <u>NATURE OF TESTIMONY</u>   |
|---|--|
| 1. Frank Stuart<br>455 South 300 East #200<br>Salt Lake City, UT 84111<br>531-6222                  | Mr. Stuart will testify as to the insolvency evaluation of the Afco businesses in 1981 and 1982, as well as general considerations of good loan practice and loan underwriting.  |
| 2. Ray Westergard<br>GRANT THORNTON<br>170 South Main #1000<br>Salt Lake City, UT 84101<br>531-6888 | Mr. Westergard will testify as to the content and adequacy of Afco financial statements and other information on Afco, as well as evaluating the nature of the Afco investment proposal.   |
| 3. Elaine Weis<br>7420 Eastbourne Circle<br>Salt Lake City, UT 84121<br>943-3141                    | Ms. Weis will testify as to both regulatory and industry standards pertaining to proper practices and procedures in the savings and loan industry. Ms. Weis will also testify as to the content and nature of audits and examinations performed on Home Savings. |
| 4. Victor and Marilyn Armitage<br>206 Crest Circle<br>Tooele, UT<br>882-7961                        | Victor and Marilyn Armitage will testify as to the events and manner of closing the loans.   |
| 5. Quinn and Sarah Beckstead<br>4769 West 5100 South<br>Hooper, UT<br>773-4037                      | Quinn and Sarah Beckstead will testify as to the events and manner of closing the loans.   |
| 6. Richard and Marilyn Devey<br>1055 North 20 East<br>American Fork, UT<br>753-3043                 | Richard and Marilyn Devey will testify as to the events and manner of closing the loans.   |
| 7. Marvin and Betty Drummond<br>121 West 4773 South<br>Ogden, UT                                    | Marvin and Betty Drummond will testify as to the events and manner of closing the loans.   |
| 8. James and Kathleen Miller<br>11531 South 2700 West<br>South Jordan, UT<br>254-4833               | James and Kathleen Miller will testify as to the events and manner of closing the loans.   |

9. Steve and Margo Scoville  
1585 West 12950 South  
Riverton, UT  
254-1259  
  
Steve and Margo Scoville will testify as to the events and manner of closing the loans.
10. Doug McEachren  
TOUCHE ROSS  
1000 Wilshire Boulevard  
Los Angeles, CA 90017  
(213) 688-0800  
  
Mr. McEachren will testify as to proper practices and procedures in the operation of a residential real estate mortgage department for a savings and loan institution. He will also testify as to investor loan files and other documents reflecting safe and sound lending practices and procedures.
11. George J. Throckmorton  
5189 Espadrille Drive  
Salt Lake City, UT 84118  
  
Mr. Throckmorton will testify as to authenticity of signatures and comparison of handwriting by Glad, Smolka, Cox, Kosta, et al.
12. Merrill Hanson  
BOYACK & HANSON  
420 East South Temple #350  
Salt Lake City, UT 84111  
484-3017  
  
Mr. Hanson will testify as an attorney who advised several people not to invest in Afco after a review of the investment proposal and investigation of Afco's background.
13. Orville Sadler  
Address unknown at present time.  
  
Mr. Sadler rejected the Afco investment offer on advice of counsel.
14. Douglas Hunter  
Address unknown at present time  
  
Mr. Hunter rejected the Afco investment proposal on the advice of counsel and will also testify as to his experience with a second mortgage loan that he did take out with Home Savings that was not related to the Afco investments.
15. Ron Carnego  
Address is unknown at this time.  
  
Mr. Carnego will testify as to his interaction with Larry Glad while at Sandy State Bank, as well as subsequent conversations with Bill Cox.
16. Clea Rasmussen  
Address is unknown at this time.  
  
Ms. Rasmussen will testify as to her interaction with Larry Glad while at Sandy State Bank, as well as subsequent conversations with Bill Cox.



17. Jay Tugaw  
BAGLEY & MOUSER  
10 West 1st South, #710  
Salt Lake City, UT 84101  
533-8000  
Mr. Tugaw will testify as to a fee he paid Larry Glad in August 1981 with the approval of Bill Cox.
18. Mary Scott  
Mountain America  
161 East 200 South  
Salt Lake City, UT 84111  
530-7130  
Ms. Scott will testify as to normal employment circumstances at Home Savings from her perspective as a loan processor.
19. Gerald Holyoke  
Address is unknown  
at this time.  
Mr. Holyoke will testify as to his experience and interaction with Grant Affleck as well as proper lending practices and procedures.
20. Terry Walker  
Address is unknown  
at this time.  
Mr. Walker will testify as to proper practices and procedures in a savings and loan institution.
21. Larry Byrne  
GREAT WESTERN SAVINGS  
& LOAN ASSOCIATION  
Pasadena, CA  
(818) 717-7228  
Mr. Byrne will testify as to his interaction with the management of Home Savings in the sale and repurchase of second mortgage loans by Home Savings to Rocky Mountain Federal Savings and Loan.
22. Robert Ulz  
AETNA LIFE & CASUALTY  
151 Farmington Avenue  
Hartford, CT 06156  
Mr. Ulz will testify as to the meaning and intended coverage of Savings and Loan Blanket Bond, Standard Form No. 22.

By including the forgoing summary of testimony, defendant does not mean or intend to restrict the scope of any witnesses' testimony more narrowly than allowed by the Rules of Evidence. In addition, defendant has previously designated certain witnesses who it now intends to hold in reserve for two reasons. First, recent decisions by the Court regarding evidentiary matters raised in motions in limine may abbreviate or even eliminate some of the previously anticipated evidence. Secondly, both evidentiary and factual developments at trial may necessitate calling additional witnesses who have previously been identified in answers to

interrogatories as well as formal designations to the Court. Those individual are as follows: Robert Homer, Jim Croft, Frank Pasarelli, Gerald Hunter, Don Bradshaw, Bill Marshall, John Morris, Gary Cox, Robert Greenwood, and Harold Turley.

Defendant expressly reserves its right to call any witness previously designated by the plaintiff, but whom the plaintiff does not call in the presentation of its case at chief. Defendant also reserves the right to call Aetna representatives Marv Smith and/or Russell Lunceford if necessary to supplement testimony of Robert Ulz regarding the application coverage, and intended meaning of the Aetna bond.

Defendant has arranged for the reading of Larry Glad and Grant Affleck deposition transcripts and interrogatory answers by Michael P. Zaccheo and George T. Naegle, respectively. These readers are available to plaintiff's counsel for preparation and rehearsal prior to presentation by either party of the read materials.

HOME/DW/RCF

Tab B

INSTRUCTION NO. 15

Before the trial of this case, I held a conference with the attorneys for both parties. At this conference, the parties entered into certain stipulations or agreements, in which they agreed that certain facts could be taken as true without further proof. By this procedure it is often possible to save much time.

The stipulated facts are as follows:

1. Home Savings is a Utah corporation with its principal place of business in Salt Lake County, State of Utah.

2. Aetna is a surety and casualty insurance company licensed to issue savings and loan blanket bonds in the State of Utah.

3. Larry Glad was an employee of Home Savings from April 30, 1981 until terminated effective December 29, 1981.

4. From mid-November, 1981 through the first week of January 1982, Home Savings made a total of 42 loans to individuals ("Afco investors"), who invested the proceeds in several inter-related companies ("Afco") controlled by Grant C. Affleck. The loans were secured by trust deeds on the borrowers' homes.

5. On November 25 and 30, 1981, Home Savings obtained commitments from Rocky Mtn. Federal Savings & Loan of Cheyenne, Wyoming, to purchase a total of \$775,000.00 second mortgage loans made by Home Savings to Afco Investors.

6. On or about December 20, 1981 it became known to the management of Home Savings that Larry Glad had received a \$15,000.00 payment from Robert Mitchell. The \$15,000.00 payment was part of a \$31,000.00 fee received by Robert Mitchell from Afco.

7. On December 23, 1981, First Federal Savings & Loan Association of Great Falls, Montana committed to purchase ninety-five percent (95%) of a \$500,000.00 block of second mortgage loans made by Home Savings to Afco investors.

8. On February 26, 1982, First Federal Savings and Loan purchased \$388,399.00 worth of Afco investor second mortgage loans and it purchased an additional \$45,118.00 worth of Afco investor second mortgage loans on March 3, 1982.

9. On March 7, 1982, Afco filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Utah.

10. On March 17, 1982, Rocky Mtn. Federal Savings & Loan purchased the Afco investor second mortgage loans from Home for the amounts of \$455,448.00 and \$288,386.00, respectively.

11. On March 26, 1982, April 7, 1982, and April 29, 1982, Home Savings was sued by Afco investors who had taken out second mortgages with Home and invested the loan proceeds in Afco.

12. Home Savings repurchased the Afco investor's second mortgage loans from Rocky Mtn. Federal Savings & Loan on April 20, 1982.

13. Aetna issued to Home Savings on the 14th day of July, 1982 a Savings and Loan Blanket Bond, Standard Form 22, with coverage made retroactive to June 21, 1982. The Bond provided for coverage in a principal amount of up to \$1,135,000.00.

14. The term of the Bond was for three years, i.e., running through June 20, 1985.

15. On July 22, 1982, a lawsuit was filed in Federal Court (Abbott v. Shaffer, C-82-0628K) in which several hundred borrowers sought relief from 17 different local financial institutions including Home Savings. The action was later severed for trial as to each financial institution. The severed portion relating to Home involved 36 husband-and-wife borrowers and was designated Armitage vs. Home Savings, (C-82-0670K).

16. On December 9, 1982 and December 21, 1982, Home Savings sent letters to Aetna to inform Aetna of the pending Armitage v. Home Savings litigation and other related cases involving the Afco investor second mortgage loans.

17. Home Savings repurchased the Afco investor second mortgage loans from First Federal Savings & Loan Association on December 30, 1982.

18. On or about May 6, 1983, Aetna retained the law firm of Suitter, Axland, Armstrong & Hanson to represent Aetna's interests with respect to Armitage v. Home Savings.

19. On September 30, 1983 Aetna wrote to Home Savings stating that it elected not to assume defense of the Armitage v. Home Savings litigation, as was its option under general Agreement C of the Aetna bond.

20. On August 14, 1994 <sup>MPV</sup> the jury in the Armitage v. Home Savings trial rendered special verdicts against Home Savings.

21. In August, 1985, and pursuant to Home Savings' request, Aetna extended coverage under the bond through August 20, 1986.

22. The court entered a final judgment in the Armitage v. Home Savings case on February 24, 1986, except for a judgment for attorneys fees which was rendered on March 21, 1986.

23. The Armitage judgment rescinded 36 separate loans with a net principal amount (face value of loans minus direct benefit to borrowers) of \$998,623.00. This net principal amount includes \$10,000.00 of punitive damages.

You are instructed that you are to accept the facts that have been stipulated to as being true.

INSTRUCTION NO. 20

Under the terms of the Aetna Bond, Aetna agreed to indemnify Home against "loss sustained by the Insured at any time but discovered during the Bond period. . . "

As a matter of law, I rule that the loss sustained by Home Savings as a consequence of the verdict and judgment in the Armitage case was both sustained and discovered during the period the Aetna Bond was in effect.



INSTRUCTION NO. 26

Aetna has asserted as a defense in this action that the loss Home Savings sustained in the Armitage litigation resulted not from the dishonesty of Larry Glad, but that it directly resulted from a separate and independent cause.

For Aetna to prevail on this defense, you are instructed that Aetna must prove the existence of an alternative cause of Home Savings' loss, i.e. one separate and independent from Larry Glad's dishonesty, if any.

INSTRUCTION NO. 27

Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances, or doing what such person under such circumstances would not have done. The fault may lie in acting or in omitting to act.

INSTRUCTION NO. 28

You are instructed that negligence, if any, on the part of Home Savings in supervising Larry Glad is not a defense available to Aetna in this action.

Aetna may not assert as a defense that management of Home Savings was negligent and thus should have known of the alleged dishonest or fraudulent acts of Larry Glad, or that management would have known but for alleged inattention or inadequate supervision. This is not a defense available to Aetna under its Bond.

INSTRUCTION NO. 29

You are instructed that negligence resulting from the existence of inadequate policies and procedures at Home Savings, or the failure to follow policies and procedures then in place at Home Savings, is not a defense available to Aetna if the conclusion drawn therefrom is that better policies and procedures or adherence thereto would have checked the dishonesty, if any, of Larry Glad and prevented a loss that would otherwise have occurred. A surety company is not released from liability by the absence of even ordinary prudence on the part of the insured in lessening the risk. The Aetna Bond does not contain any provision to this effect.

INSTRUCTION NO. 30

You are instructed that negligence, if any, on the part of Home Savings in hiring Larry Glad in May, 1981 is not a defense available to Aetna under its Bond.

Tab C

FILED IN CLERK'S OFFICE  
Salt Lake County, Utah

NOV 25 1987

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

By [Signature] Clerk of Dist. Court  
[Signature]

-----

|   |   |                     |
|---|---|---------------------|
| HOME SAVINGS AND LOAN,<br>a Utah corporation, | : | SPECIAL VERDICT     |
|   | : | CIVIL NO. C-86-2257 |
| Plaintiff,                                    | : |                     |
| vs.   | : |                     |
|   | : |                     |
| THE AETNA CASUALTY AND<br>SURETY COMPANY,     | : |                     |
| Defendant.                                    | : |                     |

-----

We, the jury, answer the questions propounded to us in the Special Verdict as follows:

1. Did Larry Glad commit any dishonest or fraudulent acts, related to the Afco investor loans, with the manifest intent to cause Home Savings and Loan to sustain its loss and to obtain personal benefit?

ANSWER: Yes ✓ No       

If your answer to Question No. 1 is "no," you have completed this Special Verdict, and you need not answer questions No. 2 and No. 3.

2. Did the verdict against Home Savings in the lawsuit of Armitage, et al v. Home Savings & Loan in whole or in part, directly result from dishonest or fraudulent acts, if any, of Larry Glad?

ANSWER: Yes ✓ No

If your answer to Question No. 2 is "no," you have completed this Special Verdict, and you need not answer question No. 3.

3. If you have answered "yes" to both question Nos. 1 and 2 above, itemize, by placing an "X" in the space provided, the specific loans where a loss resulted directly from the dishonesty or fraudulent act(s) of Larry Glad. If you find that plaintiff has not proven that a loss on any specific loan resulted directly from any such acts, mark the space provided "NONE."

BORROWER NAME

|                   |             |
|-------------------|-------------|
| ROSENLOF, Dennis  | <u>X</u>    |
| PENROD, Donald    | <u>X</u>    |
| GLEED, Virgil     | <u>X</u>    |
| PHIPPEN, Arthur   | <u>X</u>    |
| LOVELAND, Clinton | <u>X</u>    |
| MORRILL, Elvin    | <u>X</u>    |
| SORENSEN, Newell  | <u>X</u>    |
| FERRE, Shirl      | <u>NONE</u> |
| MILLER, James     | <u>NONE</u> |
| WHITAKER, Marlo   | <u>X</u>    |
| WITT, William     | <u>X</u>    |
| WALTON, Russell   | <u>X</u>    |
| FARNSWORTH, Orrin | <u>X</u>    |
| LINFORD, Melvin   | <u>X</u>    |
| PEHRSON, Reed     | <u>X</u>    |
| HIND, Richard     | <u>X</u>    |



|                          |          |
|--------------------------|----------|
| SCOVILLE, Steven         | <u>X</u> |
| BECKSTEAD, Quinn Merrill | <u>X</u> |
| HANCOCK, Terry D.        | <u>X</u> |
| DRUMMOND, Marvin         | <u>X</u> |
| CULLIMORE, O. Stanley    | <u>X</u> |
| LOVELAND, Ardel H.       | <u>X</u> |
| ROBERTS, Andrew          | <u>X</u> |
| FISHER, Craig G.         | <u>X</u> |
| PRATT, Leigh Burgess     | <u>X</u> |
| MILES, Walter M.         | <u>X</u> |
| FARNSWORTH, Orrin Fay    | <u>X</u> |
| ARMITAGE, Victor W.      | <u>X</u> |
| TOBLER, Grant            | <u>X</u> |
| RICHARDS, Kenneth D.     | <u>X</u> |
| MICHAELIS, Owen A.       | <u>X</u> |
| KIRK, Ronald             | <u>X</u> |
| CHANDLER, Jerome         | <u>X</u> |
| REESE, LeRay             | <u>X</u> |
| HOLMAN, Kathleen C.      | <u>X</u> |
| DEVEY, Richard R.        | <u>X</u> |

4. Did Home Savings fail to mitigate its losses?

ANSWER: Yes \_\_\_\_\_ No X

5. If you answered question No. 4 "yes," and you placed at least one "x" in the space provided on question No. 3, state the dollar amount by which the verdict to be calculated from your verdict must be revised because of such failure to mitigate.

ANSWER: \$ \_\_\_\_\_

DATED this 25 day of November, 1987.

Bruce E. Coulsey  
FOREPERSON

Juror No. 1 Liba Schaefer  
Juror No. 2 Kathy Cloward  
Juror No. 3 Claudia Demelha  
Juror No. 4 P. Brent Wightman  
Juror No. 5 Raymond E. Jarama  
Juror No. 6 Bruce E. Coulsey  
Juror No. 7 Betty Jaquez Bean  
Juror No. 8 Martin L. Cheloni  
Juror No. 9 Carol Ann Wightworth  
Juror No. 10 Ann Leann Lyman

STATE OF UTAH )  
COUNTY OF SALT LAKE ) SS  
I, THE UNDERSIGNED, CLERK OF THE DISTRICT  
COURT OF SALT LAKE COUNTY, UTAH DO HEREBY  
CERTIFY THAT THE INDEXED AND FOREGOING IS  
A TRUE AND FULL COPY OF AN ORIGINAL DOCU-  
MENT ON FILE IN MY OFFICE AS SAID CLERK  
WITNESS MY HAND AND SEAL OF SAID COURT  
95 NOV 27 1987 12 52

Tab D

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

NOV 25 1987

By [Signature] Deputy Clerk

HOME SAVINGS AND LOAN,  
a Utah corporation,  
  
Plaintiff,  
  
vs.  
  
THE AETNA CASUALTY AND  
SURETY COMPANY,  
  
Defendant.

:  
:  
:  
:  
:  
:  
:

SPECIAL JURY  
INTERROGATORIES  
  
CIVIL NO. C-86-2257

INSTRUCTIONS TO THE JURY: You are to respond to these special jury interrogatories only after you have reached agreement on your answers to questions contained in the special jury verdict. Put these aside until then.

We the jury, respond to the following special interrogatories as follows:

INTERROGATORY NO. 1

In accordance with the standard of proof required in numbered paragraph 1 of Jury Instruction No. 33, did Aetna prove that there were intentional misrepresentations or nondisclosures of facts known by Home Savings on the application questionnaire which facts materially affected its risks under the bond and that it would not have issued the bond or would have excluded the risk disclosed if it had known these facts?

ANSWER: Yes \_\_\_\_\_ No ✓

INTERROGATORY NO. 2

In accordance with the standard of proof required in numbered paragraph 2 of Jury Instruction No. 33, did Aetna prove that there were unintentional misrepresentations or nondisclosures of facts known by Home Savings on the application questionnaire which facts materially affected its risks under the bond and that it would not have issued the bond or would have excluded the risk disclosed if it had known these facts?

ANSWER: Yes ☒ No ☐

INTERROGATORY NO. 3

In accordance with the standard of proof required in numbered paragraph 3 of Jury Instruction No. 33, did Aetna prove that there were intentional failures to disclose facts known by Home Savings beyond those inquired about on the application questionnaire which facts materially affected its risks under the bond and that it would not have issued the bond or would have excluded the risk disclosed if it had known these facts?

ANSWER: Yes ☐ No ☒

INTERROGATORY NO. 4

In accordance with the standard of proof required in numbered paragraph 4 of Jury Instruction No. 33, did Aetna prove that there were unintentional failures to disclose facts known by Home Savings beyond those inquired about on the application questionnaire, which facts materially affected its risks under

the bond and that it would not have issued the bond or would have excluded the risk disclosed if it had known these facts?

ANSWER: Yes ☒ No ☐

INTERROGATORY NO. 5

At any time prior to the termination of Larry Glad from the employment of Home Savings, did Home Savings learn of any dishonest or fraudulent act on his part?

ANSWER: YES ☒ NO ☐

INTERROGATORY NO. 6

If your answer to Interrogatory No. 5 above was "yes", state whether the dishonest or fraudulent act occurred before Larry Glad became employed by Home Savings, after Larry Glad became employed by Home Savings, or both before and after such employment?

ANSWER: BEFORE ☐ AFTER ☒ BOTH ☐

INTERROGATORY NO. 7

If your answer to Interrogatory No. 5 above was "yes", and if you checked "After" or "Both" in response to Interrogatory No. 6 above, state whether the dishonest or fraudulent act occurring during Larry Glad's employment was related or not related to the Afco investor loans.

ANSWER: Related to Afco investor loans ☐  
Not related to Afco investor loans ☒

INTERROGATORY NO. 8

If your answer to Interrogatory No. 5 was "yes," state the date when Home Savings first learned of any dishonest or fraudulent act by Larry Glad?

ANSWER: Date: ABOUT MID DECEMBER, 1981

DATED this 25 day of November, 1987.

Bruce E. Coulsey  
FOREPERSON

Juror No. 1 Jeta Schaefer  
Juror No. 2 Kathy O. Powell  
Juror No. 3 Claudia J. Smith  
Juror No. 4 P. Brent Wightman  
Juror No. 5 Raymond E. Dossin  
Juror No. 6 Bruce E. Coulsey  
Juror No. 7 Betty Ann Seaton  
Juror No. 8 Martin J. Wadsworth  
Juror No. 9 Carol Ann Whitworth  
Juror No. 10 Clara Jean Dossin

STATE OF UTAH )  
COUNTY OF SALT LAKE ) SS

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK

WITNESS MY HAND AND SEAL OF SAID COURT THIS 25 DAY OF November '87

H. DIXON HINDLEY, CLERK

By Lee Dossin DEPUTY

Tab E





Securities Law Claims

A. Section 12(2) of the Securities Act of 1933.

1. Did Home Savings violate Section 12(2) of the Securities Act of 1933 as a matter of primary liability?

ANSWER: Yes  
(Yes or No)

2. Did Grant Affleck and/or AFCO violate Section 12(2) of the Securities Act of 1933?

ANSWER: Yes  
(Yes or No)

If your answer to 2 is "YES" answer questions 3 and 4. If your answer is "NO" go on to answer questions in "B" below.

3. Is Home Savings liable to these Plaintiffs as a controlling person of Grant Affleck and/or AFCO in the violation of Section 12(2)?

ANSWER: Yes  
(Yes or No)

4. Is Home Savings liable to these Plaintiffs as a conspirator with Grant Affleck and/or AFCO in the violation of Section 12(2)?

ANSWER: No  
(Yes or No)

B. Section 10(b) or Rule 10b-5, Securities Exchange Act of 1934.

1. Did Home Savings violate Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 as a matter of primary liability?

ANSWER: Yes  
(Yes or No)

2. Did Grant Affleck and/or AFCO violate Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934?

ANSWER: Yes  
(Yes or No)

If your answer to 2 is "YES" answer questions 3, 4, and 5. If your answer is "NO" go on to answer the questions in "C" below.

3. Is Home Savings liable to these Plaintiffs as an aider and abettor of Grant Affleck and/or AFCO in the violation of Section 10(b) and Rule 10b-5?

ANSWER: Yes  
(Yes or No)

4. Is Home Savings liable to these Plaintiffs as a controlling person of Grant Affleck and/or AFCO in the violation of Section 10(b) and Rule 10b-5?

ANSWER: Yes  
(Yes or No)

5. Is Home Savings and Loan liable to these Plaintiffs as a conspirator with Grant Affleck and/or AFCO in the violation of Section 10(b) and Rule 10b-5?

ANSWER: No  
(Yes or No)

C. Section 61-1-22(1)(b), Utah Uniform Securities Act.

1. Did Home Savings violate Section 61-1-22(1)(b) of the Utah Uniform Securities Act as a matter of primary liability?

ANSWER: Yes  
(Yes or No)

2. Did Grant Affleck and/or AFCO violate Section 61-1-22(1)(b) of the Utah Uniform Securities Act?

ANSWER: Yes  
(Yes or No)

If your answer to 2 is "YES" answer questions 3 and 4. If your answer is "NO" go on to answer questions in "D" below.

3. Is Home Savings liable to these Plaintiffs as a controlling person of Grant Affleck and/or AFCO in the violation of the Utah Uniform Securities Act?

ANSWER: Yes  
(Yes or No)

4. Do you find by clear and convincing evidence that Home Savings is liable to these Plaintiffs as a conspirator with Grant Affleck and/or AFCO in the violation of the Utah Uniform Securities Act?

ANSWER: No  
(Yes or No)

D. Fraud Claim

1. Do you find by clear and convincing evidence that Home Savings committed a fraud upon these Plaintiffs and are therefore entitled to damages?

ANSWER: Yes  
(Yes or No)

If your answer to 1 above is "YES" then answer the following questions.  
If your answer is "NO" go on to answer the questions in "E" below.

2. Do you find by a preponderance of the evidence that the Defendant's conduct was willful and malicious?

ANSWER: No  
(Yes or No)

If your answer is "YES" and, if you deem it proper to do so, you may award such sum as in your judgment would be reasonable and proper as punishment for such conduct and as a warning to others

not to offend in such manner.

If you have made this determination  
please enter the sum to be awarded on  
this line. \$ \_\_\_\_\_

Federal and State

E. Truth in Lending Claims.

1. Do you find by a preponderance of  
the evidence that Home Savings  
violated one or more requirements  
of the truth in lending provisions  
of either or both the state and  
federal truth in lending laws?

ANSWER: Yes  
(Yes or No)

If your answer is "YES" then please  
state what property or equivalent sum  
of money, if any, that these Plaintiffs  
are required to give or pay to Home  
Savings in order to rescind this  
transaction.

ANSWER: \$311.75  
\_\_\_\_\_  
\_\_\_\_\_

210.76

FOREMAN'S CERTIFICATE

I certify that I am the duly elected foreman of this jury and that the foregoing answers are our true and unanimous verdicts.

DATED: 14 AUG 84 :

Kenneth Stanley  
Foreman

Tab F



JURY INSTRUCTION NO. 2

Aetna has asserted that Home Savings' own mismanagement, misfeasance or other negligence and/or failure to follow safe and sound lending practices was the cause of the losses incurred by Home Savings. If you find that the losses sustained by Home Savings were solely-and-proximately caused by Home Savings' own mismanagement, misfeasance or other negligence and/or failure to follow safe and sound lending practices, then you must find there is no coverage for Home Savings under the bond.

JURY INSTRUCTION NO. 4

If you determine that the losses claimed by Home Savings were discovered or should have been discovered prior to the beginning of the bond period, then you must find there is no coverage for Home Savings under the Aetna bond.

In order to determine whether the facts necessary to discover the loss were at all times in the control of Home Savings, you can assume that the knowledge of the officers and employees of Home Savings must be imputed to Home Savings.

You may find there is no coverage for Home Savings under the Aetna bond if you find the following to be proved by a preponderance of the evidence:

1. The knowledge of Home Savings well exceeded mere suspicion; and

2. The tellers, bookkeepers and other employees of Home Savings dealing with the AFCO accounts had actual knowledge of the irregularities in the loan processing; and

3. Home Savings' officers had knowledge of AFCO's questionable financial status and loan practices.

If you find the above to be proved by a preponderance of the evidence, then you can find that Home Savings had "knowledge" of the loss before June of 1982.

Security National Bank of Kansas City v. Continental Ins.,  
586 F. Supp. 139, 149-50 (D. Kansas 1982).

JI9/GARYW

001229

JURY INSTRUCTION NO. 5

The savings and loan blanket bond involved in this case requires Home Savings to notify Aetna of any loss "at the earliest practicable moment after discovery of any loss . . . ." Whether Home Savings complied with the notice provisions, therefore, depends on when Home Savings "discovered" that there had been misconduct resulting in a loss.

Although mere suspicion does not trigger the notice requirement, Home Savings could not disregard the known facts. When Home Savings learned the facts constituting the alleged dishonesty, any prior suspicions are converted to knowledge which Home Savings cannot ignore and which constitutes "discovery." In other words, the time of discovery is determined according to an objective test, based on the conclusions that a reasonable person would draw from the facts known to Home Savings.

Utica Mutual Ins. Co. v. Fireman's Fund Ins. Co., 748 F.2d 118, 122-23 (2nd Cir. 1984) (and cases cited therein).

J22/GARYW

001230

JURY INSTRUCTION NO. 8

If you find from a preponderance of the evidence that prior to June of 1982, Home Savings had actual knowledge that Larry Glad had engaged in fraudulent and/or dishonest activities while in prior employment at Sandy State Bank, you may find that there is no coverage under the Aetna bond for the losses incurred by Home Savings as a result of the AFCO transactions.

Central Progressive Bank v. Fireman's Fund Ins. Co., 658 F.2d 377, 382 (5th Cir. 1981); Alfa Electric Corp. v. Travelers Indemnity, 376 F.Supp. 901, 908-12 (\_\_\_\_\_, 1973).

J29/GARYW

JURY INSTRUCTION NO. 9

In order for Home Savings to have learned of a dishonest or fraudulent act on the part of an employee, the Aetna bond does not require that Home Savings have enough information to charge Larry Glad or any other employee with fraud or dishonesty. All that is required is that Home Savings have enough information to assume that the employee has acted fraudulently or dishonestly. The question you must decide, is whether from the evidence as presented at trial, Home Savings either knew<sup>or</sup> a reasonable person would have assumed that Larry Glad was acting fraudulently or dishonestly before June of 1982.

Royal Trust Bank v. National Union Fire Ins., 788 F.2d 719, 721 n.2 (11th Cir. 1986).

J20/GARYW

001234

JURY INSTRUCTION NO. 14

The materiality of a fact misrepresented or withheld by an insured is determined by the probable and reasonable effect that a truthful disclosure would have had upon the insurer in determining the advantages of the proposed insurance contract. Because the materiality of a misrepresentation by the insured is determined by the extent to which it initially influenced the insurer to assume the risk of coverage, materiality is measured at the time that the risk is assumed and not at the date of the claimed loss.

Therefore, if you find that Home Savings made a misrepresentation in its insurance application to Aetna, you may find that misrepresentation to be material if it diminishes Aetna's opportunity to determine or estimate the risk involved.

Berger v. Minnesota Mutual Life Ins. Co., 723 P.2d 388, 391 (Utah 1986); Holz Rubber Co. v. American Star Ins. Co., 14 Cal. 3d 45, 533 P.2d 1055, 1065 (1975); Howard v. Aid Ass'n for Lutherans, 272 N.W.2d 910 (Minn. 1978); Prudential Ins. Co. of America v. Anaya, 78 N.M. 101, 428 P.2d 640 (1967).

J14/GARYW

INSTRUCTION NO. 28

Duty to Disclose Material Information  
in Application Process

A person or business applying for a fidelity bond has a duty to volunteer the disclosure of all facts materially affecting the risk which will be incurred by the insurer if the insurer issues a fidelity bond to that person or business.

Sumitomo Bank of California v. Iwasaki, 447 P.2d 956  
(Cal. 1968)

INSTRUCTION NO. 29

Representations in Insurance Applications

All statements and descriptions in any application for an insurance policy shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall prevent a recovery under the policy or contract only if: (a) fraudulent; or (b) material either to the acceptance of the risk, or to the hazard assumed by the insurer; or (c) the insurer in good faith either would not have issued the policy or contract, or would not have issued, reinstated or renewed it at the same premium rate, or would not have issued, reinstated or renewed a policy or contract in as large an amount, or would not have provided coverage with respect to the hazards resulting in a loss, if the true facts had been known to the insurer as required by the application for the policy or contract or otherwise.



JURY INSTRUCTION NO. 32

Section 11 of the bond contains the following provision:

This bond shall be deemed terminated or cancelled as to any employee - (a) as soon as the Insured shall learn of any dishonest or fraudulent act on the part of such Employee . . . .

In determining whether Home Savings learned of any dishonest or fraudulent act on the part of Larry Glad, you are instructed that Home Savings is charged with the knowledge with any officer, director or other employee of Home Savings.

If you find that Home Savings learned of any dishonest or fraudulent act on the part of Larry Glad prior to June 21, 1982, ~~the effective of the~~ bond, then you are instructed that Larry Glad was never covered under the subject bond.

JURY INSTRUCTION NO. 35

Section 2 of the bond provides in part as follows:

THIS BOND DOES NOT COVER:

(e) loss resulting from the complete or partial non-payment of, or default upon,

(1) any loan or transaction in the nature of, or amounting to, a loan made by or obtained from the Insured, or

(2) any note, account, agreement or other evidence of debt assigned or sold to, or discounted or otherwise acquired by, the Insured whether procured in good faith or through trick, artifice, fraud or false pretenses, unless such loss is covered under Insuring Agreement (A), (B) or (E) . . . .

The Insuring Agreement at issue in this case is Insuring Agreement (A), which has been read to you and described as the Fidelity Bond Coverage for loss resulting directly from one or more dishonest or fraudulent acts of an employee.

JURY INSTRUCTION NO. 37

A person or business applying for a fidelity bond has a duty to voluntarily disclose all facts of which the person or business is aware which would cause a reasonable person to assume that a loss covered by the bond has been or will be incurred even though the exact amount or details of loss may not then be known.

Notice to the insured of an actual or potential claim by a third party which alleges that the insured is liable under circumstances, which, if true, would create a loss under this bond constitutes information that should be disclosed.

Sumitomo Bank of California v. Iwasaki, 447 P.2d 956  
(Cal. 1968). Ref. Instruction No. 28.

J28/LDW

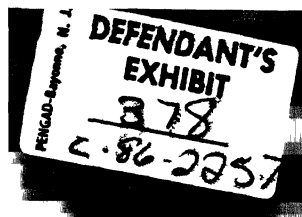
001191

JURY INSTRUCTION NO. 42

The law does not necessarily recognize only one cause of an injury, consisting of only one factor, one act, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an event or loss, and in such a case, each of the participating acts or omissions is regarded in the law as a cause.

In this case, the bond allows coverage only if Home Savings' loss directly resulted from the dishonest or fraudulent acts, if any, of Larry Glad. A direct result requires a connected sequence between any act of Larry Glad and the loss that ultimately occurred. If you find that a primary contributing cause to the Home's loss was the failure of the officers and directors of Home Savings to require compliance with appropriate lending practices and procedures, and that such failure was the primary cause of its loss, then the loss was not the direct result of dishonest or fraudulent acts, if any.

Tab G



HOME SAVINGS VS. AETNA

# HOME SAVINGS VS. AETNA

| <u>Investor/Borrower</u> | <u>Loan amount</u> | <u>Should loan<br/>have been made*</u> |            |
|--------------------------|--------------------|--|------------|
| Armitage                 | \$ 14,500          | Possibly                               | 2          |
| Beckstead                | 57,000             | No                                     | 1, 2 and 3 |
| Chandler                 | 26,500             | No                                     | 1, 2 and 3 |
| Cullimore                | 35,000             | No                                     | 1 and 3    |
| Devey                    | 45,000             | No                                     | 1 and 3    |
| Drummond                 | 40,000             | No                                     | 2 and 3    |
| Farnsworth, O.F.         | 29,500             | No                                     | 1, 2 and 3 |
| Farnsworth, O.T.         | 38,500             | No                                     | 1 and 3    |
| Ferre                    | 22,850             | No                                     | 1, 2 and 3 |
| Fisher                   | 29,000             | No                                     | 1, 2 and 3 |
| Gleed                    | 28,500             | No                                     | 1, 2 and 3 |
| Hancock                  | 22,000             | No                                     | 2 and 3    |
| Hind                     | 12,000             | Possibly                               | 1          |
| Holman                   | 17,500             | No                                     | 1, 2 and 3 |
| Kirk                     | 57,300             | No                                     | 1, 2 and 3 |
| Linford                  | 27,150             | No                                     | 1, 2 and 3 |
| Loveland, A.             | 32,400             | Possibly                               | 3          |
| Loveland, C.             | 21,000             | No                                     | 1, 2 and 3 |
| Michaelis                | 26,000             | No                                     | 1, 2 and 3 |
| Miles                    | 45,600             | No                                     | 2 and 3    |
| Miller                   | 50,000             | Possibly                               | 3          |
| Morrill                  | 34,000             | No                                     | 1, 2 and 3 |
| Pehrson                  | 33,000             | No                                     | 1, 2 and 3 |
| Penrod                   | 22,000             | No                                     | 1, 2 and 3 |
| Phippen                  | 38,000             | Possibly                               | 3          |
| Pratt                    | 34,500             | Yes                                    |            |
| Reese                    | 24,900             | No                                     | 2 and 3    |
| Richards                 | 23,500             | No                                     | 1, 2 and 3 |
| Roberts                  | 42,000             | No                                     | 1 and 3    |
| Rosenlof                 | 10,250             | No                                     | 1, 2 and 3 |
| Scoville                 | 25,500             | No                                     | 1, 2 and 3 |
| Sorenson                 | 47,000             | No                                     | 1, 2 and 3 |
| Tobler                   | 59,000             | No                                     | 1, 2 and 3 |
| Walton                   | 31,000             | No                                     | 1, 2 and 3 |
| Whitaker                 | 49,400             | No                                     | 1, 2 and 3 |
| Witt                     | 41,400             | Possibly                               | 3          |
|                          | <u>\$1,192,750</u> |  |            |

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\*Given information in loan file.

### REASONS TO REJECT LOAN

1. Debt service ratio too high
2. No liquid net worth
3. Increase in payment



Tab H

FILMED

FILED IN CLERK'S OFFICE  
Salt Lake County, Utah

NOV 24 1957

H. Dixon Hindley, Clerk of District Court  
By Marion L. Bell  
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

|  |   |                         |
|--|---|-------------------------|
| HOME SAVINGS AND LOAN, a Utah corporation, | : |                         |
|  | : |                         |
| Plaintiff,                                 | : | SPECIAL VERDICT         |
|  | : |                         |
| vs.  | : |                         |
|  | : |                         |
| THE AETNA CASUALTY AND SURETY COMPANY,     | : | Civil No. C86-2257      |
|  | : |                         |
| Defendant.                                 | : | Judge Michael R. Murphy |

We, the jury, answer the questions propounded to us in the Special Verdict as follows:

1. Was the loss sustained by Home Savings covered by the terms and conditions set forth in the Aetna bond?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

2. Did Home Savings' losses in the Armitage judgment result from acts of Home Savings' employees, which were not dishonest or fraudulent as defined by the bond?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

3. Did Home Savings and Aetna make a mistake of a material fact in entering into the Aetna bond?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

4. Did Larry Glad commit any dishonest or fraudulent acts, related to the Afco investor loans, with the manifest intent to cause Home Savings and Loan to sustain its loss and to obtain personal benefit?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

5. Did the verdict against Home Savings in the lawsuit of Armitage, et al. v. Home Savings & Loan directly result from dishonest or fraudulent acts, if any, of Larry Glad?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

6. Did any loss sustained by Home Savings directly result from the mismanagement, misconduct, negligence, and/or failure to follow safe and sound lending practices?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

7. If you answered Question No. 4 in the affirmative, when did Home Savings first learn of any dishonest or fraudulent act on the part of Larry Glad, if any, and whether or not related to the Afco investor loans.

ANSWER: Date: \_\_\_\_\_

8. Did Home Savings rely on Larry Glad's knowledge, if any, of Afco's financial circumstances or other information pertaining to Afco or Grant Affleck, in making the Afco investor loans?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

9. Did Larry Glad cause the Afco investor loan documents to be backdated before closing so as to deny to the investor/borrowers their three-day right to rescind?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

10. Did Home Savings make any material misrepresentation or fail to disclose any material fact to Aetna in applying for the Aetna bond, which misrepresentation would have caused Aetna to refuse to issue the bond?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

11. Did Home Savings fail to give Aetna notice of loss related to the Afco investor loans on a reasonable and timely basis, which resulted in prejudice to Aetna?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

12. If you have found that bond coverage is required, itemize, by placing and "X" in the space provided, the specific loans where a loss resulted directly from the dishonesty or fraudulent act(s) of Larry Glad:

BORROWER NAME

|                   |       |
|-------------------|-------|
| ROSENLOF, Dennis  | _____ |
| PENROD, Donald    | _____ |
| GLEED, Virgil     | _____ |
| PHIPPEN, Arthur   | _____ |
| LOVELAND, Clinton | _____ |
| MORRILL, Elvin    | _____ |
| SORENSEN, Newell  | _____ |
| FERRE, Shirl      | _____ |
| BOTT, David       | _____ |
| MILLER, James     | _____ |
| WHITAKER, Marlo   | _____ |
| WITT, William     | _____ |
| WALTON, Russell   | _____ |

|                          |       |
|--------------------------|-------|
| FARNSWORTH, Orrin        | _____ |
| LINFORD, Melvin          | _____ |
| LYMAN, Rodney            | _____ |
| PEHRSON, Reed            | _____ |
| HIND, Richard            | _____ |
| SCOVILLE, Steven         | _____ |
| CLIFFORD, Richard Dion   | _____ |
| BECKSTEAD, Quinn Merrill | _____ |
| HANCOCK, Terry D.        | _____ |
| DRUMMOND, Marvin         | _____ |
| BEAUMONT, Melvin         | _____ |
| CULLIMORE, O. Stanley    | _____ |
| LOVELAND, Ardel H.       | _____ |
| ROBERTS, Andrew          | _____ |
| FISHER, Craig G.         | _____ |
| PRATT, Leigh Burgess     | _____ |
| MILES, Walter M.         | _____ |
| FARNSWORTH, Orrin Fay    | _____ |
| ARMITAGE, Victor W.      | _____ |
| TOBLER, Grant            | _____ |
| RICHARDS, Kenneth D.     | _____ |
| MICHAELIS, Owen A.       | _____ |
| KIRK, Ronald             | _____ |
| CHANDLER, Jerome         | _____ |
| REESE, LeRay             | _____ |
| BROADBENT, Deann S.      | _____ |
| SORENSEN, Evan J.        | _____ |

HOLMAN, Kathleen C. \_\_\_\_\_

DEVEY, Richard R. \_\_\_\_\_

13. Did Home Savings fail to mitigate its damages?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

14. If your answer to Question No. 13 was "Yes," state the dollar amount by which Home Savings' verdict for principal herein must be reduced because of such failure to mitigate.

ANSWER: \$ \_\_\_\_\_

15. If you answered "Yes" to both Question No. 5 and Question No. 6, indicate the proportionate percentage of liability which Home Savings and Aetna must bear for any loss sustained.

|                |                      |
|----------------|----------------------|
| <u>ANSWER:</u> | Home Savings: _____% |
|                | Aetna: _____%        |
|                | Total: 100%          |

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1987.

\_\_\_\_\_  
FOREPERSON

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
HOME/SV1/RCF

Tab I



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

By S. J. [Signature]  
Deputy Clerk

: ORDER AND MINUTE ENTRY

: CIVIL NO. C-86-2257

2

:

:

2

For purposes of this motion, the court assumes the evidence establishes as a matter of law that the dishonesty of plaintiff's employee, Larry Glad, was known before the policy period commenced on June 21, 1982. This discovery of the dishonesty, however, is not discovery of a loss sustained. It is not the dishonesty which is insured, but the loss sustained thereby. There is no evidence that there was any loss sustained prior to the judgment in or settlement of the Armitage case. The Federal Home Loan Bank Board Report (Def. App. 0), dated June 4, 1982, itself indicates that plaintiff Home Savings was subjected only to "possible losses." A loss cannot be discovered until

sustained; since the latter occurred during the policy period, the discovery thereof could not have occurred earlier.

Defendant contends that Rider 6091 precludes coverage in this case. Rider 6091 in the context of the policy in question, however, does not change the basic matter insured, i.e., any sustained loss which is discovered during the policy period. Rider 6091 is an insertion in Section 4 which is a procedural provision imposing various conditions and limitations intended to give the insurer early notice of an actual loss or possible loss not yet realized. This is evident from the reference in Rider 6091 to a loss which "will be incurred" and notice of an "actual or potential claim." The elaboration of the meaning of the term "discovery" in Rider 6091, then, is to establish when notice of a loss or potential loss must be given to the insurer. Had Rider 6091 been intended for more general application, it would not have been imposed as an insertion to Section 4, but as an insertion or specific amendment of the Insuring Agreements (e.g., Rider 6041), or the general definition provisions in Section 1 (e.g., Rider 5923b). Finally, had Rider 6091 been intended for more general application, the language of the policy would have so indicated.

It could well be that defendant's policy is directed at the typical situation where there is near simultaneousness of the dishonesty and resultant loss. When, however, as in this case,

the dishonesty does not necessarily translate into a loss and, if it does result in a loss, such is not sustained until sometime following the dishonesty, the policy provisions dictate that there is coverage only if the discovery of an actual or sustained loss occurs during the policy period.

The view expressed herein does not deprive defendant of an ability to deny coverage when an insured obtains a policy knowing of or having reason to believe that dishonesty has occurred which may not have resulted in a loss at the time of application for coverage. All an insurer needs to do is to make reasonable inquiry in the insurance application process concerning the proposed insured's knowledge or discovery of incidents suggesting dishonesty. Defendant has not brought to the court's attention any such failure to disclose in the application process in this case. Furthermore, the views expressed herein do not deprive defendant of an ability to deny coverage under Rider 6091 for an insured's failure to notify the insurer of the discovery of dishonesty prior to a resulting loss assuming, of course, prejudice to the insurer can be shown for failure to comply with the notice provisions of Section 4.

At best, defendant's motion highlights a possible ambiguity created by the amendments of Rider 6091. Defendant has not, however, presented parole evidence suggesting an interpretation

consistent with its assertions. Any such ambiguity, then, must be construed in favor of plaintiff.

It is therefore ordered that defendant's Motion for Summary Judgment is denied.

Dated this 25<sup>th</sup> day of August, 1987.

S/ Michael R. Murphy  
MICHAEL R. MURPHY  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I ~~mailed~~ <sup>hand delivered</sup> a true and correct copy of the foregoing Order and Minute Entry, ~~postage prepaid~~, to the following, this 25<sup>th</sup> day of August, 1987:

Gary R. Howe  
P. Bryan Fishburn  
Attorneys for Plaintiff  
Suite 800, Kennecott Bldg.  
Salt Lake City, Utah 84133

Lynn S. Davies  
Russell C. Fericks  
Richard L. King  
Attorneys for Defendant  
50 S. Main, Suite 700  
P.O. Box 2465  
Salt Lake City, Utah 84110

S/Marlene Bilks

Tab J

*Katie Goodrich*

---

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

HOME SAVINGS AND LOAN, a Utah  
corporation,

Plaintiff,

vs.

THE AETNA CASUALTY AND SURETY  
COMPANY,

Defendant.

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

AFFIDAVIT OF  
BETTY BEAN

Civil No. C86-2257

Judge Michael R. Murphy

---

STATE OF UTAH                    )  
                                      ) ss.  
County of Salt Lake            )

Betty Bean, being first duly sworn upon oath, deposes  
and says:

1. My name is Betty Bean. I served as a juror  
in this case during October and November, 1987.

2. I have been made aware that Bruce Coulsey,  
the jury foreman, has signed an affidavit, indicating that  
there was some jury confusion regarding Special Interrogatories  
Nos. 2 and 4.

3. I was not confused by Special Interrogatories Nos. 2 and 4. I understood that in order to answer "Yes" to Special Interrogatory No. 2, it was necessary for me to conclude that Home Savings made misrepresentations or nondisclosures of facts which they knew at the time the application questionnaire was completed. Several officers and employees of Home Savings knew facts in June of 1982, which they should have disclosed to Aetna on the application questionnaire.

4. With regard to Special Interrogatory No. 4, my understanding was the same, except that I concluded that Home Savings had an obligation to disclose information which Home Savings had in June of 1982 separate and apart from the application questionnaire.

5. I also concluded that if Home Savings had disclosed the facts discussed above, that Aetna would not have issued the bond or would have made an exclusion related to the Afco loans. The misrepresentations and nondisclosure of facts materially effected Aetna's risks under the bond.

5. The jury instructions regarding mismanagement at Home Savings created a great deal of confusion. I understood, and the jury discussions were to the same effect, that we could not consider evidence of mismanagement for any purpose whatsoever. If we had been allowed to consider



mismanagement as a separate cause of Home Savings' loss, then my answers on the Special Verdict form would have changed.

6. I understood that it was necessary for me to consider each of the different parts of Question No. 1 on the Special Verdict form, and then to answer "Yes" or "No" based on my decision about all of those parts of the question combined. With regard to the issue of manifest intent to cause Home Savings a loss, I concluded that Larry Glad did not intend to hurt Home Savings, but that he should have known the results of his acts. It was necessary for us to answer "Yes" to Special Verdict Question No. 1 so that we could answer the remaining questions about causation. Because we were not allowed to consider mismanagement of Home Savings as a separate cause of the loss, Larry Glad's conduct was the only other possible choice.

7. I answered "Yes" to Special Verdict Question No. 2, because even though the mismanagement of Home Savings was the overwhelming reason for Home Savings' loss, that issue had been taken away from the jury, and so the only other explanation for the loss was Larry Glad's conduct.

8. I intended Aetna Casualty & Surety Company to win the lawsuit based on our answers to the Special Verdict and Special Jury Interrogatories. If I had been given the opportunity to enter a general finding in favor of either Home Savings or Aetna, I would have found in favor of Aetna.

Further affiant sayeth not.

DATED this 18 day of February, 1988.

Betty Jean Bean  
BETTY BEAN  
Affiant

STATE OF UTAH                    )  
                                      : ss.  
County of Salt Lake            )

On this 18<sup>th</sup> day of February, 1988, personally appeared before me Betty Bean, who being first duly sworn, states that she has read the foregoing instrument, knows the contents contained therein are true and correct, and signs the same as her own free act.

My Commission Expires:

10-1-91

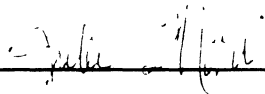
Patricia J. Moeller  
NOTARY PUBLIC  
Residing at: Sandy, Utah

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand delivered on this 12th day of February, 1988, to the following counsel of record:

Richard H. Nebeker  
Gary R. Howe  
P. Bryan Fishburn  
CALLISTER, DUNCAN & NEBEKER  
Suite 800 - Kennecott Building  
Salt Lake City, Utah 84133

HOME/BB/LSD  
pm021788

  
\_\_\_\_\_

FILMED

*Katie Goodrich*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HOME SAVINGS AND LOAN, a Utah  
corporation,

Plaintiff,

vs.

THE AETNA CASUALTY AND SURETY  
COMPANY,

Defendant.

AFFIDAVIT OF  
RAYMOND EDWARD DENNIS

Civil No. C86-2257

Judge Michael R. Murphy

STATE OF UTAH                    )  
                                      ) ss.  
County of Salt Lake            )

Raymond Edward Dennis, being first duly sworn upon  
oath, deposes and says:

1. My name is Raymond Edward Dennis. I am a  
resident of Salt Lake County, Utah, over the age of 18 years,  
and I was a juror in this case during October and November,  
1987.

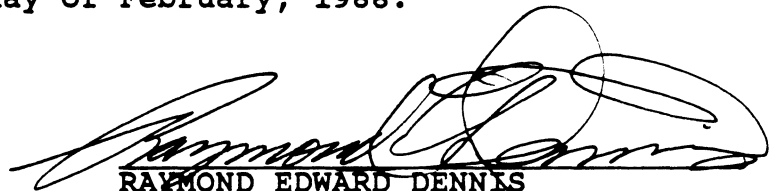
2. I answered "No" to Special Verdict Question  
No. 1, because I felt that Home Savings had not shown by a  
preponderance of the evidence that the question should be  
answered "Yes" in its entirety.

3. I answered "Yes" to Special Jury  
Interrogatories Nos. 2 and 4. I felt that there were facts  
known to officers of Home Savings at the time that the

application questionnaire was completed by Home Savings, which information should have been disclosed on the application questionnaire and volunteered in addition to the information requested on the application questionnaire. The facts that should have been disclosed in accordance with the standard discussed in Special Interrogatories Nos. 2 and 4, were available to and known by employees and officers of Home Savings in June of 1982, at the time that the application questionnaire was completed. However, the individual who actually completed the application questionnaire may not have known those facts, and therefore I concluded that the misrepresentations and nondisclosures were unintentional.

Further affiant sayeth not.

DATED this 17 day of February, 1988.

  
RAYMOND EDWARD DENNIS  
Affiant

STATE OF UTAH                     )  
  : ss.  
County of Salt Lake             )

On this 17<sup>th</sup> day of February, 1988, personally appeared before me Raymond Edward Dennis, who being first duly sworn, states that she has read the foregoing instrument, knows the contents contained therein are true and correct, and signs the same as her own free act.

My Commission Expires:

10-1-91

Patricia J. Maeller  
NOTARY PUBLIC  
Residing at: Sandy, Utah

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand delivered on this 18<sup>th</sup> day of February, 1988, to the following counsel of record:

Richard H. Nebeker  
Ray R. Howe  
Bryan Fishburn  
LLISTER, DUNCAN & NEBEKER  
Suite 800 - Kennecott Building  
Salt Lake City, Utah 84133

Julie Mori

*Katie Goodrich*

---

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

|                               |   |                         |
|-------------------------------|---|-------------------------|
| HOME SAVINGS AND LOAN, a Utah | : |                         |
| corporation,                  | : |                         |
|                               | : | AFFIDAVIT OF            |
| Plaintiff,                    | : | PHILO BRENT WIGHTMAN    |
|                               | : |                         |
| vs.                           | : |                         |
|                               | : |                         |
| THE AETNA CASUALTY AND SURETY | : | Civil No. C86-2257      |
| COMPANY,                      | : |                         |
|                               | : | Judge Michael R. Murphy |
| Defendant.                    | : |                         |

---

STATE OF UTAH                    )  
                                      ) ss.  
County of Salt Lake            )

I, Philo Brent Wightman, hereby affirm and  
declare as follows:

1. I am a resident of Salt Lake County, State of  
Utah, I am over 18 years old, and I served as a juror in the  
trial of Home Savings v. Aetna during October and November,  
1987, in the Third District Court, in and for Salt Lake County,  
State of Utah.

PART I

2. I understand that an affidavit has been  
submitted to the Court by the jury foreman, Mr. Bruce  
Coulsey, suggesting that the jury's answer to Special

Interrogatories Nos. 2, and 4 were based upon confusion and misunderstanding and suggesting that the jury's finding of unintentional misrepresentation or nondisclosure of facts occurred because of information which only came into Home Savings' possession during the fall of 1982 after Home applied for Aetna's bond.

3. I was not confused by Special Interrogatories Nos. 2 and 4, and I answered them in the affirmative on the basis that Aetna proved by a preponderance of evidence that officers and employees of Home Savings knew information in June 1982 about the Afco Investor Loan problems, and that Home had a duty to disclose that information even if it was not asked for on the bond application form, and yet such information was not disclosed in the application process.

4. The information which Home Savings had during June 1982 and which it unintentionally misrepresented or failed to disclose involved matters which were material to the risks assumed by Aetna on the bond and I believe Aetna would have not issued the bond had the information been properly disclosed.

5. As a jury, we concluded that Home Savings learned of other, significant facts about the Afco Investor Loans in the process of the Armitage litigation; nevertheless, Home Savings knew of enough material facts in June 1982 about possible losses on the Afco Investor Loans that Home should have disclosed that information during the June 1982 application process.



6. I expected and intended that affirmative responses on Interrogatories Nos. 2 and 4 would work to Aetna's advantage.

## PART II

7. With regard to the jury instructions, it was my understanding after reading them and discussing them with my fellow jurors, that the jury was precluded from considering Home Savings' bad business judgment and/or mismanagement as a separate, independent cause of the losses Home sustained in the Afco Investor Loans.

8. As a result of my interpretation of the jury instructions, it was my belief that the jury was precluded from considering Home Savings mismanagement and bad business judgment for any purpose whatsoever in its deliberation on the Special Verdict.

9. In my opinion, and based on the evidence, the predominant cause of Home Savings' losses on the Afco Investor Loans was its bad business judgment and mismanagement, separate and apart from both the relationship of Larry Glad to the investors and the relationship of Home Savings to Larry Glad.

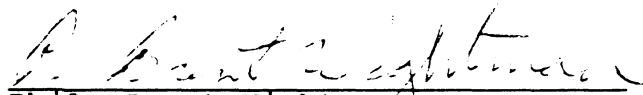
10. The only reason I voted on the first question of the Special Verdict to find that Larry Glad acted with manifest intent to cause Home Savings to sustain a loss on the Afco Investor Loans was because the only other possible cause was Home's own mismanagement and bad business judgment. Because I believed that mismanagement and bad business judgment

were ruled out as a possible choice for what directly caused the losses, it left Larry Glad's conduct as the only available choice, and we had to find manifest intent to cause a loss in order to establish Larry Glad's conduct was the cause.

11. In responding to Special Verdict Question No. 1, I felt that Home Savings had proved by a preponderance of the evidence that Larry Glad had committed dishonest or fraudulent acts, that they were related to the Afco Investor Loans, and that Larry intended to obtain personal benefit thereby. However, I did not believe that Home Savings had established by a preponderance of the evidence the element of "manifest intent to cause Home Savings and Loan to sustain its loss." Nevertheless, I voted "Yes" to Special Verdict Question No. 1 because "manifest intent" was only one out of four elements of the question. Taking the question as a whole, I thought that "Yes" responses to the other three elements of the question required a "Yes" response to the entire question.

Further affiant sayeth not.

DATED this 15 day of February, 1988.

  
Philo Brent Wightman  
Affiant

STATE OF UTAH                   )  
County of Salt Lake         ) ss.

On this 15th day of March, 1988, personally appeared before me Philo Brent Wightman, who being first duly sworn, states that he has read the foregoing instrument, knows the contents contained therein are true and correct, and signs the same as his own free act.

My Commission Expires:

NOTARY PUBLIC

Residing at:

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand delivered on this 14<sup>th</sup> day of February, 1988, to the following counsel of record:

Richard H. Nebeker  
Gary R. Howe  
P. Bryan Fishburn  
CALLISTER, DUNCAN & NEBEKER  
Suite 800 - Kennecott Building  
Salt Lake City, Utah 84133

HOME/PBW/RCF  
jm021888



PART I

2. I understand that an affidavit has been submitted to the Court by the jury foreman, Mr. Bruce Coulsey, suggesting that the jury's answer to Special Interrogatories Nos. 2, and 4 were based upon confusion and misunderstanding and suggesting that the jury's finding of unintentional misrepresentation or nondisclosure of facts occurred because of information which only came into Home Savings' possession during the fall of 1982 after Home applied for Aetna's bond.

3. I was not confused by Special Interrogatories Nos. 2 and 4, and I answered them in the affirmative on the basis that Aetna proved by a preponderance of evidence that officers and employees of Home Savings knew information in June 1982 about the Afco Investor Loan problems, and that Home had a duty to disclose that information or that information was asked for on the bond application form, and yet such information was not disclosed in the application process.

4. The information which Home Savings had during June 1982 and which it unintentionally misrepresented or failed to disclose involved matters which were material to the risks assumed by Aetna on the bond and I believe Aetna would have not issued the bond had the information been properly disclosed.

5. As a jury, we concluded that Home Savings learned of other, significant facts about the Afco Investor Loans in the process of the Armitage litigation; nevertheless, Home Savings knew of enough material facts in

June 1982 about possible losses on the Afco Investor Loans that Home should have disclosed that information during the June 1982 application process.

6. I expected and intended that affirmative responses on Interrogatories Nos. 2 and 4 would work to Aetna's advantage and result in Aetna winning the case.

## PART II

7. With regard to the jury instructions, it was my understanding after reading them and discussing them with my fellow jurors, that the jury was precluded from considering Home Savings' bad business judgment and/or mismanagement as a separate, independent cause of the losses Home sustained in the Afco Investor Loans.

8. As a result of my interpretation of the jury instructions, it was my belief that the jury was precluded from considering Home Savings mismanagement and bad business judgment for any purpose whatsoever in its deliberation on the Special Verdict.

9. In my opinion, and based on the evidence, the predominant cause of Home Savings' losses on the Afco Investor Loans was its bad business judgment and mismanagement, separate and apart from both the relationship of Larry Glad to the investors and the relationship of Home Savings to Larry Glad.

Further affiant sayeth not.

DATED this 17 day of February, 1988.

Claudia Bishop Nemelka  
Claudia Bishop Nemelka  
Affiant

STATE OF UTAH                     )  
  ): ss.  
County of Salt Lake            )

On this 17<sup>th</sup> day of February, 1988, personally appeared before me Claudia Bishop Nemelka, who being first duly sworn, states that she has read the foregoing instrument, knows the contents contained therein are true and correct, and signs the same as her own free act.

My Commission Expires:

11-3-91

Jackie S. DeJong  
NOTARY PUBLIC  
Residing at: Murray, Utah

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand delivered on this 17<sup>th</sup> day of February, 1988, to the following counsel of record:

Richard H. Nebeker  
Gary R. Howe  
P. Bryan Fishburn  
CALLISTER, DUNCAN & NEBEKER  
Suite 800 - Kennecott Building  
Salt Lake City, Utah 84133

HOME/CBN/RCF  
jm021788

John Allen

Katie Goodrich

2. I understand that an affidavit has been submitted to the Court by the jury foreman, Mr. Bruce Coulsey, suggesting that the jury's answer to Special Interrogatories Nos. 2, and 4 were based upon confusion and misunderstanding and suggesting that the jury's finding of unintentional misrepresentation or nondisclosure of facts occurred because of



information which only came into Home Savings' possession during the fall of 1982 after Home applied for Aetna's bond.

3. I was not confused by Special Interrogatories Nos. 2 and 4, and I answered them in the affirmative on the basis that Aetna proved by a preponderance of evidence that officers and employees of Home Savings knew information in June 1982 about the Afco Investor Loan problems, and that Home had a duty to disclose that information or that information was asked for on the bond application form, and yet such information was not disclosed in the application process.

4. The information which Home Savings had during June 1982 and which it unintentionally misrepresented or failed to disclose involved matters which were material to the risks assumed by Aetna on the bond and I believe Aetna would have not issued the bond had the information been properly disclosed.

5. As a jury, we concluded that Home Savings learned of other, significant facts about the Afco Investor Loans in the process of the Armitage litigation; nevertheless, Home Savings knew of enough material facts in June 1982 about possible losses on the Afco Investor Loans that Home should have disclosed that information during the June 1982 application process.

6. I expected and intended that affirmative responses on Interrogatories Nos. 2 and 4 would work to Aetna's

advantage and result in Aetna winning the case.

## PART II

7. With regard to the jury instructions, it was my understanding after reading them and discussing them with my fellow jurors, that the jury was precluded from considering Home Savings' bad business judgment and/or mismanagement as a separate, independent cause of the losses Home sustained in the Afco Investor Loans.

8. As a result of my interpretation of the jury instructions, it was my belief that the jury was precluded from considering Home Savings mismanagement and bad business judgment for any purpose whatsoever in its deliberation on the Special Verdict.

9. In my opinion, and based on the evidence, the predominant cause of Home Savings' losses on the Afco Investor Loans was its bad business judgment and mismanagement, separate and apart from both the relationship of Larry Glad to the investors and the relationship of Home Savings to Larry Glad.

10. The only reason I voted on the first question of the Special Verdict to find that Larry Glad acted with manifest intent to cause Home Savings to sustain a loss on the Afco Investor Loans was because the only other possible cause was Home's own mismanagement and bad business judgment. Because I believed that mismanagement and bad business judgment were ruled out as a possible choice for what directly caused the losses, it left Larry Glad's conduct as the only available

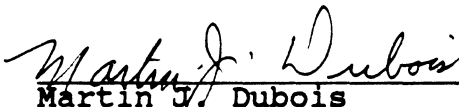
choice, and we had to find manifest intent to cause a loss in order to establish Larry Glad's conduct was the cause.

PART III

11. In responding to Special Verdict Question No. 1, I felt that Home Savings had proved by a preponderance of the evidence that Larry Glad had committed dishonest or fraudulent acts, that they were related to the Afco Investor Loans, and that Larry Glad intended to obtain personal benefit thereby. However, I did not believe that Home Savings had established by a preponderance of the evidence the part of the question referring to "manifest intent to cause Home Savings and Loan to sustain its loss." Nevertheless, I voted "Yes" to Special Verdict Question No. 1 because "manifest intent" was only one out of four parts of Question No. 1. Considering the question in its entirety, I thought that an affirmative finding on the three other parts of the question required a "Yes" response to the entire question.

Further affiant sayeth not.

DATED this 17 day of February, 1988.

  
\_\_\_\_\_  
Martin J. Dubois  
Affiant

[illegible]

On this 17<sup>th</sup> day of February, 1988, personally appeared before me Martin J. Dubois, who being first duly sworn, states that he has read the foregoing instrument, knows the contents contained therein are true and correct, and signs the same as his own free act.

**My Commission Expires:**

10-1-91

Patricia J. Moeller  
NOTARY PUBLIC  
Residing at: Sandy, Utah

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand delivered on this 12th day of February, 1988, to the following counsel of record:

Richard H. Nebeker  
Gary R. Howe  
P. Bryan Fishburn  
CALLISTER, DUNCAN & NEBEKER  
Suite 800 - Kennecott Building  
Salt Lake City, Utah 84133

HOME/MJB/RCF  
jm021788

-5-

[FILED]

FILED IN CLERK'S OFFICE  
SALT LAKE COUNTY, UTAH

FEB 26 4 31 PM '88

*James Peterson*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HOME SAVINGS AND LOAN, a Utah  
corporation,

Plaintiff,

vs.

THE AETNA CASUALTY AND SURETY  
COMPANY,

Defendant.

AFFIDAVIT OF  
ARLENE LYNN

Civil No. C86-2257

Judge Michael R. Murphy

STATE OF UTAH                    )  
                                      ) ss.  
County of Salt Lake            )

Arlene Lynn, being first duly sworn upon oath, affirm  
and say as follows:

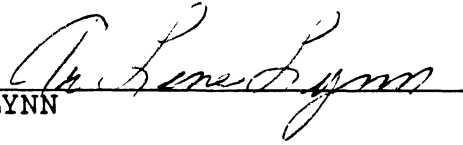
1. I am a resident of Salt Lake County, Utah,  
over the age of 18, and I served as a juror in the case during  
October and November, 1987.

2. In answering the Special Verdict questions  
during the jury deliberations, the jury members discussed at  
length what was required in order to answer "Yes" to Question  
No. 1. After sending out several questions to the judge and  
receiving his responses, we decided that each juror must answer  
"Yes" or "No" to the question as a whole, deciding on balance  
whether the answer to the question was generally "Yes" or "No,"  
even though there was much doubt expressed about the manifest

intent aspect of the question. On balance, I felt that the answer was "No," and answered accordingly.

3. In response to Special Interrogatories Nos. 2 and 4, I concluded that officers of Home Savings did know facts, at the time that the application questionnaire was completed, which should have been disclosed to Aetna Casualty & Surety in completing the application questionnaire. I was not confused by these questions, and I understood that the phrase "known by Home Savings" referred to facts known by Home Savings' officers at the time that the application questionnaire was completed.

DATED this 26 day of February, 1988.

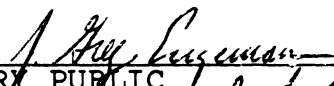
  
ARLENE LYNN  
Affiant

STATE OF UTAH                    )  
                                      ): ss.  
County of Salt Lake            )

On this 26 day of February, 1988, personally appeared before me Arlene Lynn, who being first duly sworn, states that she has read the foregoing instrument, knows the contents contained therein are true and correct, and signs the same as her own free act.

My Commission Expires:

2/18/92

  
NOTARY PUBLIC  
Residing at: Salt Lake City

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand delivered on this 26<sup>th</sup> day of February, 1988, to the following counsel of record:

Richard H. Nebeker  
Gary R. Howe  
P. Bryan Fishburn  
CALLISTER, DUNCAN & NEBEKER  
Suite 800 - Kennecott Building  
Salt Lake City, Utah 84133

  
\_\_\_\_\_

HOME/AL/LSD  
pm022488

Tab K



INSTRUCTION NO. 5.03

You are instructed as a matter of law that we are dealing with a security within the meaning of the Federal and State securities laws and therefore the Federal and State laws and regulations relating to securities apply.

You are further instructed that the Court has found as a matter of law that the AFCO Corporate Promissory Notes given to the Plaintiffs were securities.

You are further instructed that the Call Option Notes and loan documents executed by Plaintiffs in favor of Home Savings are not securities.

You may consider the acts of Home Savings in entering into the loan transactions with Plaintiffs and the documents prepared by Home in deciding whether Home Savings is liable to Plaintiffs for violations of the state and federal securities laws.

INSTRUCTION NO. 6.03

In order to recover on their claim that Home Savings was a primary violator of Section 12(2) of the Securities Act of 1933, plaintiffs must prove by a preponderance of evidence:

First: That Home Savings offered or sold the security involved here.

In this connection I instruct you as a matter of law that Plaintiffs' investment was and is a security. It is for you to determine therefore whether Home Savings was a seller of the security. A seller is any person or company whose conduct or assistance was a substantial motivating factor in causing the sale of the security without whose assistance the sale would not have occurred. The act of lending money, standing alone, does not constitute the sale of a security, but is a factor which may be considered along with other factors which you may find from the evidence.

Second: That Home Savings made a written or oral communication in connection with such sale that was untrue as to a material fact or omitted to state a material fact necessary in order to make statements that were made not misleading.

An omission or misrepresentation is material if a reasonably prudent person, situated in the same position as Plaintiffs, would have considered the undisclosed or misrepresented facts important in deciding whether to invest in the securities purchased. You must remember that the issue of materiality is an objective standard that would have been important to a reasonable man; not a subjective standard that would have been important to a particular plaintiff.

Third: that the Plaintiffs did not know of such untruth or omission.

If Plaintiffs establish the foregoing, they are entitled to recover on their Section 12(2) claim unless you further find from a preponderance of the evidence that Home Savings did not know, and in the exercise of reasonable care could not have known, of the existence of any omitted fact and that any stated fact was false.

210

INSTRUCTION NO. 202

Section 10 (b) of the Securities Exchange Act of 1934  
provides that:

It shall be unlawful for any person,  
directly or indirectly, by the use of any means  
or instrumentality of interstate commerce or of  
the mails, or of any facility of any national  
securities exchange . . .

(b) To use or employ, in connection with the  
purchase or sale of any security registered on a  
national securities exchange or any security not  
so registered, any manipulative or deceptive  
device or contrivance in contravention of such  
rules and regulations as the Commission may  
prescribe as necessary or appropriate in the  
public interest or for the protection of  
investors.

INSTRUCTION NO. 7.05

Rule 10b-5 provides, in material part, that:

It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails:

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

INSTRUCTION NO. 7.04

To prevail on their claim under Section 10(b) and Rule 10b-5, each Plaintiff must establish each of the following elements by a preponderance of the evidence:

1. Home used "any means or instrumentality of interstate commerce or the mails" in connection with the securities transaction involved in the case;
2. Home's conduct in connection with such transaction violated Section 10(b) and Rule 10b-5;
3. Home acted "knowingly" or "recklessly" as those terms are defined in these instructions;
4. Each Plaintiff "justifiably relied" upon Home's conduct as those terms are defined in these instructions; and
5. Each Plaintiff suffered damages as a result of Home's wrongful conduct.

The second element that each Plaintiff must establish is that Home conducted itself in a manner proscribed by Rule 10b-5. Included in Rule 10b-5's list of prohibited acts is the making of any untrue statement of material fact or the omission to state a material fact which would tend to mislead the prospective buyer of securities. In this instance, Plaintiffs allege both that Home misrepresented material facts and that Home failed to state material facts. To establish the second essential element of his claim under Rule 10b-5, each Plaintiff must prove that:

1. Home made one or more misrepresentations of fact or failed to state one or more facts which would be necessary to make other statements by Home not misleading to each Plaintiff; and
2. The misrepresentation or omission involved "material" facts.

A "misrepresentation" is a statement that is not true. In deciding whether a statement is untrue, you are to determine only whether the statement was untrue at the time it was made. This means that the truth or falsity of the statements upon which each Plaintiff-purchaser bases his claim is to be determined as of the time those statements were made. This does not mean that you are to disregard later events entirely. You may consider later events if they reflect on the truth or falsity of a statement as of the time it was made.

Because I instruct you about misrepresentations does not mean that I am commenting on the evidence. You may find that misrepresentations were made or that no representations at all were made to a particular Plaintiff.

For an omission to be the basis of a claim, Home must have a duty to make a disclosure to the particular Plaintiff.

The test for determining that a misrepresentation or omission is "material" is whether, under all the circumstances, a substantial likelihood exists that the misrepresentation or omitted fact would be significant to a reasonable investor in deciding to invest. In making this determination, you should

consider all the information available to each Plaintiff before his investment.

The third element that each Plaintiff must establish under Section 10(b) and Rule 10b-5 is that Home acted "knowingly" or "recklessly". To act "knowingly" means to act with the intent to deceive, manipulate or defraud Plaintiffs. To prove that Home acted "knowingly", Plaintiffs must establish that Home stated material facts which it knew to be false, or that Home knew material facts that it did not disclose although knowledge of those facts would be reasonably necessary to make Home's other statements not misleading. To act "recklessly" means that Home stated or failed to state material facts with substantial disregard of their truth or falsity. Recklessness requires more than an accident or mistake. It requires a gross departure from the practices of a prudent individual.

As the fourth element of their Section 10(b) and Rule 10b-5 claims, Plaintiffs must either show that they "relied" upon Home's alleged misrepresentations or that there were material omissions.

The Plaintiffs' burden of proving reliance is different when an omission of a material fact which makes a statement misleading is involved. If Home made a statement omitting a



material fact, Plaintiffs' burden of showing that they relied on something they did not know would be difficult. The law infers, therefore, that Plaintiffs would have relied upon facts which are shown to be material and are withheld. Accordingly, if you find, based on a preponderance of the evidence, that Home knew material facts and did not disclose those facts to Plaintiffs in connection with their loan and investment transactions and that Home had a duty to disclose those facts, then Home must demonstrate that even if it had disclosed those material facts, Plaintiffs would have made the same investment decision.

If Plaintiffs can show that Home misrepresented a fact, Home will not be liable unless Plaintiffs relied on that misrepresentation in deciding to take out their loans and to invest. If you find that Plaintiffs would have engaged in these transactions regardless of Home's representations, then Plaintiffs will have failed to establish reliance.

The fifth and last element that each Plaintiff must establish to succeed on his Section 10(b) and Rule 10b-5 claim is that he suffered injury or damage as a proximate result of Home's alleged misrepresentations or omissions. For damage to be the proximate result of a misrepresentation or omission, Plaintiffs must show that the misrepresentation or omission played a substantial part in bringing about or actually causing their damage.

INSTRUCTION NO. 8.01

210

Section 61-1-22(1) (a) of the Utah Uniform Securities Act provides that any person who offers or sells a security in violation of sections 3, 10 or 17 or the Act is liable to the purchaser of the security for the amount of consideration paid by the purchaser.

I will now explain these sections to you.

INSTRUCTION NO. 8.02

A "seller" of a security under the Utah Securities Act is any person or company whose conduct or assistance was a substantial motivating factor in causing the sale of the security, without whose assistance or participation the sale would not have occurred. The act of lending money, standing alone, does not constitute the sale of a security, but is a factor which may be considered along with other factors which you may find from the evidence.

INSTRUCTION NO. P.03

Section 61-1-3 of the Utah Securities Act provides that any person who offers or sells a security is liable when a sale of a security takes place through an agent or broker-dealer who is not registered with the Utah Securities Commission or exempt from registration.

If you find by a preponderance of evidence that Home engaged in the sale of the security to Plaintiff through an unregistered broker-dealer or agent who was not exempt, that plaintiff is entitled to recover.

INSTRUCTION NO. 8.04

Section 61-1-10(4) of the Utah Securities Act requires that a purchaser of a security be given the prospectus before or concurrently with one of the following events, whichever occurs first:

- (1) The first written offer by or for the issuer;
- (2) The confirmation of the sale by or for the purchaser;
- (3) Payment pursuant to the sale; or
- (4) Delivery of the security pursuant to any such sale.

If you find that a Plaintiff did not receive a complete prospectus in connection with their purchase of a security before or concurrently with the happening of whichever of the foregoing events occurred first, and that Home was a person who offered or sold the security, you should find for the Plaintiff on that claim.

INSTRUCTION NO. 8.05

Plaintiffs claim that an AFCO registration statement and prospectus filed with the Utah Securities Division did not contain certain information required by Section 61-1-10(4) of the Utah Securities Act.

Section 61-1-10(4) of the Utah Securities Act requires that a registration statement and the offering circular contain certain information about the company, its officers, its business and its finances. If the registration statement and the prospectus fail to contain the information required, then anyone buying the securities can recover against the company issuing the security or against any person who offers or sells the security. The statute requires the following information to be included in the prospectus or offering circular:

(1) The remuneration paid during the past twelve months and estimated to be paid during the next twelve months, directly or indirectly to each director and officer of the issuer and every person occupying a similar status by the issuer, together with all predecessors, parents, subsidiaries, and affiliates, to all those persons in the aggregate;

(2) The capitalization and long-term debt (on both a current and proforma basis) of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration (whether in the form of cash, physical assets, services, patents, good will, or anything else) for which the issuer or any subsidiary has issued any of its securities within the past two years or is obligated to issue any of its securities;

(3) The kind and amount of securities to be offered; the proposed offering price or the method by which it is to be computed; any variation therefrom at which any proportion of the offering is to be made to any person or class of persons other than the underwriters, with a specification of any such person or class; the basis upon which the offering is to be made if otherwise than for cash; the estimated aggregate underwriting and selling discounts or commissions and finders' fees or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of every underwriter and every recipient of a finder's fee; and,

(4) The estimated cash proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the amount to be used for each purpose; the order of priority in which the proceeds will be used for the purposes stated; the amounts of any funds to be raised from other sources to achieve the purposes stated; the sources of any such funds; and, if any part of the proceeds is to be used to acquire any property (including good will) otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons who have received commissions in connection with the acquisition, and the amounts of any such commissions and any other expense in connection with the acquisition (including the cost of borrowing money to finance the acquisition).

INSTRUCTION NO. 8.06

Section 61-1-17 of the Utah Code dealing with registration of securities with the Securities Division of the State of Utah provides:

(1) Neither the fact that an application for registration or a registration statement has been filed nor the fact that a person or security is effectively registered constitutes a finding by the Commission that any document filed under this act is true, complete and not misleading . . . (Such fact does not mean) that the Commission has passed in any way upon the merits or qualifications of, or recommended or given approval to, any person, security, or transaction.

(2) It is unlawful to make, or cause to be made, to any prospective purchaser, customer, or client any representation inconsistent with subsection (1).

Some of the Plaintiffs claim that the provisions of Section 61-1-17 were violated in that it was represented to them that the Utah Securities Commission had passed on, or approved, the merits of the registration statement or the securities sold to them.

If you find that Home was a person who offered or sold a security to a Plaintiff and that said Plaintiff was told that the Utah Securities Commission had passed on or approved the merits of the registration statement or the securities sold to that Plaintiff, that Plaintiff is entitled to recover on that claim.



INSTRUCTION NO. 8. 67

Section 61-1-22(1)(b) of the Utah Uniform Securities Act  
also provides that:

"Any person who

\* \* \*

offers, sells, or purchases a security by means of  
any untrue statement of a material fact or any  
omission to state a material fact necessary in  
order to make the statements made, in the light of  
the circumstances under which they were made, not  
misleading (the buyer not knowing of the untruth  
or omission), and who does not sustain the burden  
of proof that he did not know, and in the exercise  
of reasonable care could not have known, of the  
untruth or omission, is liable to the person . . .  
buying the security from him . . ."

INSTRUCTION NO. 8.68

In order to recover under Section 61-1-22(1)(b) a Plaintiff must prove:

First, that Home was a person who offered or sold the security.

Second, that Home made a written or oral communication that was untrue as to a material fact or omitted to state a material fact necessary in order to make statements that were made not misleading. Again, an omission or misrepresentation is material if a reasonably prudent person, situated in the same position as Plaintiffs, would have considered the undisclosed or misrepresented facts important in deciding whether to invest in the securities purchased. Thus, the test is an objective standard. It is not necessarily what a particular Plaintiff may have considered important.

Third, that the Plaintiff did not know of such untruth or omission.

11

INSTRUCTION NO. 13.01

We now turn to Plaintiffs' claim of secondary liability against Defendant for violations of the federal securities laws. Even if you find that Defendant was not primarily liable for violation of the federal securities laws that I have explained to you, you must consider whether it was secondarily liable.

Under a secondary liability theory, there must first be a primary violation of the securities laws. A primary violation means that a person directly engaged in conduct in violation of the securities law. Plaintiffs claim that AFCO and/or Grant Affleck directly violated Section 12(2) of the Securities Act of 1933, Section 10(b) of the Securities and Exchange Act of 1934, Rule 10b(5) and the Utah Securities Act.

If you find that there was a primary violation of the securities laws by AFCO and/or its agents, even though neither is a party to this action, you should further consider whether Defendant Home Savings is also liable for violation of the federal security laws under a theory of secondary liability.

If you find that AFCO and/or Grant Affleck directly violated Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b(5) you must consider whether Home Savings is liable under a theory of aiding and abetting the primary violator or as a controlling person or as being part of a conspiracy.

If you find that AFCO and/or Grant Affleck directly violated Section 12(2) of the Securities Act of 1933 and/or the Utah Securities Act you must consider only whether Home Savings is

liable under the two theories of secondary liability as a controlling person or as being part of a conspiracy. In other words, the secondary liability theory of aiding and abetting the primary violator applies only to the Section 10(b) and Rule 10b-5 alleged violations, but the controlling person and conspiracy theories apply to all three alleged primary violations.

I have already instructed you on the elements of conspiracy. You should apply those instructions here to determine whether Home Savings is a conspirator. I will now instruct you on aiding and abetting and on controlling persons.

INSTRUCTION NO. 13.12

Plaintiffs claim that Home is secondarily liable based upon its aiding and abetting violations of 10b-5. The elements of the wrongful act of aiding and abetting a violation of Section 10(b) and Rule 10b-5 are:

1. A violation of Section 10(b) and Rule 10b-5 by a primary violator who is aided and abetted by a person who has knowledge of a fraud involving the sale of a security as explained above, or who acts so recklessly that knowledge of the fraud may be imputed to him; and,
2. Either (a) has actively participated in the transaction in an effort to assist the violator in the fraud, or (b) has failed to disclose the fraud to the plaintiff in breach of a duty to disclose owing to the plaintiff. Standing alone, a lender-borrower relationship does not create such a duty, but such relationship may be considered in conjunction with other evidence in the case.

If you find that Home Savings aided and abetted, a violation of Section 10(b) and Rule 10b-5, then Plaintiffs are entitled to recover on that claim.

INSTRUCTION NO. 12.03

Section 12(2), Section 10(b), Rule 10b-5 and Section 61-1-22(B) of the Utah Securities Act all provide that a person who controls another who violates the provisions of those acts is just as liable as if he had violated the acts himself, unless he proves that he did not know and in the exercise of reasonable care could not have known of the existence of the facts constituting the violation. ...

"Control", "controlled person" and "controlling person" are terms that have been used in these instructions. In this regard you are instructed that control is the power to direct, or cause the direction of, the management and policies of another person whether that power is exercised directly or indirectly, whether by contract or otherwise. Control is determined not by the legal right to control, but by the realities of the situation.

Tab L

LYNN S. DAVIES (A0824)  
RUSSELL C. FERICKS (A3793)  
RICHARD L. KING (A4611)  
RICHARDS, BRANDT, MILLER  
& NELSON  
Attorneys for Defendant  
CSB Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Telephone: (801) 531-1777

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

|  |   |                         |
|--|---|-------------------------|
| HOME SAVINGS AND LOAN, a Utah corporation, | : |                         |
|  | : |                         |
|  | : |                         |
| Plaintiff,                                 | : |                         |
|  | : |                         |
| vs.  | : | AFFIDAVIT OF            |
|  | : | FRANCIS X. LEMUNYON     |
|  | : |                         |
| THE AETNA CASUALTY AND SURETY COMPANY,     | : | Civil No. C86-2257      |
|  | : |                         |
| Defendant.                                 | : | Judge Michael R. Murphy |
|  | : |                         |

---

STATE OF NEW JERSEY                    )  
  ) ss.  
County of Middlesex                    )

I, Francis X. LeMunyon, having been first duly sworn, do now affirm and represent as follows:

1. I am currently Vice President of The Surety Association of America, a non-profit association of insurance companies which provide surety and bonding coverage throughout the United States of America, and I have been an employee of the Association for 31 years and an officer for about 25 years.



2. Among its other authorized functions, The Surety Association of America drafts financial institution bonds and other policies for its members to use in extending insurance coverage to their clients.

3. In preparing financial institution bond forms, The Surety Association of America works closely with trade associations of other industries (i.e., the American Bankers Association, the U.S. League of Savings & Loan Associations and others) to draft documents and tailor coverage appropriate for use in particular industries.

4. Employee Dishonesty coverage for the savings and loan industry is provided through Standard Form No. 22, such as the policy issued on June 21, 1982, by Aetna Life & Casualty Company to Home Savings & Loan on bond No. 19 F 3041 BCA, a copy of which is attached hereto as Exhibit "A."

5. The Savings and Loan Blanket Bond, Standard Form No. 22, is analogous and nearly identical to the employee dishonesty coverage extended by members of The Surety Association of America to members of the banking industry on the Banker's Blanket Bond, Standard Form No. 24.

6. Standard Form 22, like Standard Form 24, is subject to riders which may limit, define, or expand coverage.

7. The trading loss exclusion rider attached to Exhibit A (SR 6030a) is a limitation on the coverage of the Savings and Loan Blanket Bond.

8. The language and function of the trading loss exclusion rider applies to both Standard Form 22 and Standard Form 24 and other financial institution bonds.

9. Trading exclusion riders evolved during the 1970's from the limitations and terms found for many years in financial institution bonds issued to stockbrokers.

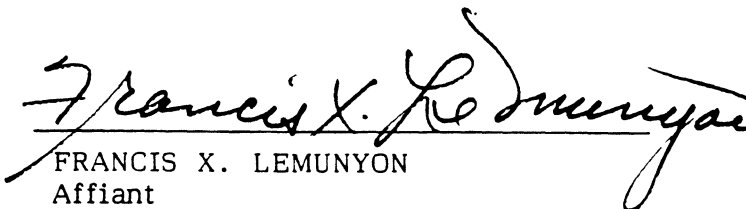
10. The trading loss exclusion was necessitated as members of the increasingly deregulated banking and savings and loan industries became involved in activities which subjected them to risks and losses not originally contemplated by underwriters and for which there had been no consideration in calculating an appropriate premium.

11. The trading exclusion definitely covers and refers to activities involving the sale, purchase, and trade of securities, and it pertains to losses resulting from either legal or illegal trading.

12. The trading exclusion rider functions as an affirmative limitation on policy coverage. The insured can consciously override this limitation by purchasing an exemption to the exclusion and paying appropriately higher premiums.

13. Based upon my examination of Exhibit A, I have found no indication that Home Savings & Loan has purchased extended coverage for losses resulting from trading in securities.

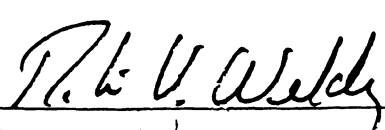
DATED this 27th day of July, 1987.

  
FRANCIS X. LEMUNYON  
Affiant

SUBSCRIBED AND SWORN to before me this 27th day of July, 1987.

My Commission Expires:

**ROBIN V. WELDY**  
Notary Public of New Jersey  
My Commission Expires August 1, 1989

  
NOTARY PUBLIC  
Residing at 7 Kyte Place  
Fanwood, N.J.

Tab M

AUG 19 1987

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT 3/14/2008  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
Deputy Clerk

The rider in pertinent part excludes coverage "for any loss resulting directly or indirectly from trading. . . " (Emphasis added). While no reference is made to trading in securities, the court assumes for the purpose of this motion that no reasonable person could believe that the rider has reference to anything but securities. Defendant's position is necessarily and expressly that plaintiff's alleged loss arises out of the judgment in Armitage, et al v. Home Savings and Loan Association, which was based on a jury finding against Home for fraud "involved in the sale or exchange of securities." The nature of the evidence, jury instructions and verdict in Armitage necessarily requires

the nomenclature "involved in the sale or exchange of securities" to characterize Home's conduct and the jury's findings. Such "involvement," however, does not necessarily equate to "trading" in securities as that term is used in rider SR 6030a.

The jury's affirmative answer to question A.1. in the verdict form necessarily required a finding that Home offered or sold a security. Jury instruction 6.03, however, required such a finding if Home's "assistance was a substantial motivating factor in causing the sale of a security. . . ." Such a finding is not necessarily the equivalent of a finding that Home or any employee was "trading" in securities. These same concepts apply to the jury finding under Section 61-1-22(1)(a), Utah Code Ann., pursuant to jury instruction Nos. 8.01, 8.02, 8.03, 8.07 and 8.08, and recorded in response to question C.1. in the verdict form. Under these particular securities claims, if Home facilitated the sale of a security, it was itself a seller. Facilitation of a sale may constitute a sale under various securities statutes, but it does not necessarily constitute trading in securities as that term is used in rider SR 6030a.

The jury finding of primary liability under Section 10(b) of the 1934 Act and Rule 10b-5 did not require a finding that Home was a seller of a security. This finding was premised on an inherent finding of the proscribed acts "in connection with the purchase or sale of any security." Such a finding is not

necessarily the equivalent of a finding that Home traded securities.

The undisputed facts submitted in support of defendant's motion establish that trading in securities, if any, occurred at the level between AFCO and the investor. These same facts do not, however, establish as a matter of law that Home was trading in securities. The problem perceived by the court in the context of a summary judgment motion is that the term "trading" is inherently ambiguous, meaning different things to different people in different contexts. The affidavit of Francis LeMunyon does not eliminate the ambiguity in the context of the undisputed adjudicated facts in Armitage. Consequently, rider SR 6030 a must be construed in favor of the insured and summary judgment is therefore inappropriate.

This minute entry shall constitute the Order denying defendant's motion.

Dated this 19<sup>th</sup> day of August, 1987.

51  
MICHAEL R. MURPHY  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 9th day of August, 1987:

Gary R. Howe  
P. Bryan Fishburn  
Attorneys for Plaintiff  
Suite 800, Kennecott Bldg.  
Salt Lake City, Utah 84133

Lynn S. Davies  
Russell C. Fericks  
Richard L. King  
Attorneys for Defendant  
50 S. Main, Suite 700  
P.O. Box 2465  
Salt Lake City, Utah 84110

Mark Bille

Tab N



# The Surety Association of America

100 WOOD AVE. S., ISELIN, NEW JERSEY 08830 (201) 494-7600

LLOYD PROVOST  
President

FEDERAL EXPRESS

July 27, 1987

Russell C. Fericks, Esq.  
Richards, Brandt, Miller & Nelson  
CSB Tower  
50 South Main - Suite 700  
P.O. Box 2465  
Salt Lake City, Utah 84110-2465

Re: Home Savings & Loan v. Aetna  
Your File No. 6724-596

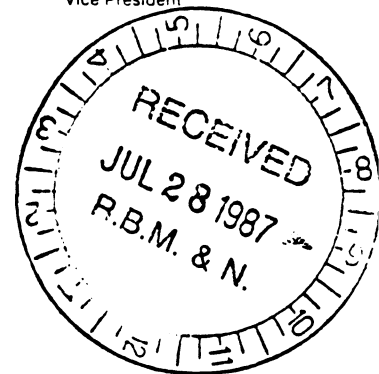
Fidelity Department  
FRANCIS X. LeMUNYON  
Vice President

ROBIN V. WELDY  
Director - Legal

Actuarial Department  
ROBERT G. HEPBURN, JR.  
Vice President

GAETON SACCOCCIO  
Senior Statistician

Surety Department  
DENNIS E. WINE  
Vice President



Dear Mr. Fericks:

Here's a copy of the affidavit you requested concerning the captioned case. As I indicated to you over the phone, the changes I made in the affidavit are more of an editorial nature than of substance.

When the Trading Loss Exclusion Rider was originally promulgated in 1977, the savings and loan industry did not indicate a need for a buy back. In 1979 they apparently changed their mind and the coverage was made available to them by rider for attachment to the Savings and Loan Blanket Bond, Standard Form No. 22. I am enclosing a copy of our filing letter of October 2, 1979 to the Utah Insurance Department evidencing this change.

If you have any further questions, please give me a call.

Very truly yours,

*Francis X. LeMunyon*  
Francis X. LeMunyon

FXL/ik

Encl.

210

201-7  
WFO

# The Surety Association of America

**RECEIVED**

100 WOOD AVE. S., ISELIN, NEW JERSEY 08830 (201) 494-7600  
ELVER T. PEARSON, GENERAL MANAGER

OCT - 9 1979  
UTAH STATE  
INSURANCE DEPT.

SURETY ASSOCIATION OF AMERICA  
October 2, 1979  
TIERNEY

SAVINGS AND LOAN BLANKET BOND R 15 1979  
STANDARD FORM NO. 22  
RATE MANUAL PAGES FI-34, 34(a), 34(b)

RIDER SR-6035 TO ADD  
TRADING COVERAGE

Hon. Roger Day (2)  
Comptroller of Insurance  
30 South 500 East  
Salt Lake City, Utah 84102

**FILED**  
OCT 11 1979  
STATE OF UTAH  
INSURANCE DEPARTMENT

Surety Department  
QUENTIN W. LERCH  
Secretary  
LLOYD PROVOST  
Secretary-Surety Rating

Fidelity Department  
FRANCIS X. LEMUNYON  
Secretary  
ROBIN V. WELDY  
Assistant Secretary Attorney

Actuarial Department  
ROBERT G. HEPBURN, JR.  
Assistant Secretary  
GAETON SACCOCCIO  
Statistician

Membership Services  
ALICE TIERNEY  
Assistant Secretary

| <u>RATE FILING</u>                | <u>FORM FILING</u> |
|-----------------------------------|--------------------|
| RELEASE DATE: NOVEMBER 19, 1979   |                    |
| EFFECTIVE DATE: NOVEMBER 21, 1979 |                    |

Dear Sir:

We enclose printers proof copies of the Rate Manual Pages as captioned which are revised to become effective November 21, 1979.

A copy of the Rider SR-6035 providing trading loss coverage in full or partial amount for use with Savings and Loan Blanket Bond, Standard Form No. 22 is also attached.

In 1977, when the Trading Loss Exclusion Rider SR-6030a was adopted the United States League of Savings Associations, the trade association for savings and loan associations felt that there was no need for trading coverage. The League now indicates a need for this coverage due to recent involvement in government securities.

The rate we have established for Savings and loan associations as indicated on the attached rate pages are the same as the rate for comparable coverage for commercial banks.

Since this is a new coverage for this class of insured, there is no prior experience available, thus the charge is based on informed judgement.

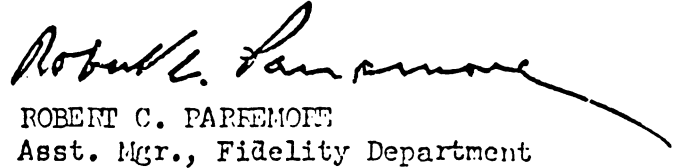
Rider SR-6035 is patterned after the Trading Loss Rider for use with Bankers Blanket Bond, Standard Form No. 24.

We respectfully request your approval of this filing, if required.

16

This letter is being sent in duplicate together with a stamped, self-addressed envelope for your convenience in reply.

Very truly yours,

  
ROBERT C. PARFEMOFF  
Asst. Mgr., Fidelity Department

FCF:pd  
Encl.

P.S. This submission represents a combined countrywide Fate and Form Filing.  
As respects those states or jurisdictions which do not require Form Filings,  
this submission is to be considered a Fate Filing only.

Tab O

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-oo0oo-

HOME SAVINGS AND LOAN  
ASSOCIATION, a Utan  
corporation,

Plaintiff,

vs.

THE AETNA CASUALTY AND  
SURETY COMPANY,

Defendant.

Civil No. C36-2257

REPORTER'S TRANSCRIPT

November 4, 1987  
(Record, Page 2914)

BEFORE THE HONORABLE MICHAEL R. MURPHY  
District Court Judge

A P P E A R A N C E S:

For the Plaintiff:

Gary R. Howe  
P. Bryan Fishburn  
Wallace R. Bennett  
CALLISTER, DUNCAN & NEBEKER  
Suite 800 Kennecott Building  
10 East South Temple  
Salt Lake City, Utan 84100

For the Defendant:

Lynn S. Davies  
Russell C. Fericks  
RICHARDS, BRANDT, MILLER &  
NELSON  
CSB Tower Suite 700  
50 South Main Street  
Salt Lake City, Utah 84110

1 A We generally would order credit reports  
2 on everything. I imagine we had credit reports.

3 Q Did it involve inaccuracies of financial  
4 statements that were obtained?

5 A It may have involved unaudited financial  
6 statements on companies which generally in the secondary  
7 market they want those audited.

8 Q What other inadequate documentation was  
9 there, Bill?

10 A Well, I'm not so sure it's as much  
11 documentation as again, the types of loans that just  
12 weren't sellable.

13 Q Well, what were these loans involved  
14 with? Were some of them people that Fred and Howard  
15 knew?

16 A Yes. Usually customers of the bank.

17 Q People they were familiar with?

18 A Yes.

19 Q Friends.

20 A Yes.

21 Q Let's talk about quickly what happened  
22 here with this AFCO loan. The first meeting you had  
23 with Grant Affleck was in Fred Smolka's office, and  
24 you and Fred were present?

25 A Right.

~~Bill Cox~~

1 Q And Affleck talked about a \$300,000 loan  
2 to cover an immediate cash flow problem?

3 A Yes.

4 Q And that was a loan from Home Savings  
5 to AFCO?

6 A Right.

7 Q And then there was a \$3 million proposal  
8 for second mortgages to people who were going to invest  
9 in AFCO; right?

10 A Right.

11 Q And Affleck proposed to pay those back  
12 to Home Savings on behalf of the borrowers; right?

13 A Well, he indicated that that's how it  
14 was being done with other lending institutions.

15 Q That was how it had been done on \$9 million  
16 worth of them at other lending institutions; right?

17 A Yes.

18 Q And that raised a red flag for you?

19 A Yes.

20 Q You didn't like that idea because it  
21 put Home Savings at risk, or Home Savings' money?

22 A It increased the credit risk yes.

23 Q Increased the credit risk; right?

24 A Right.

25 Q So that's what the Wallace Woodbury letters,

1 Exhibits 89 and 90, were all about?

2 A In relation to --

3 Q To making sure that the borrower knew  
4 they had to pay the loan back to Home Savings?

5 A Yes.

6 Q Now, all these loans involved a promissory  
7 note, didn't they?

8 A Yes.

9 Q Isn't a promissory note something that  
10 says, "I promise to pay the money back"?

11 A Yes.

12 Q So Wallace Woodbury was doing what with  
13 the promissory note, reaffirming it?

14 A Yes.

15 Q You had never used a letter like that  
16 to reaffirm a promissory note in any other transaction  
17 had you?

18 A No.

19 Q So then you had the second meeting.  
20 The second meeting was a trip to Glenmoor village to  
21 look at the collateral for the \$300,000 loan; right?

22 A Yes.

23 Q And that was Bill Cox, Fred Smolka and  
24 Howard Bradshaw?

25 A Yes.



1 Q The Richards Woodbury group was not represented  
2 in that trip, were they?

3 A No.

4 Q And you looked at the collateral and  
5 said that it wouldn't support a \$300,000 loan. You  
6 called Grant Affleck and said, "It won't do it." And  
7 the next thing you know, Fred Smolka called you on the  
8 phone; right?

9 A Yes.

10 Q And tells you "do it up for \$100,000"?

11 A Right

12 Q So you take the information from Fred  
13 Smolka over the phone and draft up Exhibit 11. Would  
14 you look at it. I beg your pardon, Bill. It is Exhibit  
15 No. 10. You drafted that document up based upon what  
16 Fred Smolka told you over the phone; right?

17 A That's right.

18 Q And by the time you got around to doing  
19 that Grant Affleck had arrived at your office.

20 A Right. That and Exhibit 11.

21 Q You did Exhibit 11 at the same time?

22 A Yes.

23 Q Also according to Fred Smolka's instructions?

24 A Yes.

25 Q And then you went ahead and signed the

1 document; right?

2 A Yes.

3 Q So that was a commitment, wasn't it?

4 A Yes.

5 Q And when you signed that document, Exhibit  
6 10, was Home Savings committed to loan \$100,000 to AFCO  
7 on the basis of the terms of that letter?

8 A Yes.

9 Q And then you turned around and you told  
10 Larry Glad to go ahead and prepare the closing documents  
11 for that loan?

12 A Yes.

13 Q And he did it and it was done; right?

14 A Yes.

15 Q You didn't go out and get any extra  
16 appraisals on that Glenmoor Village property, did you?

17 A No, I didn't.

18 Q You didn't go out and check with any of  
19 the creditors of AFCO to get any credit background check,  
20 did you?

21 A I did not.

22 Q You didn't go out and do a credit report  
23 on AFCO, did you?

24 A I did not, no.

25 Q And do you know if Howard or Fred did?

1           A     I know Howard was to make the contact  
2 with Deseret Federal who had the construction loan to  
3 see if they were current.

4           Q     He was supposed to; right?

5           A     Yes.

6           Q     Do you know if he ever did that?

7           A     I assume he did.

8           Q     Okay. Bill, just give me a little reminder  
9 here. Isn't it important when you are doing a loan to  
10 check on the collateral? Isn't that an important aspect?

11          A     Yes.

12          Q     You check on the credit history of the  
13 borrower; right?

14          A     Yes.

15          Q     And you check on their capacity to repay;  
16 right?

17          A     Yes. Unless it is a collateral loan,  
18 and then you look at the project to pay off the loan.

19          Q     So there is such a thing as a collateral  
20 loan that is based upon no information about the capacity  
21 to pay?

22          A     Well, you know, income property loans  
23 are generally repaid from the income of the project.  
24 Or commercial loans. A spec construction loan, like  
25 these loans were, half the source of repayment comes

1 from the sale of the units.

2 Q So Home Savings was going to rely upon  
3 the sale of that collateral to pay itself back on the  
4 AFCO loan?

5 A Yes.

6 Q And that's called a collateral loan?

7 A Yes. That's what I assumed had been agreed  
8 upon.

9 Q Home Savings wasn't looking to AFCO's  
10 general financial health to pay it back, was it?

11 A I wasn't involved in the final negotiations,  
12 so I assume that the decision that had been made was  
13 based on a collateral loan basis.

14 Q Who was involved in the final decision?

15 A Well, Fred and Howard. And when Fred  
16 called me he indicated that he had talked to Orrin  
17 Woodbury and got approval from him.

18 Q He had talked to Orrin Woodbury here.

19 A Yes.

20 Q He hadn't talked to Frank Richards, had  
21 he?

22 A Frank Richards was out of town.

23 Q So it didn't make any sense to check into  
24 AFCO's background and their ability to pay, did it?

25 A I didn't know what had to be done at that

1 point in time as far as checking those things out.

2 Q You hadn't done it?

3 A I had not done it.

4 Q And this occurred fairly soon after you  
5 got back from the Glenmoor Village property; right?

6 A Couple of days.

7 Q Is this an example of one of the kinds  
8 of loans that couldn't be sold on the secondary market,  
9 this AFCO \$100,000 loan?

10 A Yes.

11 Q It wasn't documented enough to sell on  
12 the secondary market, was it?

13 A Right.

14 Q Fred and Howard cooked that up and they  
15 approved it, didn't they?

16 A It was my understanding.

17 MR. FISHBURN Objection to the form of  
18 the question, Your Honor.

19 THE COURT: Overruled. You may answer.

20 Q (By Mr. Fericks) Fred gave you the terms  
21 of the loan right there on the phone?

22 A Yes.

23 Q And Fred told you it was approved; right?

24 A Yes.

25 Q You weren't involved in voting to approve

1 it, were you?

2 A No.

3 Q Was Larry Glad?

4 A Not to my knowledge.

5 MR. FERICKS: Your Honor, this is a good  
6 place to stop.

7 THE COURT: All right. We are going to  
8 start again tomorrow morning at 9:00 o'clock a.m. Any  
9 problem with that? All right. Then I see no reason  
10 why we can't start promptly.

11 Remember the admonition of the court. Do not  
12 discuss this matter with anyone, including among yourselves.  
13 Do not form or express any opinions or conclusions, and  
14 we'll see you at 9:00 a.m.

15 (Whereupon, court was in evening recess at  
16 5:05 p.m.)

17 \* \* \*

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IN THE THIRD JUDICIAL DISTRICT COURT  
 IN AND FOR SALT LAKE COUNTY  
 STATE OF UTAH

----- :  
 HOME SAVINGS & LOAN, :

Plaintiff, :

vs. : C-86-2257

AETNA INSURANCE COMPANY, :

Defendant. :  
 -----

TRANSCRIPT OF PROCEEDINGS

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 APPEARANCES:

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Date: Thursday, November 5, 1987 (record, page 2905)

1 back their loan, he was going to give them a car or  
2 some kind of a fund to send their children on a  
3 mission.

4 A You are saying I testified to that?

5

6 MR. FISHBURN: Your Honor, I object. The  
7 question assumes that testimony. It has not been  
8 offered into evidence at this point.

9

10 Q Didn't you understand that Grant Affleck was  
11 going to pay back their loan for them?

12 ~~Bill Cox~~ A I understood that he was going to pay them  
13 back, yes, but I knew nothing about cars. I have  
14 never testified about cars.

15 Q Okay. Again, make sure that I am clear in  
16 the answer that I get. He was going to pay back their  
17 loan for them, and then didn't you testify that you  
18 also assumed he was going to give them something on  
19 top of that; although you didn't know what it was  
20 going to be.

21 A That's what Franklin Richards brought up in a  
22 board meeting.

23 Q So Grant Affleck was not only going to have  
24 to pay these nineteen and a half, eighteen, nineteen  
25 and a quarter percent loans, but he was going to do



1 something over and above that, right?

2 A Yes, yes, right.

3 Q So the investment involved a return of  
4 upwards of 20 percent, maybe more, based upon that,  
5 right?

6 A Right.

7 Q Pretty good rate of return, right?

8 A Very good.

9 Q You had some investments during that year,  
10 didn't you? Didn't you have some certificates of  
11 deposit or something?

12 A I had a two-year certificate at Home Savings.

13 Q What was the rate on that?

14 A It was an insured deposit at 16.55 percent,  
15 as I recall.

16 Q Well, Bill, why didn't you invest in the AFCO  
17 thing because it was a much, much better rate of  
18 return.

19 A No one ever asked me.

20 Q This storm was going on around you and you  
21 didn't get asked?

22

23 MR. FISHBURN: I object to the form of the  
24 question, Your Honor.

25 THE COURT: Sustained.

1 the purchase of the loan, I guess Home Savings  
2 wouldn't have had to hold their loan in its portfolio  
3 and suffer the interest, right?

4 A That's right.

5 Q Okay. Let's take a look at exhibit No. 26,  
6 which is the flip chart presentation that Fred Smolka  
7 testified about, which is what Grant Affleck gave  
8 them, gave you and Fred when he came in the first  
9 time.

10 Do you have that in front of you?

11 ~~Bill Cox~~ A I do.

12 Q Okay. Now, do you recognize this document  
13 from when Grant Affleck came into the Home Savings  
14 office and talked to you and Fred Smolka?

15 A Yes.

16 Q And it has got a picture of Paul Dunn in the  
17 upper right-hand corner on page two.

18 A Yes.

19 Q And it has got a picture of the AFCO Board of  
20 Directors in there. You saw that, right?

21 A Yes.

22 Q And then I think we also talked about some of  
23 the other pages, the pictures and various projections  
24 and things. Somewhere in here is a picture of Donny  
25 and Marie Osmond.

1 Do you recall that?

2 A I don't know if I recall.

3 Q That didn't impress Fred very much. Did it  
4 impress you?

5 A I think Donny and Marie are great.

6 Q I do too. I would be the last one to  
7 criticize Donny and Marie Osmond.

8 don't know what they know about real  
9 estate, do you?

10 A I don't know.

11 Q Take a look back here towards the end, about  
12 the last six pages, there is a page called "Credit and  
13 Client References."

14 Can you find that page?

15 A Yes.

16 Q Now, did this page -- did you get to see this  
17 page when Grant Affleck was in?

18 A I don't recall it. He didn't leave the  
19 brochure with us.

20 Q And you don't recall him showing it to you?

21 A No.

22 Q Didn't he tell you that you could get  
23 references at Deseret Federal Savings, Zions First  
24 National Bank, Prudential, State Federal Savings and  
25 Loan and Union Bank?

1       A     I only recall him talking about it in the  
2 context of the three million dollar loans, mentioning  
3 that they had already done eight million dollars with  
4 other institutions, but I don't remember specific  
5 institutions being mentioned.

6       Q     Okay. So he had done eight million dollars  
7 worth of these second mortgage investor loans at other  
8 institutions when he came into Home Savings right  
9 around the 1st of November, 1981?

10      A     Right.

11      Q     Did you call any of those other institutions  
12 to find out what their experience was?

13      A     I did not, no. At that time he didn't even  
14 tell us who they were.

15      Q     And you didn't ask?

16      A     We were just listening to a proposal in that  
17 meeting.

18      Q     Wasn't it peculiar you hadn't done any second  
19 mortgage investor loans up to that point in time? It  
20 was a new line of business, wasn't it?

21      A     We thought it was going to be regular second  
22 mortgage loans.

23      Q     Don't go too fast for me. Larry Glad came in  
24 the first time and asked you if you could do these  
25 second mortgage packages, and you said, "We can't do

1    that yet, there is no Fannie Mae approval yet. There  
2    is no forms," right?

3           A     Right.

4           Q     And he came in again and he asked you again,  
5    and by that time the Fannie Mae had been done and so  
6    Home was ready to start doing that kind of business,  
7    is that right?

8           A     That's right.

9           Q     The only other second mortgages you had done  
10   up to that point were for people that were friends of  
11   the bank, right?

12          A     Yes.

13          Q     Five to maybe ten, you say?

14          A     Right.

15          Q     And he had done eight million dollars worth  
16   of these things at other institutions and you didn't  
17   call them?

18          A     No.

19          Q     Take a look at the last page there of exhibit  
20   No. 26. That's a Certificate of Registration with  
21   AFCO Enterprises and the Utah State Securities  
22   Commission. It indicates down here eight million  
23   dollars aggregate amount of promissory notes at five  
24   thousand dollars per note. Issue with no commission.  
25   Sold by officers, Grant Affleck, Michael D. Wright,

1 Raymond Lambert, Steven Neal Olpin, Rod Goodman.

2 Now, did you see that document when Grant  
3 Affleck came in?

4 A No.

5 Q You didn't know anything about the  
6 registration of this thing with the Securities  
7 Commission?

8 A No.

9 Q Did you ever find out that Grant Affleck had  
10 registered this thing March 31, 1981 with the State  
11 Securities Commission?

12

13 MR. FISHBURN: Your Honor, I object to the  
14 form of the question. I don't think it is clear what  
15 "this thing" is.

16

17 Q Excuse me. It indicates the sale of  
18 securities by Grant Affleck, isn't that what that  
19 document there on the last page indicates?

20 A Right. I did not become familiar with this  
21 form at all until the first trial.

22 Q Okay. Now, you didn't get a copy of exhibit  
23 No. 26 when Grant was in, did you?

24 A No.

25 Q You didn't get a copy of a financial

1 statement, did you?

2 A I think he may have given an unaudited  
3 statement to Fred.

4 Q Fred got an unaudited statement? What was  
5 the date of that?

6 A I don't recall.

7 Q Did you look at it?

8 A I didn't look at it.

9 Q When Grant came in, didn't he also talk about  
10 the sales projections, how he was going to pay this  
11 loan back with sales of time share units at Sherwood  
12 Hills?

13 A Yes.

14 Q And he also was going to pay it back with the  
15 sale of units at Glenmoor Village?

16 A Right.

17 Q Did you do anything to check up on those  
18 sales projections?

19 A It was just numbers that he was throwing out.  
20 I don't recall any written projections that he gave us  
21 to review.

22 Q But anyway, you weren't relying upon AFCO's  
23 income to repay that loan, it was a collateral loan.

24 A That's what I assumed when they reduced it to  
25 a hundred thousand dollars.

1           Q     So what difference did it make what AFCO was  
2 making other than that collateral was worth at  
3 Glenmoor Village?

4           A     He felt like we had sufficient collateral for  
5 the repayment of the loan.

6           Q     Okay. Grant did talk about going to Japan  
7 and having a proposal for 15 million dollars of joint  
8 venture money, didn't he?

9           A     Yes.

10          Q     Hadn't he gone with Lt. Governor David Monson  
11 or something?

12          A     He went on one of those excursions they take  
13 every year.

14          Q     I think the press call it a junket, don't  
15 they? Okay.

16                     Yesterday, Bill, we talked about exhibits  
17 number 56 and 57. Would you take a look at those?

18          A     Okay.

19          Q     Now, again, I am trying to be cognizant of  
20 the time here so let me help. Number 56 is the letter  
21 that is addressed to Larry Glad from Grant Affleck  
22 with Larry Glad having signed at the bottom, "Larry  
23 Glad, Home Savings and Loan."

24                     It is signed, dated and agreed upon, right?

25          A     Right.



1 Q And you have never seen that letter before  
2 the trial?

3 A Right.

4 Q So Larry Glad didn't have authority to agree  
5 upon anything on behalf of Home Savings, did he?

6 A No.

7 Q Well, just read the letter to the jury, will  
8 you, please, quickly and -- not quickly, because it is  
9 hard to understand when you go too quickly, but please  
10 read it.

11 A Addressed to Mr. Larry Glad, Home Savings and  
12 Loan, 130 West, dated November 2nd, 1982.

13 "Dear Mr. Glad. Please accept this letter as  
14 an outline of our request that we have already  
15 discussed with you. Let this letter also act as a  
16 letter of understanding and agreement between AFCO  
17 Enterprises and Home Savings and Loan.

18 "We propose that you fund up to three million  
19 dollars in our investor second mortgage loans at  
20 an 80 percent to 90 percent value rating. We will  
21 supply compensating balances in the form of  
22 Certificates of Deposits for a period of no less  
23 than one year.

24 "We further agree to pay fees to the  
25 secondary market lenders who subsequently purchase

1 second mortgage loans on a long-term basis from  
2 Home.

3 "We reserve the right to reject any  
4 unreasonable commitment, and origination buy-off  
5 will be paid to Home Savings for a cost incurred  
6 while underwriting the second mortgage loans."  
7 There is a word missing there, something under the  
8 rate of interest charged will be two percent above  
9 the rate paid on Certificates of Deposit.

10 "Also, the consideration of AFCO  
11 repurchasing the second mortgage credits at the  
12 end of the one-year term of Certificates of  
13 Deposit is acceptable. However, should an  
14 additional one-year term of Certificate of Deposit  
15 be offered, the same conditions of this agreement  
16 would apply upon approval of both parties.

17 Sincerely, Grant C. Affleck," signed, dated  
18 and agreed upon, "Larry Glad, Home Savings and  
19 Loan."

20 Q When you read that letter yesterday, were you  
21 criticizing Larry Glad for having signed this letter?  
22 Did you mean to imply that?

23 A Did I read this letter yesterday?

24 Q You talked about it yesterday.

25 A I think I was asked if I had seen it before

1 and that's all.

2 Q It was admitted into evidence on the basis of  
3 your testimony.

4  
5 MR. FISHBURN: Your Honor, I don't think  
6 that's an accurate characterization at all. It was  
7 admitted through questioning of Fred Smolka, and my  
8 questioning to Bill was had he seen it and he said no.  
9 And my question to Bill --

10 THE COURT: That's my recollection too.

11 MR. FERICKS: I apologize.

12

13 Q You hadn't seen it, right?

14 A That's right.

15 Q Just as a little exercise, why don't you look  
16 back at exhibit No. 11. The jury has this in their  
17 notebook. Now, that's the letter that you wrote on  
18 November 10, 1981 after Fred Smolka called you on the  
19 telephone and said we are going forward with the Grant  
20 Affleck proposals, right?

21 A That's correct.

22 Q And you wrote those terms up on the basis of  
23 what Fred Smolka told you over the phone?

24 A That's right.

25 Q After you wrote them up, you called Fred

1 Smolka back on the telephone and you read these terms  
2 back to Fred.

3 A Right, that's right.

4 Q o you would be sure that they were right?

5 A Yes.

6 Q Aren't the terms identical? Loan to value  
7 ratio, paragraph three, 80 percent?

8 A Grant had proposed 80 to 90 percent.

9 Q There is a three percent commitment fee there  
10 in paragraph ten. Grant had agreed to pay a  
11 commitment fee, right?

12 A Right.

13 Q Total amount of the loans in No. 11 is three  
14 million dollars, three million dollars on the letter  
15 from November 2nd, right?

16 A Right.

17 Q Now, Bill, I think that -- let me rephrase  
18 that. Was Larry Glad kind of a braggart?

19 A He tended along those lines, yeah.

20 Q He sort of had an inflated opinion of  
21 himself, didn't he?

22 A I don't know what his opinion of himself was.

23 Q I think you do, Bill. Take a look again at  
24 your December 8, 1986 deposition at page 117. Would  
25 you read the sentence that starts at page -- line 9

1 as there because I couldn't remember having seen it  
2 on the penciled copy, but it didn't really concern me  
3 because the refinancer can pay anybody he wants to  
4 pay.

5 Q After Home Savings loaned the money to Grant  
6 Affleck, it was Grant Affleck's money.

7 ~~Bill Cox~~ A That's right.

8 Q Grant Affleck could do whatever he wanted to  
9 with his money?

10 A That's right.

11 Q And Home Savings didn't care or control what  
12 the borrower did with their money, did it?

13 A That's right.

14 Q And it didn't care or control what the AFCO  
15 investor borrowers did with their money, did it?

16 A That's right.

17 Q And the AFCO investors were treated the same  
18 way, right?

19 A They had the right to invest in what they  
20 decided to invest in, you bet.

21 Q In the November 18, 1981 Board of Director's  
22 meeting when Franklin Richards and David Richards  
23 expressed concerns about these people borrowing money  
24 and investing it in AFCO, didn't Wallace Woodbury, the  
25 general counsel for Home Savings, speak up and say

1 Home doesn't have any business worrying about what  
2 these people do with their money?

3 A He made some comments along the line that we  
4 couldn't basically dictate to people how they -- how  
5 to use their proceeds.

6 Q And then he wrote two letters, exhibits  
7 number 89 and 90, which says, it is your money, we  
8 can't tell you or advise you how to use it, right?

9 A Right.

10 Q Take a look at exhibit No. 6 quickly, if you  
11 will. Now, that's another letter from Grant Affleck  
12 to Larry Glad that you had not seen before today,  
13 right?

14 A I saw it at the previous trial.

15 Q Before the previous trial?

16 A Right.

17 Q Just let me read the second paragraph, you  
18 follow along, tell me if I read it correctly.

19 "Because of a temporary and unexpected cash  
20 flow problem, we have a need to inject cash of  
21 three hundred thousand dollars. The terms  
22 requested are three hundred thousand dollars for  
23 one year. The collateral is a second trust deed  
24 position against five condos and an office  
25 building at Glenmoor Village. The appraised value

1 is \$240,000 for the office building and \$475,000  
2 for the five condos."

3 Did I read that correctly?

4 A Yes.

5 Q That's what Grant Affleck told you and Fred  
6 Smolka when he came in, right?

7 A Yes. As far as the unexpected -- the  
8 problems while he was in Japan caused some unexpected  
9 cash flows, and they were requesting three hundred  
10 thousand dollars.

11 Q And then exhibit No. 7, if you take a look at  
12 that, that's just a letter on November 5, 1981 from  
13 Grant Affleck to Larry Glad identifying the Glenmoor  
14 Village collateral, isn't it?

15 A Yes.

16 Q Nothing different than what Grant Affleck  
17 told you and Fred and Howard Bradshaw when you went  
18 out on the second meeting to look at the Glenmoor  
19 collateral, right?

20 A Right.

21 Q Bill, would you take a look at exhibit No. 13  
22 which is the AFCO Enterprises Credit Report. Do you  
23 have that there?

24 A Yes.

25 Q Now, as I recall, you testified that you did

1 not see this document before the loan to AFCO closed,  
2 right?

3 A Right.

4 Q And the date on this at the top is -- it goes  
5 through November 10, 1981, right?

6 A Right.

7 Q Now, in your experience as a banker, does  
8 that mean the information in there is current to  
9 November 10, 1981?

10 A Yes.

11 Q So it could take a credit agency a little bit  
12 of time to get that current information, put it in  
13 their report and give it to a bank, wouldn't it?

14 A It depends on the number of inquiries they  
15 have had. If they have had a recent inquiry, it could  
16 already be done. It normally would take them a short  
17 period of time.

18 Q A few days, a week, maybe?

19 A Depends on the volume of loans going on at  
20 the time.

21 Q Okay. This document came to your attention  
22 after the AFCO loan closed, didn't it?

23 A Yes.

24 Q In fact, you saw this document when you  
25 reviewed the AFCO loan file a couple of weeks after



1 November 10, 1981, didn't you?

2 A I don't know if I reviewed the credit report  
3 or just the closing statement.

4 Q You didn't see this document then?

5 A I don't know if I went through the file. I  
6 was getting ready for shipping and just opened it up  
7 and saw it.

8 Q You didn't pay too much attention?

9 A No.

10 Q Anyway, by the time you became aware of it,  
11 it was just too darn late because the loan had already  
12 closed, right?

13 A That's right.

14 Q Besides, you weren't looking to AFCO's credit  
15 rating worthiness to repay the loan, right?

16 A That's what I assumed, yeah.

17 Q Did you learn of this document, exhibit 13,  
18 the credit report, before the November 18, 1981 Board  
19 of Director's meeting?

20 A No.

21 Q Bill, Home Savings didn't lose any money on  
22 its loan to AFCO, did it?

23 A I believe that they paid that loan off with  
24 some of the last proceeds of the second investor loan.

25 Q So it got paid back a hundred percent on

1 AFCO?

2 A I believe so.

3 Q AFCO's credit worthiness didn't have a darn  
4 thing to do with Home's loss of any money, did it?

5 A No.

6 Q Bill, take a look at -- I think it starts on  
7 the third page of this document, exhibit No. 13. I  
8 see there some notes to financial statements as of  
9 September 30, 1981, is that what you have?

10 A Yes.

11 Q Is this the financial statement that Grant  
12 Affleck had with him when he first visited you and  
13 Fred Smolka? Take a look at it.

14 It goes to the end of that exhibit.

15 A I really didn't look at it. I don't know.

16 Q You didn't ask for a copy? Fred Smolka got  
17 one.

18 A Yeah, I left that meeting with nothing.

19 Q You seem to recall that the statement was  
20 dated around the fall of 1981.

21 A I really don't recall.

22 Q You don't have any memory of that?

23 A No.

24 Q Okay.

25 MR. FERICKS: Your Honor, I would like to

1 give the jury a break now. I am going to shift gears  
2 here slightly and if this is a convenient spot --

3 THE COURT: I was thinking of waiting until  
4 10:40.

5 MR. FERICKS: That's fine.

6  
7 Q Bill, let's shift gears here. The loans were  
8 approved by Fred Smolka and Howard Bradshaw. They  
9 called you, you prepared exhibits 10 and 11 and the  
10 project was off and running.

11 Now, at that point in time, Grant Affleck  
12 brought in a stack of loans you said that was a couple  
13 of feet high, a stack of applications.

14 A Right.

15 Q And these had previously been submitted to  
16 other lending institutions that you knew.

17 A He had told us they were being transferred  
18 over from one lender who had reached their limit.

19 Q And you told Larry Glad to contact each  
20 borrower and confirm two things; one, do you still  
21 want to make the loan and two, that the information is  
22 correct.

23 A Right.

24 Q And Larry came back a couple of days later  
25 and said it was done, right?

1 A Right.

2 Q How did he do that, Bill?

3 A It wouldn't have been that hard to make  
4 telephone calls in two days.

5 Q And confirm all of those application forms  
6 and find all of those people at home at the time he  
7 called them, and find the telephone numbers for them?

8 A The phone numbers are already on the  
9 applications, but I can -- but I took him at face  
10 value that he said he had contacted them and he said  
11 he had.

12 Q And you told Larry Glad to do that so you  
13 could go out and start securing a commitment on a  
14 second area market, right?

15 A Right.

16 Q Now, we have already talked about exhibit No.  
17 40 here. This is just a blow up of it.

18

19 MR. FISHBURN: Excuse me, counsel. Can you  
20 turn that around to where he can see it?

21 MR. FERICKS: Exhibit 40.

22 MR. FISHBURN: Thanks, all right.

23

24 Q Home Savings pays a commitment fee right  
25 here, right?

1           A     Right.

2           Q     And so if it doesn't fill the commitment, it  
3     loses that money, right?

4           A     Right. Plus there could be potential other  
5     penalties whether it be a mandatory delivery or  
6     commitment.

7           Q     So you are committing Home Savings to do  
8     something where it could not only lose the money it  
9     had paid for that, but it could also get penalized an  
10    additional amount while Larry Glad is suppose to be  
11    calling people represented by a stack of paper two  
12    feet high and confirm the information you asked him to  
13    confirm.

14          A     That's right.

15          Q     Bill, at the November 18th Board of  
16    Director's meeting, you said that Franklin Richards  
17    knew what the proposal was all about, and that he had  
18    extreme or -- you said that Frank and Dave Richards  
19    knew what the proposal was all about and that they had  
20    extreme -- or they expressed reservations about doing  
21    it, right?

22          A     They expressed some concern about doing it,  
23    yes.

24          Q     And concerns also about dealing with Grant  
25    Affleck, right?

1 A Yes.

2 Q What was the AFCO proposal? What did you  
3 understand it to be on November 18th?

4 A I just understood it to be that he was  
5 referring these people to us to take out second  
6 mortgage loans, and they were turning the proceeds of  
7 that second mortgage over to him.

8 Q To invest in his company?

9 A Right.

10 Q And that he would pay the mortgage back,  
11 right?

12 A Yes, we were designing our program so they  
13 would pay us individually.

14 Q Home Savings was going to modify that aspect  
15 of it?

16 A Right.

17 Q Okay. And you knew that before you got to  
18 the Board of Director's meeting, didn't you?

19 A Yes.

20 Q You knew it because Grant Affleck had told  
21 you and Fred about it.

22 A Yes.

23 Q And that's how you were able to write some of  
24 the terms on exhibits 10 and 11 because you knew what  
25 the relationship was here between Affleck and his

1 investors, right?

2 A Yes.

3 Q Take a look, for instance, at paragraph 14 of  
4 exhibit 11.

5 A Exhibit 11?

6 Q Paragraph 14, exhibit 11.

7 "AFCO does hereby agree and commit and assign  
8 its interest in \$100,000 of the first one million  
9 dollars in second mortgages funded as repayment on  
10 a note due to Home as executed November 10, 1981."

11 What is its interest? You knew what that  
12 was, right?

13 A Right.

14 Q You knew that AFCO was going to get the money  
15 from the second mortgage loans?

16 A Yes.

17 Q And you knew that on November 10, 1981?

18 A Yes.

19 Q And you knew that and talked to Fred Smolka  
20 about it too?

21 A Yes.

22 Q And that was directly linked to repayment on  
23 a note due to Home from AFCO executed on November 10,  
24 1981, right?

25 A Right.

1           Q       Bill, Fred Smolka testified on direct  
2 examination here in court that the first time he was  
3 aware of exhibits number 10 and 11 was at the Board of  
4 Directors meeting when you showed up with them. Is he  
5 just wrong about that?

6           A       Memories fade but I distinctly remember the  
7 telephone calls and calling him back and reviewing  
8 that information with him. He would not have seen the  
9 forms.

10          Q       He might not have seen them physically?

11          A       Right, but we reviewed the information on the  
12 phone.

13          Q       So he knew about them?

14          A       Yes.

15          Q       So he was aware of them then at the November  
16 18th meeting, he just hadn't seen them?

17          A       He was aware of the information contained,  
18 but hadn't seen the actual written information.

19          Q       After the November 18th meeting, Wallace  
20 Woodbury was instructed to go write the letters to the  
21 investors to tell them that they were responsible to  
22 do what they had just said they would do by signing a  
23 promissory note, and that's to pay Home Savings back.

24          A       Right.

25          Q       Exhibit numbers 89 and 90, which are in the



1 books that the jurors have, would you take a look at  
2 those?

3 Now, exhibit No. 89 is what, the  
4 four-paragraph letter?

5 A Yes.

6 Q And the four-paragraph letter was designed to  
7 be sent to those people whose loans came up after the  
8 November meeting, right?

9 A Yes.

10 Q And that's because of the language that is  
11 contained in the third paragraph of exhibit 89, right?

12 A Right.

13 Q And exhibit 90 was designed to be sent to the  
14 people that had closed their loans before the November  
15 meeting, right?

16 A Right.

17 Q And there was no contingent approval on those  
18 loans at all, was there?

19 A No.

20 Q Now, Fred Smolka testified on direct  
21 examination here that it was the other way around. Is  
22 he just wrong?

23 A I have to read them in detail again in order  
24 to determine --

25 Q Bill, the only difference in the letters is

1 paragraph three on exhibit No. 89.

2

3 MR. FISHBURN: Your Honor, if this is a  
4 continuation of what Mr. Fred Smolka testified to, I  
5 object as a mischaracterization of testimony. I think  
6 the person that got it changed around is Elaine Reese  
7 but not Fred Smolka.

8 THE COURT: Well, the jury will do the best  
9 they can to remember who said what when. I think he  
10 can be asked the question as to what his belief is,  
11 the reason for the existence of the paragraph in 89  
12 and its non-existence in another.

13 MR. FISHBURN: I have no objection if the  
14 question is confined to what Bill's understanding is.

15 THE COURT: The objection is sustained.

16

17 Q 89 is for the post-November loans, 90 is for  
18 the pre-November loans, November 18th loans?

19 A Yes.

20 Q So if I was to go into the exhibits and take  
21 a look at all those loans where there is a three  
22 paragraph letter like exhibit 90, I would then be able  
23 to tell exactly which loans closed before the November  
24 board meeting, right?

25 A That were signed up.

1 Q Before the AFCO proposal was ratified by the  
2 Board of Directors?

3 A There should have been one on each file.

4 Q And there should have been one there because  
5 you gave them to Elaine Reese and told her to send  
6 them out, right?

7 A Right, and I asked her if she had done it and  
8 received them back and she said that she had.

9 Q Take a look at exhibit No. 90, Bill. Who  
10 notarized that?

11 A Valerie -- Valerie Kosta.

12 Q She was inside Home Savings' office?

13 A Right.

14 Q And Elaine had mailed these out. How on  
15 earth could Valerie notarize those signatures?

16 A It is an amazement to me.

17 Q What was the date on exhibit No. 90, Bill?

18 A November 19th, 1981.

19 Q Now, Home Savings has previously prepared an  
20 exhibit, which is exhibit No. -- excuse me -- I  
21 prepared this. It is exhibit No. 79.

22 Would you take a look at that?

23 A Okay.

24 Q Now, I am going to tell you, and I told you  
25 this in your deposition, that exhibit No. 79 is just a

1 Xerox copy of part of the pleadings in this case. It  
2 is what Home Savings filed against Aetna indicating  
3 who the plaintiffs in the Armitage case were, the date  
4 on the promissory note for those people, and the  
5 original principal amount of those loans.

6 Do you remember seeing that in your  
7 deposition?

8 A Yes.

9 Q What is the date of the note for the Ferre's?

10 A November 9th, 1981.

11 Q How many other loans are indicated with  
12 promissory notes dated November the 9, 1981?

13 A Five.

14 Q It is Ferre, Rosenloff, Walton, Whitaker and  
15 White, right?

16 A Right.

17 Q This program wasn't even approved until  
18 November 10th, was it?

19 A I don't know why those dates would be there.

20 Q Grant Affleck brought the loan applications  
21 in after November 10th, right?

22 A It was around the time we closed his loan,  
23 yeah.

24 Q Two or three days later, Grant came back and  
25 confirmed with these people that they still wanted to

1 go forward, is that right?

2 A That's right.

3 Q And then the loans started closing. You went  
4 to the Board of Directors meeting, you heard from  
5 Frank Richards and Dave Richards that they didn't  
6 trust Grant Affleck, and you were concerned enough  
7 about what you heard there that you went back and told  
8 Elaine and Larry, "One of you guys has got to be there  
9 when Affleck closes these loans," right?

10 A That's correct.

11 Q And you, Bill Cox, had previously let Grant  
12 Affleck take these loans out for closing, right?

13 A Right.

14 Q Bill, did you go back and check those loan  
15 files after you came back from the November 18th  
16 meeting?

17 A No, I did not.

18 Q If you had, it would have been sitting right  
19 in front of your face, wouldn't it? It was November  
20 9th on those documents.

21 A That's right.

22

23 THE COURT: If this is a convenient place we  
24 can stop now, unless you rather go on for a little  
25 while.

1 weren't there, were you?

2 A No.

3 Q Did you talk to the people that did the  
4 underwriting, Bill?

5 A No.

6 Q You don't know what they actually looked at.  
7 You know what you sent to them, right?

8 A Right.

9 Q But you don't know what they did with it, do  
10 you?

11 A No.

12 Q You would just be assuming that they did the  
13 same thing that you did, right?

14 A Yeah, I think it would be a valid assumption.

15 Q All right. Let's shift gears again. Let's  
16 talk about the Larry Glad fee that you discovered in  
17 December of 1981. I want to put some things in  
18 context here.

19 You gave Home Savings your notice that you  
20 were going to quit the 1st of December, right?

21 *Bill Cox* A First part.

22 Q And then Larry and then Grant Affleck came in  
23 and was horrified that you wanted money to make these  
24 loans move forward, right?

25 A Right.

1           Q     And you were offended that Larry Glad had  
2 suggested that that might motivate you, right?

3           A     That's right.

4           Q     In fact, what was going on was you just  
5 hadn't gotten the commitment yet from First Federal  
6 Savings?

7           A     That's right.

8           Q     So you couldn't close any of the loans.

9           A     That's right, couldn't disperse any loans.

10          Q     So you were furious, that's what you said,  
11 right?

12          A     Yeah.

13          Q     Now, was this before or after you took the  
14 automobile ride with Larry Glad up to visit with Max  
15 Schmidt?

16          A     That was after.

17          Q     So before that, you had this automobile ride  
18 with Larry Glad to visit Max Schmidt. Is that the Max  
19 Schmidt of Cox, Schmidt & Associates?

20          A     That's right.

21          Q     And Larry was on the way up -- wasn't it to  
22 Ogden or something?

23          A     Just a luncheon.

24          Q     And Larry Glad had said, "Gentlemen, I think  
25 Grant Affleck and I are going to give you a Christmas

1 present, aren't we?"

2 Do you remember that?

3 A That's not how it came about, no.

4 Q Tell me what happened?

5 A Elaine Reese had been indicating to me that  
6 Grant Affleck was putting on an extreme amount of  
7 pressure on her, and so as we were riding down to the  
8 restaurant, I told Larry to get Grant Affleck out of  
9 the office and stay off everybody's back.

10 And I don't know why or something, but he  
11 must have misinterpreted what I was saying there and  
12 he said, "Well, I realize you guys are all taking the  
13 pressure for these loans, and I am going to talk to  
14 Affleck and we are going to chip in and get you a  
15 Christmas present."

16 Q We are going to get you, Bill Cox, a  
17 Christmas present?

18 A Right.

19 Q Didn't you tell him that Grant had also been  
20 on your back too?

21 A Yes, I just told him he was getting on  
22 everybody's back, the pressure was too much, and get  
23 him out of the office.

24 Q Didn't you say to Glad, "If he doesn't back  
25 off, I am going to go to Fred and we will just quit



1 doing the loans."

2 A Right.

3 Q So it was enough pressure to suggest that you  
4 were just going to quit making AFCO investor loans at  
5 that point in time.

6 A If he continued that kind of pressure, yeah.

7 Q In spite of the fact you had a commitment to  
8 do \$300,000 worth of loans, is that correct?

9 A That's right.

10 Q Okay. You are talking to Larry Glad. Did  
11 you tell him you didn't want any Christmas present?

12 A I said, "I am not interested in a Christmas  
13 present. I just want Affleck off our back."

14 Q Didn't you tell him a car phone would be  
15 okay?

16 A No.

17 Q Didn't you talk to Larry Glad at some point  
18 in time about getting a car phone for Christmas?

19 A No.

20 Q You didn't?

21 A No. What I discussed -- if you want that --

22 Q Sure, tell me about a car phone.

23 A They had fired him, you know, I said, "How  
24 could you accuse or insinuate that I was wanting money  
25 to get these loans closed?"

1           And he said, "Oh, I told you I was going to  
2 get you a Christmas present."

3           I said, "Gees, a Christmas present, Larry, is  
4 an answer'g phone or something for the office. It is  
5 not five thousand dollars." It was just an analogy,  
6 and he said, "I always did think in bigger terms than  
7 you did."

8           Q       That's what Glad said to you?

9           A       Yes.

10          Q       Is that part of his braggadocio again?

11          A       Probably.

12          Q       Okay. You had this ride with Larry Glad.

13          This was at the end of November, 1981?

14          A       First of December, end of November, somewhere  
15 around there.

16          Q       "Tell Grant Affleck to get off our backs or  
17 we are going to quit doing loans. Too much pressure  
18 on Elaine and me."

19          A       Yes.

20          Q       And then you give your notice to quit.

21          A       Around the 10th of December, maybe a little  
22 later.

23          Q       And then Grant Affleck walks in and tells you  
24 that Larry Glad is demanding more money, trying to  
25 blackmail him.

1           A     Right.

2           Q     Now, you didn't do anything about that right  
3 away because you said, "Grant, let's go contact him  
4 right now," right?

5           A     Right.

6           Q     And Grant wouldn't do it because he "didn't  
7 want to get anybody in trouble," right?

8           A     Right.

9           Q     And then you told us yesterday, a week later  
10 Bob Mitchell came in and he confirmed what Grant had  
11 told you.

12          A     That's right.

13          Q     Now, did Bob Mitchell come in before or after  
14 the Board of Directors meeting in December 1981?

15          A     I don't recall.

16          Q     Take a look at exhibit No. 21. It shows that  
17 the Board of Directors meeting was on December 16,  
18 1981. Do you have that there?

19          A     Which one?

20          Q     Exhibit No. 21. Doesn't it show December  
21 16th, 1981?

22          A     Yes.

23          Q     Now, you heard from Grant before that meeting  
24 that Mitch had taken this fee.

25          A     It was right around that time, yes.

1           Q     And then after that meeting, you got the word  
2 from Mitchell, right?

3           A     Right.

4           Q     And then you called Fred Smolka and said,  
5 Fred, I have got a problem here," and Fred said,  
6 Don't worry about it. We have already decided to let  
7 him go," right?

8           A     Right.

9           Q     Because, as Fred testified, "Glad isn't our  
10 kind of guy."

11          A     Just personality conflicts.

12          Q     Okay. You didn't tell Fred Smolka that Grant  
13 Affleck had walked in and told you that he had given  
14 Larry Glad \$15,000.

15          A     Well, I don't know whether that information  
16 came to my knowledge before December 16th. It was  
17 around mid-December when Affleck came in and when Bob  
18 Mitchell came in and confirmed that, then I --

19          Q     You told Fred?

20          A     Yes.

21          Q     And Bob Mitchell came in a week or so after  
22 Grant came in?

23          A     Yes.

24          Q     So you sat on the information for a week?

25          A     Yes.

1 Q Did you confront Glad about it?

2 A Not without a second witness, no.

3 Q What did you do with regard to AFCO investor  
4 loans, Bill? Did they continue to just march right  
5 along?

6 A By that time most of the loans had been  
7 pretty much underwritten and sent to the Closing  
8 Department and it never even crossed my mind that  
9 there may have been something going on with those  
10 loans.

11 Q It didn't occur to you?

12 A Didn't even cross my mind. I was totally  
13 surprised when I found out sometime later that some  
14 documents had been forged.

15 Q So you didn't do anything about Larry Glad's  
16 continued participation in the processing of these  
17 loans?

18 A He wasn't in the office much the last half of  
19 December.

20 Q He just wasn't around?

21 A He came and went. He would be gone for a day  
22 or two and then around Christmas he was gone prior to  
23 Christmas and went to California for a vacation. We  
24 had to wait for him to come back, and that's when I  
25 let him go.

1           Q     You had to wait for him to come back to fire  
2 him, right?

3           A     Right.

4           Q     So he wasn't involved in the loan processing  
5 during the last part of December and January to the  
6 extent any was going on.

7           A     Yeah, by that time, it was very little.

8           Q     Did you do anything about the way the loans  
9 were being closed?

10          A     I assumed that he had made arrangements for  
11 that, or Elaine was taking care of it in his absence  
12 if he was out of town.

13          Q     Wait a minute. You knew Elaine was pregnant.  
14 She is eight months pregnant at that stage.

15          A     She was still working.

16          Q     Yeah, but these loans were out in Brigham  
17 City and Tooele and places like that. She wasn't  
18 going to go out of the office to do that, was she?

19          A     Not all of them were out in those areas.

20          Q     Bill, you told Elaine Reese that you didn't  
21 expect her to go out and close the loans, didn't you?

22          A     I preferred that Larry Glad do it.

23          Q     And that's because it was going to be out of  
24 the office after hours, things like that, right?

25          A     That's right.

1           Q     So you assumed, after you heard about the  
2 kickback or the fee that Glad got, that Elaine somehow  
3 was going to compensate for Glad not being present to  
4 take care of that himself.

5           A     I really don't recall how many loans were  
6 being closed during that last two weeks of December.

7           Q     Now, does Elaine Reese normally notarize the  
8 documents that she closes?

9           A     Yes.

10          Q     So you could have found out very easily  
11 whether Elaine Reese was doing that by simply looking  
12 at the notary on those documents, right?

13          A     Right.

14          Q     Did you do that?

15          A     No.

16          Q     Bill, did you do that on the basis of what  
17 you don't know won't hurt you?

18          A     No. I assumed Elaine had taken care of  
19 whatever closings were taking place. I didn't  
20 question the closing procedure.

21          Q     And you learned about Elaine Reese's fee at  
22 the same time that you were confirmed by Robert  
23 Mitchell that Larry Glad had gotten a fee, right?

24          A     Right.

25          Q     And you also told that to Fred?

1           A     Right.

2           Q     And you really didn't care what they did, it  
3 was their decision at that point in time, right?

4           A     That's right.

5           Q     It wasn't your problem any more?

6           A     It was their decision to make. I was  
7 concerned about what had happened, but it was their  
8 decision.

9           Q     Okay. So you asked Fred Smolka if you could  
10 have the opportunity to fire Larry Glad?

11          A     That's right.

12          Q     And that was part of your way of reaffirming  
13 that you had integrity, and you weren't subject to the  
14 kind of influences that you think Larry Glad was.

15          A     That's right.

16          Q     And so you called him into your office and  
17 there was a heated discussion.

18          A     That's right.

19          Q     You also called Sue Pewtress in, didn't you?

20          A     I don't recall her being in the office during  
21 the time I fired him.

22          Q     You didn't call Sue Pewtress in and ask her  
23 to tell Larry Glad what she had told you two or three  
24 weeks earlier about Larry Glad?

25          A     Say that again.



1           Q     Did you call Sue Pewtress into the office and  
2 ask her to repeat to Larry Glad what she previously  
3 reported to you about Larry Glad's conduct two or  
4 three weeks earlier?

5           A     I don't recall her reporting anything to me  
6 about his conduct.

7           Q     Let me try to refresh your memory further.  
8                 Did Sue Pewtress tell you that Larry Glad had  
9 got her to sign or to cash a check for Larry Glad's  
10 sister even though the sister didn't have an account  
11 with Home Savings, and that the check hadn't cleared  
12 and Home Savings had lost money on that?

13          A     I don't recall.

14          Q     Did Sue tell you about an event where Larry  
15 Glad, after hours, had confronted Sue and tried to get  
16 her to convert some funds into a certified check for  
17 some stranger that was with him there in the office?

18          A     I don't think -- don't recall her reporting  
19 those incidents to me.

20          Q     What reasons did Fred Smolka give you for  
21 saying that they were going to terminate Larry Glad?

22          A     Basically they needed -- they didn't like his  
23 personality, personality conflicts.

24          Q     They were going to fire him because of his  
25 personality?

1           A     Mode of operation, I guess, I don't know. I  
2     didn't go into it. That was a determination they  
3     made, apparently, in the board meeting in December,  
4     and I wasn't present.

5           Q     That was their decision to make because you  
6     were leaving.

7           A     That's right. I had given my notice.

8           Q     You had given your notice? Let's take a  
9     look at exhibit No. 32 which is the separation notice.  
10    Do you have that there?

11          A     I do.

12          Q     I think you talked about this yesterday,  
13    didn't you?

14          A     Yes. It was covered a little bit.

15          Q     Now, it shows the last date worked was  
16    December 29, 1981, right?

17          A     Yes.

18          Q     That's not right, is it, Bill?

19          A     It was right around the last week of December  
20    when we let him go.

21          Q     Hadh't Glad written a letter to Fred Smolka  
22    and asked him, "Please let me have a little bit more  
23    time, don't fire me right now."

24          A     My conversation in letting him go was the  
25    last week of December. I don't know about the letter

1 to Fred.

2 Q Okay. And you had entered, "Reduction in  
3 force," there. That really wasn't right either, was  
4 it?

5 A As far as I was concerned, he was fired.

6 Q So is that just a technicality?

7 A Yeah.

8 Q Doesn't matter, the guy was gone, right?

9 A Right.

10 Q Take care of the big things and the little  
11 things will take care of themselves.

12  
13 MR. FISHER: Objection, form of the  
14 question

15 THE COURT: Sustained.

16  
17 Q Now, you talked about exhibit 3 yesterday,  
18 Bill, and that's this note that Larry Glad wrote to  
19 you so that he could get approval to receive a fee  
20 from Jay Tugaw who he had just done a loan for, right?

21 A Back in August.

22 Q Back in August of 1981. You signed that as  
23 the vice-president of Home Savings.

24 A Right.

25 Q Approving him to get \$850 on a loan to build

1 until the three-day rescission is up.

2 Q So you normally don't record the trust deed  
3 until the rescission has been exhausted?

4 A Right.

5 Q And then you record the trust deed and then  
6 you disperse the money?

7 A Yes, right.

8 Q Do you recall the Sadler and Scoville loans,  
9 Bill?

10 ~~Bill Cox~~ A I don't remember specific names. I know we  
11 had one loan that Elaine came in and said they had  
12 exercised their right to rescind.

13 Q And they had done that after the funds had  
14 already been dispersed?

15 A Right.

16 Q So the funds were out the door, the trust  
17 deed hadn't been recorded, right?

18 A I don't know. I assume that it had been.

19 Q You don't record the trust deed until you  
20 find out about the rescission, right?

21 A Our policy was that no funds were to go out  
22 unless the trust deed had been recorded.

23 Q And the trust deed hadn't been recorded yet.

24 A I don't know. I would assume that it had  
25 been.

1           Q     You don't remember that you instructed Elaine  
2 Reese to go ahead and use some of the money from the  
3 final closings to pay Home Savings back for that  
4 particular loan?

5           A     Yeah, she came into my office and she was  
6 quite embarrassed. She told me she had released some  
7 money early and the people had decided to rescind, and  
8 I said, "Well, you don't have much choice but to go to  
9 Grant Affleck and arrange to recollect the funds and  
10 let them rescind their loan."

11          Q     Take a look at exhibit No. 67. Is that your  
12 handwritten note to Elaine Reese?

13          A     Yeah.

14          Q     And it says, "Elaine:" and then you have just  
15 listed three loans; Clifford, Chandler and Sorensen  
16 with the words "our checks."

17          A     Right.

18          Q     "Our" being Home Savings, right?

19          A     Right.

20          Q     These are to pay off AFCO and Sadler, the  
21 difference of \$19,592.08 was given to Grant.

22          A     Right.

23          Q     Had you negotiated this split with Grant?

24          A     I would assume that that was just the balance  
25 remaining from the loans. We probably took the funds

1 from these three loans to pay off the hundred thousand  
2 dollar loan and Sadler, and the difference would have  
3 gone to Grant.

4 Q So Sadler was going to get reimbursed from  
5 Home Savings through proceeds from subsequent second  
6 mortgage investor loans?

7 A Right.

8 Q After all, that's AFCO's interest in that  
9 money, right?

10 A Right.

11 Q Which he had already assigned to Home Savings  
12 in the exhibit 11, November 10th agreement, right?

13 A Right.

14 Q Pay off AFCO, \$52,968.

15 A Pay off Sadler \$2,633, \$23,287 balance, good  
16 luck, Bill."

17 Q When did you give that to Elaine?

18 A Right at the end of my employment.

19 Q Right towards the end of December?

20 A Right.

21 Q And you started Cox, Schmidt & Associates  
22 January 1, 1982?

23 A Right.

24 Q "If you have questions, please call." Is  
25 that your home phone?

1           A     Probably the work number.

2           Q     You had already set up Cox, Schmidt &  
3 Associates?

4           A     We had arranged for the phones.

5           Q     "Good luck, Bill."

6

7           MR. FISHBURN: Your Honor, I would move that  
8 last comment be stricken. It wasn't in the form of a  
9 question.

10          THE COURT: It will be stricken. Pay no  
11 attention to it.

12

13          Q     Now, Bill, you told us yesterday that Home  
14 Savings had a good year in 1981 as contrasted with the  
15 rest of the savings and loan industry, right?

16          A     Right.

17          Q     And then you told us that this was because  
18 Home Savings management had a conservative approach to  
19 conducting business, right?

20          A     That's right. They had generally taken the  
21 attitude of selling most of their longer term fixed  
22 rate loans and reducing their interest rate risks.

23          Q     And the AFCO loans didn't make that much of a  
24 difference in the year that Home Savings had, right?

25          A     I don't think the net result. It may have

1 given them a minus, but I don't know even without  
2 those it would have been a good year in relation.

3 Q This little thing right here in November and  
4 December, that didn't have much to do with giving them  
5 a good year?

6 A It did not do a lot as far as generating huge  
7 amounts of income to Home Savings, no.

8 Q Didn't do much to generate huge amounts of  
9 income?

10 A Right.

11 Q Well, let's talk about what they did do for  
12 Home Savings, Bill.

13 Now, if Home Savings hadn't been paid back  
14 on the AFCO \$100,000 loan, that would have been a loss  
15 for Home Savings, right?

16 A That is not necessarily --

17 Q That's not a loss if you don't get paid back  
18 on a loan?

19 A They had the collateral and they would have  
20 taken over the collateral, and would have sold that  
21 collateral.

22 Q That takes time, doesn't it, Bill.

23 A It doesn't mean you are going to have a loss.

24 Q Didn't the AFCO investor loans go on to pay  
25 off the hundred thousand dollar loan?



1           A     Yes, they did.

2           Q     Didn't they go to pay Home Savings' interest  
3 of \$2,154 on that loan?

4           A     I guess that's what it was.

5           Q     Didn't they go to pay the commitment fees for  
6 the secondary market commitment, Bill?   These fees  
7 right here; \$10,000, \$5,500, \$5,000 and \$2,500?

8           A     I believe so.

9           Q     Didn't they go to pay the MGIC policy  
10 premiums to insure those loans?

11          A     Yes.

12          Q     That was \$6,486, wasn't it?

13          A     Right.   But those are fees that would not  
14 have been paid if the loans hadn't been made anyway.

15          Q     Don't those monies go to pay the Smith, Cox,  
16 Sadler snafus?   The total on those loans is \$623.

17          A     Again, if those loans had not been made --

18          Q     All this was possible because the AFCO loans  
19 were made.

20          A     Most of that stuff is not what generates  
21 income to Home Savings.

22          Q     It prevents a loss.   It prevents something  
23 from not happening, which is not collecting those  
24 things.

25          A     But if they hadn't made the loans, those fees

1 and charges wouldn't have been asked for anyway is  
2 what I am saying.

3 Q Bill, you told us yesterday that Max Schmidt  
4 had talked to Larry Glad about -- this was after, in  
5 February 1982 -- paying a fee to Glad for the work  
6 done for Max Schmidt & Associates, right?

7 A Right.

8 Q Five thousand dollars, right?

9 A Right.

10 Q You paid that fee to Larry Glad, didn't you?

11 A Over my objection, yeah.

12

13 MR. FERICKS: Your Honor, I am wondering if  
14 we should take a pulse of the jury's endurance on this  
15 thing. I might run slightly into the lunch hour if  
16 you war me to go straight through.

17 THE COURT: I think we should. I think we  
18 should go on.

19 MR. DAVIES: Your Honor, could I have just  
20 one moment with Mr. Fericks?

21

22 Q Okay, Bill, let's take a look at exhibit  
23 No. 23. Do you have it?

24 A I do.

25 Q That's the Home Savings Policy and Procedures

1 manual dated September 30, 1979, right?

2 A Right.

3 Q You helped draft this up, didn't you?

4 A Yes.

5 Q This was drafted up so that in 1979 Home  
6 Savings could get qualified to have Federal Savings  
7 and Loan insurance, right?

8 A Right.

9 Q It became a federally insured institution?

10 A Right.

11 Q And this document was one of the necessary  
12 things that Home Savings had to do to get that  
13 certification?

14 A That's right.

15

16 THE COURT: What is your number, 23?

17 MR. FERICKS: Exhibit No. 23, Your Honor.

18

19 Q Now, Bill, you are familiar with the  
20 document, aren't you?

21 A Yes.

22 Q Is it safe to say that there is no policy in  
23 here for how to handle or what to do with second  
24 mortgage loans?

25 A Yeah.

1 Q And really exhibit No. 23 was just instituted  
2 in order to get Home Savings' ticket punched for the  
3 Federal Home Loan Bank Board.

4 A It was required for that purpose.

5 Q You never used it in the operation of the  
6 Mortgage Department, did you?

7 A We all pretty well understood the first  
8 mortgage guidelines that were outlined in there.

9 Q You all just did what you did over at Miller  
10 and Viele before you got there.

11 A Pretty much, yeah.

12 Q You never trained any of the employees in  
13 this Policy and Procedures Manual, did you?

14 A No.

15 Q You never required any of them to read it?

16 A No.

17 Q In fact, really, Home Savings just did on the  
18 loans what it had to do to satisfy the secondary  
19 market purchasers, right?

20 A For the various investment type loans we were  
21 making, originating for their behalf.

22 Q Let's take a look through it pretty quickly  
23 here, Bill. The first full page, Loan Procurement  
24 Procedures. Let me read it. Tell me if I make a  
25 mistake.

1 report, would come in with actual balances.  
2 Ninety-nine percent of the time those balances are  
3 slightly different than the people know them to be and  
4 we will, in the final application so that everything  
5 will be consistent, put the verified balances on.

6 Q I see. And so really, what you try to do is  
7 you are trying to make the final loan application  
8 consistent with the documents that support the data,  
9 right?

10 A That's right.

11 Q Because a lot of times the borrower doesn't  
12 really know the identical or exact amounts.

13 A That's right.

14 Q And that's just standard.

15 A That's right.

16 Q It is not written down anywhere, it is just  
17 something you do.

18 A That's right.

19 Q Now, when Larry Glad was out of the office a  
20 lot during December of '81, Valarie Kosta would bring  
21 you the loan files and asked you questions and gave  
22 you guidance, right?

23 ~~Bill Cox~~ A Gave me guidance?

24 Q Asked you questions and got guidance from  
25 you?

1           A     On a few cases when they were needing some  
2 processing done because he was out of the office, she  
3 would bring me the file and I would show her what to  
4 do.

5           Q     And also, at one point in time, Grant Affleck  
6 was impatient with some loans and so you pushed three  
7 or four files through yourself, is that right?

8           A     I think that's the same period of time we are  
9 talking about here.

10          Q     Towards the December period?

11          A     Late November, early December, somewhere in  
12 there.

13          Q     So sometimes Kosta would confer with you  
14 about files she was processing, sometimes you would  
15 just take the file and drive it through yourself?

16          A     During the same period of time -- I think we  
17 are talking about the same period of time, the same  
18 number of loans. It was probably because Larry Glad  
19 was not in the office that she came to me and asked me  
20 for guidance on the how to process loans.

21          Q     Grant Affleck all this time was keeping track  
22 of what loans were in the process of -- were in the  
23 processing and the closing stage, wasn't he?

24          A     Yes, he was.

25          Q     Was monitoring this pretty darn closely. In

1 fact, if a loan sat on a desk for more than ten  
2 minutes, he was upset and wanted somebody working on  
3 them, didn't he?

4 A He wanted them pushed through fast.

5 Q We talked about you telling Elaine Reese to  
6 take the proceeds from the final closings and apply  
7 them to certain things that Home Savings needed to  
8 apply them to, right?

9 A There would be times as the underwriter  
10 where, on the application, for example --

11 Q Maybe the question was totally  
12 incomprehensible. You told Elaine Reese, exhibit 67,  
13 your handwritten note, take the proceeds from the  
14 final loans and apply them to these certain things,  
15 right?

16 A Yes.

17 Q Now, Fred Smolka told you to have that done,  
18 right?

19 A Right.

20 Q You got that instruction from the executive  
21 vice-president of the company, right?

22 A Right.

23 Q And you were just passing that right on down  
24 the line, right?

25 A Right.

1 Q Because you had given your notice to quit?

2 A That's right.

3 Q And part of your instructions to Elaine Reese  
4 was to put restrictive endorsements on the backs of  
5 some of the checks payable to Home Savings, right?

6 A Yeah. I probably instructed her along those  
7 lines.

8 Q So the borrower never really had a choice on  
9 what to do with the money, they just signed the check  
10 and it came back to Home.

11  
12 MR. FISHBURN: I object to the form of the  
13 question. I think Mr. Fericks is testifying at this  
14 point.

15 THE COURT: Overruled. He may answer the  
16 question.

17  
18 A I assume the borrower didn't have to sign the  
19 check if he didn't agree with the endorsement.

20 Q So they had the choice not to sign the check?

21 A That's right.

22 Q But Grant Affleck was closing these loans in  
23 their home, so you don't know how much of a choice  
24 they really had, do you?

25 A That's correct.



1 Q We talked about the fact you learned that  
2 Elaine Reese had been paid some money by Affleck to do  
3 some overtime and weekend work, and you learned about  
4 that when you told Elaine about Glad's fee, right?

5 A Right.

6 Q And you passed that word up to Fred Smolka?

7 A Right.

8 Q And it was their decision to do with it as  
9 they chose?

10 A Right.

11 Q Because you had given your notice by that  
12 time?

13 A Right.

14 Q It wasn't a concern to you?

15 A I think we have answered this once, but it  
16 was a concern, what she had done, but I felt it was  
17 more appropriate for Fred and Howard to make the  
18 decision.

19 Q It wasn't your problem any more, was it?

20 A It was their decision to make.

21 Q Bill, you were served with a complaint in  
22 April 1982, weren't you?

23 A Yes.

24 Q You were sued by about 285 people that  
25 invested in AFCO?

1 A I was named in it, yeah.

2 Q And Home Savings was named in it?

3 A Yes.

4 Q And there were like five or six pages worth  
5 of plaintiffs in that case, weren't there?

6 A I don't recall.

7 Q Do you remember that the complaint was filed  
8 in the United States Bankruptcy Court for the District  
9 of Utah.

10 A I am sure that's probably what was happening.  
11 I don't remember the details of the complaint.

12 Q Do you remember that the complaint was for  
13 like 50 million dollars?

14 A I don't remember the amount.

15 Q It was for a lot of money, wasn't it, Bill?

16 A I just assumed it was in relation to Home  
17 Savings. I didn't know it was for that amount.

18 Q You didn't read the complaint?

19 A I just don't remember. I was released a very  
20 short time thereafter from it.

21 Q So you went down and you went to Home Savings  
22 and told Fred Smolka about it?

23 A Right.

24 Q And Fred Smolka arranged for you to be  
25 represented by Home Savings' counsel, right?

1 A Right.

2 Q And you had quit with Home Savings starting  
3 December 31, 1981 and this was now four months later,  
4 right?

5 A Right.

6 Q And Home Savings represented you in that, or  
7 their counsel represented you in that complaint.

8 A Right.

9 Q April 1982?

10 A Around that time.

11 Q Thanks, Bill.

12 THE COURT: Could I see counsel at the side  
13 bar for a minute?

14

15 OFF THE RECORD DISCUSSION

16

17 THE COURT: Members of the jury, sorry for  
18 all the whispering. As best we can through the trial,  
19 we, with notable exceptions like this morning where I  
20 kept you waiting for half an hour, I always take the  
21 approach, and counsel does too and counsel in other  
22 cases, realize, as I told them this morning, I have  
23 got a jury waiting, hurry up.

24 Everybddy respects the desires of the jury.  
25 Sometimes, you know, while we are making the greatest

Tab P

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-oo0oo-

|                        |   |                    |
|------------------------|---|--------------------|
| HOME SAVINGS AND LOAN  | ] |                    |
| ASSOCIATION, a Utah    | ] |                    |
| corporation,           | ] |                    |
|                        | ] |                    |
| Plaintiff,             | ] | Civil No. C86-2257 |
|                        | ] |                    |
| vs.                    | ] |                    |
|                        | ] |                    |
| THE AETNA CASUALTY AND | ] |                    |
| SURETY COMPANY,        | ] |                    |
|                        | ] |                    |
| Defendant.             | ] |                    |

REPORTER'S TRANSCRIPT

November 3, 1987  
*(Record, page 2903)*

BEFORE THE HONORABLE MICHAEL R. MURPHY  
District Court Judge

A P P E A R A N C E S:

|                    |  |
|--------------------|--|
| For the Plaintiff: | Gary R. Howe<br>P. Bryan Fishburn<br>Wallace R. Bennett<br>CALLISTER, DUNCAN & NEBEKER<br>Suite 800 Kennecott Building<br>10 East South Temple<br>Salt Lake City, Utah 84133 |
| For the Defendant: | Lynn S. Davies<br>Russell C. Fericks<br>RICHARDS, BRANDT, MILLER &<br>NELSON<br>CSB Tower Suite 700<br>50 South Main Street<br>Salt Lake City, Utah 84110                    |

1 Q Why did that occur, if you can recall?

2 ~~Elaine Reese~~ Again, the borrowers were out of town, Brigham City,

3 Tooele, areas like that, and it was asked by -- I don't know

4 who -- that they be able to take those so that they could

5 sign them the same time they signed the papers and avoid the

6 second trip.

7 Q Do you recall that as a problem?

8 A The checks came back to me with the closing docu-

9 ments, so it was not a problem.

10 Q And the scenario never did cause you any concern?

11 A Yes, it did. There were -- all the checks didn't

12 come back. So towards what I call the end, I started

13 typing -- which I'm sure you will bring up -- "Pay to the

14 Order of Home Savings" on the back of some checks, because

15 we needed to get some funds from AFCO that they weren't

16 paying.

17 Q Who instructed you to do that?

18 A I verified it with Bill Cox.

19 Q You talked that over with Bill?

20 A Yes.

21 Q Who instructed you to send checks out because of

22 the fact that the people were away from Salt Lake City?

23 A I believe it was a discussion between Bill and

24 Larry and myself.

25 Q Do you remember when that took place?

1 Q. (By Mr. Fericks) Okay. When you were doing your  
2 loan closing operation, who would you get the interest rate  
3 information from?

4 A. Either the loan officer or Bill Cox.

5 Q. Or Bill Cox?

6 A. Yes.

7 Q. When Bill Cox was available, did you ever go to  
8 Fred Smolka and get it from him?

9 A. I don't recall doing that at any time. I may have,  
10 I don't know.

11 Q. But you would just go somewhere up the line to get  
12 it, if they had it, right?

13 A. Yes.

14 Q. Did you ever see any policies or procedure manuals  
15 at Home Savings while you were there?

16 *Elaine Rose* A. No.

17 Q. Let me direct your attention --

18 MR. FERICKS: Your Honor, may I approach the  
19 witness?

20 THE COURT: You may. Usually that request doesn't  
21 last past the first week of trial. You may go ahead. When  
22 you need a document, just go ahead, both you and plaintiff's  
23 counsel.

24 MR. FERICKS: All right. Thank you, Your Honor.

25 Q. (By Mr. Fericks) Now, Exhibit 22 is a policy and

1 procedures manual. Do you have that in front of you?

2 A. Yes.

3 Q. What is the title at the top of that?

4 A. Home Savings and Loan Policy and Procedures

5 effective January 1, 1982.

6 Q. Have you ever seen that document before today?

7 A. In your office.

8 Q. In my office when we talked earlier?

9 A. Right. But not when I was at Home Savings, no.

10 Q. Would you turn over to Exhibit No. 23 and let me

11 ask you just to read what is on the top of that document.

12 A. Home Savings and Loan Lending Processes and

13 Procedures.

14 Q. What is the date on that?

15 A. September 30, 1979.

16 Q. You were not hired at Home Savings until what

17 time?

18 A. July of 1979.

19 Q. Did you ever see this document while you were

20 working at Home Savings?

21 A. I may have. I don't recall it. I may have seen

22 that at some point in time.

23 Q. But you don't recall it?

24 A. No.

25 Q. Did you have a copy with you when you worked at



1 Home Savings?

2 A. No.

3 Q. Did you ever refer to it?

4 A. No.

5 Q. Normally, when a person came in for a closing, they  
6 would make an appointment with you, wouldn't they?

7 A. Yes.

8 Q. Or you would call them and make an appointment?

9 A. Right.

10 Q. And then we heard you explain to Mr. Howe that  
11 they would review the documents and you would explain to  
12 them, and you had a standard sort of litany that you went  
13 through?

14 A. Yes.

15 Q. Is that because people don't read the documents,  
16 that you would explain them to them?

17 A. Most people don't really care, to be honest with  
18 you. They wanted to know what the payment was, and that's  
19 it.

20 Q. So why do you take the trouble to explain it to  
21 them?

22 A. Just so you can say you have.

23 Q. And so the bank can emphasize, then, the things  
24 that it thinks are important about the loan?

25 A. Yes.

1 Q Is it then mostly a protection for the bank that  
2 you take the time to explain to them?

3 A I don't know. It's just the way it was always  
4 done.

5 Q Just the way it's always been done?

6 A Yes.

7 Q Let's direct your attention to the AFCO investors'  
8 second mortgages. This was a pretty unusual activity for  
9 Home Savings, wasn't it? Unusual in what sense?

10 A We had done very few second mortgages at all. We  
11 had done two, that I recall.

12 Q So Home Savings really hadn't done any second  
13 mortgage activity or any substantial second mortgage activity  
14 up until this time?

15 A Yes.

16 Q Kind of a new product?

17 A Yes.

18 Q Was it also unusual to have 50 loan applications  
19 come in and hit Home Savings all at once?

20 A Yes.

21 Q It caused quite a bit of backlog, didn't it?

22 A I wasn't involved in that part of it, but, yes,  
23 it was busy.

24 Q And didn't I see you sitting out here with  
25 Valerie Kosta, and she's indicated that this caused you to

1 be fairly swamped?

2 A. Yes.

3 Q. Were you fairly swamped with that?

4 A. Yes. Very busy. Uh-huh. (Affirmative)

5 Q. When did you understand that the second mortgages  
6 were going to -- why did Home Savings need to make the second  
7 mortgages?

8 MR. HOWE: I'll object. It's vague and ambiguous.  
9 I'm not sure what the question is that's being asked.

10 THE COURT: Do you understand the question?

11 THE WITNESS: Yes.

12 THE COURT: Okay. Objection is overruled.

13 THE WITNESS: The same reason any mortgage com-  
14 pany would make a loan, to make money.

15 Q. (By Mr. Fericks) To make money?

16 A. Yes.

17 Q. Did Home Savings have a commitment with some  
18 other party that required them to fulfill a commitment to  
19 make these mortgages?

20 A. It's typical marketing practice in the mortgage  
21 business to go out and buy a box of money called a commit-  
22 ment, which you need to fill, yes. So I believe Home  
23 Savings had one in this situation.

24 Q. And does Home Savings pay a fee for that commit-  
25 ment?

1 Q Elaine, if Home Savings doesn't fulfill its  
2 commitment, what happens to that fee; do you know?

3 A. They lose the fee.

4 Q. Which is just money down the drain?

5 A. Yes.

6 Q. After you prepared the documents, when you went  
7 to the closing, you delivered some of those to Grant Affleck,  
8 right?

9 *Elaine Reese* I believe I did.

10 Q. Some of them went to Valerie Kosta. Did you  
11 deliver any of them to the runners of AFCO?

12 A. I could have.

13 Q. Could have?

14 A. Could have.

15 Q. But all of those loans had been reviewed by Bill  
16 Cox before any of them were written up; is that right?

17 A. Yes. To the best of my knowledge, yes.

18 Q. All right. And I didn't quite understand your  
19 explanation when you talked about checks going out. Now,  
20 normally the trust deed and the promissory note and the  
21 settlement statement and the rescission agreement, those  
22 would go out for signature, or the borrower would come in  
23 and sign those documents, then; is that right?

24 A. Yes.

25 Q. And then on our chart we showed that you would

1 record the trust deed, and when you had it recorded then  
2 you would cut the check?  
3 A. Correct.  
4 Q. Now, was the process in this case that you cut a  
5 check and send it out before the documents were even  
6 executed?  
7 A. Yes. On some of them.  
8 Q. On some of them?  
9 A. Yes.  
10 Q. And then would that check come back to Home  
11 Savings after the documents had been signed?  
12 A. Yes.  
13 Q. But that didn't always happen, did it?  
14 A. No.  
15 Q. And, in fact, Grant Affleck didn't bring back all  
16 the checks, did he?  
17 A. No.  
18 Q. A number of them were cashed before you ever got  
19 the documents back in your desk, right?  
20 A. Yup.  
21 Q. So he just had that money at that point in time?  
22 A. I assume.  
23 Q. And you still hadn't recorded the trust deed yet?  
24 A. I don't recall.  
25 Q. As far as you knew, you still didn't have in your

1 possession a signed promissory note, right?

2 A. I knew that he had not given us back some of the  
3 checks, but I did not know they were cashed before the loan  
4 was recorded.

5 Q. Didn't you talk to Bill Cox about that problem?

6 A. Yes.

7 Q. And you and Bill Cox came up with a solution, and  
8 what was that solution?

9 A. To write "Pay to the Order of Home Savings" on the  
10 back of the check.

11 Q. So then when the check went out with the loan  
12 closing documents for signature, there was a restrictive  
13 endorsement on the back of those checks?

14 A. Yes.

15 Q. And you did that because Grant Affleck hadn't  
16 brought your money back?

17 A. Yes.

18 Q. Let me direct your attention to Exhibit No. 163  
19 and Exhibit No. 177. Are those checks from Home Savings and  
20 and Loan?

21 A. Yes.

22 Q. Who are they made out to?

23 A. One is made out to Grant T. Tobler and Dory C.  
24 Tobler and then Michael and Shirley Michaelis, whatever.

25 Q. Is that Michaelis, M-i-c-h-a-e-l-i-s?

1           A.     I've never been good with names.

2           Q     And is there anything unusual about those checks?

3     Are those the standard Home Savings checks?

4           A.     Yes.

5           Q     Did you prepare those checks for the distribution

6     of proceeds from the loan?

7           A.     Yes.

8           Q     And take a look at the back side of those checks.

9     Do those have typed on them "Pay to the Order of Home

10    Savings"?

11          A.     Yes.

12          Q     And did you put that on there?

13          A.     I did.

14                MR. FERICKS: Your Honor, I request that Exhibit

15    No. 177 and 163 be admitted into evidence.

16                THE COURT: Is there a different book containing

17    Exhibits 145 to 180?

18                MR. FERICKS: Yes, Your Honor. Do you not have

19    it?

20                THE COURT: I haven't got it. That's all right.

21    Any objection to 163 and 177?

22                MR. HOWE: No objection.

23                THE COURT: They are received.

24                MR. FERICKS: May I show those exhibits to the

25    jury?

1 THE COURT: You may.

2 Q. (By Mr. Fericks) Elaine, let me show you a couple  
3 of additional exhibits here. These are designated as 147W  
4 and 146U, and 172X. Are those also standard loan proceeds  
5 checks by Home Savings?

6 A. Yes.

7 Q. Does each one of those have the restrictive  
8 endorsement, "Pay to the Order of Home Savings" on the back?

9 A. No.

10 Q. They don't?

11 A. (Handing document back to Mr. Fericks)

12 Q. Okay. Do two of them?

13 A. Yes.

14 Q. And which two do?

15 A. Jerome F. Chandler and Kenneth D. Richards.

16 Q. That Richards is 172X and Chandler is 147W, right?

17 A. Yes.

18 MR. FERICKS: Your Honor, may those two exhibits  
19 be admitted into evidence?

20 THE WITNESS: Also, there were some that came  
21 back signed that did not have that on them until after they  
22 were signed.

23 MR. FERICKS: We're going to get there.

24 THE WITNESS: All right.

25 THE COURT: Any objection to 147 and 172?



1 MR. HOWE: We haven't seen them yet, Your Honor.

2 MR. FERICKS: Your Honor, it's important that

3 you use the initials, also. It's 172X and 147W, and those

4 have previously been marked.

5 THE COURT: 172W?

6 MR. FERICKS: 172X and 147W. Those have previously

7 been marked and accepted as to foundation.

8 MR. HOWE: We have no objection to 172X and 147W.

9 THE COURT: 147W is received. 172X is received.

10 Q (By Mr. Fericks) Elaine, that little interlude

11 was so long that I forgot: Did I ask you if those checks

12 were made out similar to the first two we looked at?

13 A Yes, but I didn't do this one. (Indicating)

14 Q You didn't do the one?

15 A No. I was out of town. I went out of town the

16 last week in December.

17 Q And when you say you didn't do the one, that's

18 Exhibit 147W?

19 A Right.

20 Q But that does have the restrictive endorsement

21 on the back side?

22 A Yes.

23 MR. FERICKS: Your Honor, may I show these to the

24 jury?

25 THE COURT: You may.

1 Q (By Mr. Fericks) I think you told me while we  
2 were working with those documents that there were a couple  
3 of documents where they came back just handwritten in, "Pay  
4 to the Order of Home Savings"; is that right?

5 A No. There were some that were signed by the  
6 borrowers, brought back, and then AFCO owed us money for  
7 several items. I don't know what for exactly. And that  
8 was typed up in order to put the checks through the bank.

9 Q Let me show you a couple more documents, more  
10 checks here. This is 174X and 168U.

11 MR. HOWE: I have no objection to Exhibit 174X.

12 THE COURT: 174X is received.

13 MR. HOWE: No objection to 168U.

14 THE COURT: 168U is received.

15 Q (By Mr. Fericks) Elaine, the back side of those  
16 checks show that they were endorsed by the borrower, right?

17 A Right.

18 Q They were endorsed payable to AFCO?

19 A Right.

20 Q And then they were further endorsed payable to  
21 Home Savings, right?

22 A Yes.

23 Q And was that the two extra ones that you say AFCO  
24 owed money to Home Savings and the checks came back like  
25 this?

1           A.     They could have been.

2           MR. FERICKS: Your Honor, may I show these to the  
3 jury?

4           THE COURT: You may.

5           Q.     (By Mr. Fericks) There are now a total of seven  
6 loans that we've talked about where the money came back to  
7 Home Savings, right?

8           A.     Yes.

9           Q.     And there were 36 loans there?

10          A.     I don't know.

11          Q.     You don't?

12                 Your Honor, I wonder if this would be an appropri-  
13 ate time to give the jury a break. What is your convenience?

14                 THE COURT: We can go on a little longer if you  
15 think it's convenient. I would like to go at least 10 minutes  
16 more.

17                 MR. FERICKS: All right.

18                 THE COURT: I'm engaging in this so that we can  
19 use every minute possible today, and at the same time give  
20 the court reporter and the jury breaks approximately every  
21 hour and 15 minutes.

22                 MR. FERICKS: I just have a lot of sympathy for  
23 the period right after the lunch hour. Okay.

24           Q.     (By Mr. Fericks) Now, the reason that Home Savings  
25 put these restrictive endorsements on these checks is

1 because Grant wasn't bringing the money back?

2 A. Right.

3 Q. And AFCO owed Home Savings money, right?

4 A. Right.

5 Q. It had borrowed \$100,000 and that hadn't been paid

6 back yet?

7 A. I don't remember.

8 Q. Well, it had agreed to pay the commitment fees on

9 the second mortgage commitments, hadn't it?

10 A. I believe so.

11 Q. And it had agreed to pay certain other fees for

12 appraisals and title reports and things, hadn't it?

13 A. I don't remember. I don't know about that.

14 Q. What other things did AFCO owe Home Savings?

15 A. They agreed to pay for the private mortgage

16 insurance.

17 Q. And that private mortgage insurance was insurance

18 that Home Savings buys to insure these second mortgage loans

19 so that it can sell them to a third party?

20 A. Right.

21 Q. So AFCO was going to pay that fee?

22 A. Yes.

23 Q. What else needed to be paid back?

24 A. That's all I know of.

25 Q. And AFCO wasn't paying those back, was it?

1           A.     He didn't bring the funds in to pay them.

2           Q.     And hadn't, in fact, AFCO made several payments  
3 but the checks bounced?

4           A.     Yes, I think they did.

5           Q.     So he tried to make payments out of AFCO's accounts  
6 but the checks didn't clear?

7           A.     That's right.

8           MR. HOWE: Can we have some foundation for that  
9 testimony?

10           THE COURT: I think it would be appropriate to  
11 lay some foundation.

12           Q.     (By Mr. Fericks) Okay. What were those checks?

13           A.     I don't recall in a lot of detail. I would assume  
14 they would be for things like we were just discussing, to  
15 pay back the hundred thousand dollar loan, the commitments,  
16 et cetera.

17           Q.     Would the payment come in to you, Elaine Reese?

18           A.     They may have been given to me to apply on the  
19 computer.

20           Q.     Was that one of your jobs?

21           A.     That would be something I would handle, putting  
22 things on the computer, yes.

23           Q.     Did you ever talk to Bill Cox about the fact that  
24 AFCO's checks weren't clearing the bank?

25           A.     I'm sure I would have.

1 Q Did you ever talk to Fred Smolka about it?  
2 A Probably not.  
3 Q But Bill was your boss, so you took it to him?  
4 A Yes.  
5 Q Weren't there a couple of these loans where the  
6 money had actually gone out before the trust deed had been  
7 recorded?  
8 A Yes. We've discussed those, unless you're think-  
9 ing of something different.  
10 Q Well, let me show you in another exhibit.  
11 THE COURT: Ms. Reese, be sure to keep your voice  
12 up.  
13 THE WITNESS: Okay.  
14 THE COURT: It tends to lower at the end of your  
15 sentence.  
16 Q (By Mr. Fericks) Would you please turn to Exhibit  
17 No. 83 just for a little background. Mr. Smolka testified  
18 that this is a document he prepared to summarize what  
19 happened to funds from loans that Home Savings closed, okay?  
20 A Okay.  
21 Q Have you ever seen this document before?  
22 A No.  
23 Q Up at the top it lists the borrowers and it says  
24 "Funds endorsed to Home Savings by borrowers or AFCC." So  
25 it was either these checks were funds that came back with

1 the typed endorsement, or the checks where AFCO actually  
2 signed it over in handwriting. All right?

3 A. All right.

4 Q. And we have seen these come through. And, let's  
5 see, we see Tobler up here, and we see Michaelis up here.  
6 Do you see that on your copy?

7 A. Yes.

8 Q. And we have Richards up here, and Chandler is up  
9 here, then Penrod and Rosenlof. So these funds, at least,  
10 came back to Home Savings through this endorsement process.

11 Now, this is money, then, that Home Savings had  
12 to disburse, right?

13 A. Yes.

14 Q. And you were responsible for disbursing funds,  
15 right?

16 A. Not in a situation like this, no.

17 Q. Who would handle that?

18 A. The accountant, I would assume.

19 Q. Would Bill Cox handle this?

20 A. Again, this would be an abnormal situation. I  
21 might have been told to pay something down on the computer,  
22 but I wouldn't have decided where the funds were to be  
23 disbursed.

24 Q. Let's take a look at the bottom section here, the  
25 disposition of funds endorsed to Home Savings by borrowers

1 of AFCO. Did you make a \$99,672.50 deposit into Home Savings  
2 to bring the principal current on the AFCO loan?

3 A. I don't recall doing that.

4 Q. Did you make the interest deposit of \$2,154.08?

5 A. I could have. I don't recall it specifically.

6 Q. Now, the next line might kick off some memory  
7 here. Rescission of second mortgage loans, Snitkoff and  
8 Sadler. Do you remember those two loans?

9 A. Yes.

10 Q. Weren't those two loans where the checks had gone  
11 out with Grant Affleck and the documents had come back but  
12 the check hadn't?

13 A. Could have. Probably.

14 Q. And before you got the trust deed record, Snitkoff  
15 and Sadler called up and said, "I rescind"?

16 A. Yes.

17 Q. And they called by telephone, right?

18 A. Yes. I could have recorded the trust deeds.  
19 I don't know if they were recorded or not.

20 Q. But anyway, they rescinded, right? They called  
21 you and told you that?

22 A. Yes.

23 Q. But the money was already out the door, right?

24 A. Right.

25 Q. So the \$42,193.25 for Sadler was already in Grant



1 Affleck's hands, right?

2 A. Right.

3 Q. And that is Home Savings no longer had a loan, but  
4 they had money out the door, right?

5 A. Right.

6 Q. And so it had to use some of the proceeds from  
7 these subsequent investors money to pay itself back on these  
8 two loans that were rescinded; isn't that right?

9 A. Yes.

10 Q. And then you see a payment to Home Savings of  
11 commitment fees of \$31,875.

12 A. Like I said, I probably cut some of those checks.

13 Q. And then refunds to AFCO. Was that just money  
14 that was left over that just went back to AFCO?

15 A. Yes.

16 Q. It didn't go back to the investors, did it?

17 A. No.

18 Q. It was AFCO's money there, right?

19 A. Yes.

20 Q. And down at the bottom here we have a little  
21 section called Commitment Fees, and this is just the summary  
22 of these payments that were made and where the money went,  
23 that comes up here into the commitment fee line, which is  
24 the bottom line here of \$31,875.

25 A. Yes.

1 Q So as far as you personally know, at least some of  
2 the money from these final loans went to pay off Home  
3 Savings for money that had gone out the door but they didn't  
4 have a loan to cover it?

5 A Right.

6 Q Let me direct your attention to Exhibit No. 91.  
7 Do you see that there?

8 A Yes.

9 Q What is that? Do you recognize that letter?

10 A No.

11 Q You've never seen that before?

12 A No.

13 MR. FERICKS: All right. Your Honor, I would like  
14 to take a break.

15 THE COURT: All right. We'll take about a 10-  
16 minute break. Remember the admonition of the Court; do not  
17 form or express any opinions or conclusions. Do not discuss  
18 this matter among yourselves or with anyone else. Those of  
19 you who have the exhibits now, you can finish looking at  
20 them right here in the courtroom, but don't take them out.  
21 Just leave them on the chair and we'll see you in a few  
22 minutes.

23 [Whereupon, court was in recess from 2:30 until  
24 2:40 p.m.]

25 MR. FERICKS: Your Honor, I would like to invoke

1 MR. HOWE: Thank you, Your Honor.

2 Q. (By Mr. Fericks) Elaine, Bill Cox approved doing  
3 a restrictive endorsement so the money could come back in  
4 and Home could get some money that was due from AFCC, right?

5 *Elaine Reese* A. Right.

6 Q. Bill Cox also approved the backdating of the  
7 rescission agreement in that meeting where you explained  
8 that Grant was present.

9 A. Right. The first loan.

10 Q. And that was so that Grant could get the money  
11 faster, right?

12 A. Yes.

13 Q. Now, did Grant, at that meeting, have any kind of  
14 a document or any kind of a waiver agreement that he showed  
15 you that the investor had signed allowing the rescission  
16 period to be waived?

17 A. No.

18 Q. You did not see one?

19 A. No.

20 Q. Was there ever one in the file that you were  
21 aware of?

22 A. Not in writing, no.

23 Q. Wasn't there supposed to be a document in the file  
24 that the borrower affirmatively waived the three-day  
25 rescission period?

1 A. Yes. There should have been, if it was waived.  
2 Q. But you never saw one?  
3 A. No.  
4 Q. Now, exactly when would that document get into the  
5 file? At what stage in our four-stage exhibit would that  
6 happen?  
7 A. As far as in a normal process?  
8 Q. Yes.  
9 A. At the -- I would assume at the signing at the  
10 closing. Again, we didn't deal that much with rescission.  
11 Q. Would that be a document that was signed by the  
12 borrower?  
13 A. Yes.  
14 Q. As you sit here today, were there any such  
15 documents in any of the files that you prepared for closing?  
16 A. No.  
17 Q. Now, on the loans there were two letters prepared,  
18 and let me direct your attention to Exhibits 89 and 90.  
19 A. Okay.  
20 Q. Before I ask you about those two exhibits, let me  
21 ask one further question. Did Larry Glad have authority to  
22 instruct you to backdate loan documents?  
23 A. No.  
24 Q. You didn't work for Larry Glad, did you?  
25 A. No.

1 Q. You worked for Bill Cox?  
2 A. Right.  
3 Q. And Larry Glad worked for Bill Cox, too?  
4 A. Right.  
5 Q. On Exhibits 89 and 90, Exhibit 89 is a four-  
6 paragraph letter, and Exhibit 90 is a three-paragraph  
7 letter. Do you understand where those documents came from?  
8 A. As far as I know, the board of directors came up  
9 with them.  
10 Q. How did you first become aware of these documents?  
11 A. Bill told me to have the borrowers sign them with  
12 the closing package.  
13 Q. So Bill Cox gave them to you?  
14 A. Yes.  
15 Q. And they are two different forms. Do you know why?  
16 A. No.  
17 Q. By the time Bill Cox gave these letters to you,  
18 hadn't some of the loans already closed?  
19 A. Yes, they had.  
20 Q. And was one form of the letter for the loan that  
21 had already been closed?  
22 A. Yes, that's right.  
23 Q. And the other form of the letter was loans that  
24 were going to close in the future?  
25 A. Right.

1 you by Bill Cox?

2 MR. HOWE: That's asking for speculation. I'll  
3 object. It's been stated thus far that she cannot establish  
4 the foundation for the mailing of these letters or the  
5 delivery of these letters or the timing of these letters.  
6 She just doesn't have the knowledge.

7 THE COURT: This is still Ferres?

8 MR. FERICKS: No. This is not Ferres, but she  
9 did --

10 MR. HOWE: It is comparing Ferres with these,  
11 was your question? Counsel.

12 MR. FERICKS: She testified that she understood  
13 what the three-paragraph letter was compared to the four-  
14 paragraph letter.

15 THE COURT: Well, she testified that at least in  
16 part -- well, in response to your query, I thought she said  
17 she assumed that was the case. There's been varying testi-  
18 mony. I do think it's appropriate that more foundation be  
19 laid, so the objection will be sustained.

20 MR. FERICKS: All right.

21 Q (By Mr. Fericks) Elaine, the AFCO loans came in  
22 and you were swamped with the closings, right?

23 *Elaine Reese* A. Right.

24 Q And Grant Affleck put a lot of pressure on you  
25 to get those loans closed, didn't he?

1           A.     Yes.

2           Q.     He kept wanting to know what was happening with  
3 the pace of the loans, right?

4           A.     Well, I usually work as hard as I can to get as  
5 much done as possible. So if I can get it done, it gets  
6 done. I don't think he put a --

7           Q.     Well, at some point in time you actually worked  
8 overtime, didn't you, to get these loans closed?

9           A.     Quite a bit.

10          Q.     And that was in the evening and on weekends?

11          A.     Yes.

12          Q.     And AFCO paid you to do that, didn't they?

13          A.     I found out it came from AFCO. It was Larry who  
14 agreed to give me some money for working Saturday.

15          Q.     And who had asked you to work on Saturday?

16          A.     Larry.

17          Q.     And then you found out later that that money had  
18 come from AFCO?

19          A.     Yes.

20          Q.     When you were working overtime, he knew that you  
21 were working on the AFCO investor loans, right?

22          A.     Yes.

23          Q.     And Larry Glad didn't have any authority to tell  
24 you to work overtime, did he?

25          A.     I was not allowed overtime. I was a corporate

1 officer.

2 Q Home Savings didn't pay any overtime?

3 A No, they did not.

4 Q So there was no way for you to get compensated for  
5 doing that extra work?

6 A That's correct.

7 Q Why did you do it? Did Grant ask you?

8 A No.

9 Q The work had to be done and you did it?

10 A Yes.

11 Q There was nobody else to help you?

12 A That's right. I work a lot of overtime now and  
13 don't get paid for it, too. That's just the way I do it.

14 Q Let me show you, and turn your attention to  
15 Exhibit No. 67, if you would, please. Do you have a copy  
16 of that there?

17 A Yes.

18 Q What is that document, Elaine?

19 A It looks like something I wrote on just for my own  
20 notes. It's not really a document.

21 Q It's just one page full of notes?

22 A Right.

23 Q And all those notes aren't yours, are they?

24 A No.

25 Q Part of those are Bill Cox's?



1 A. I don't know whose writing that is.  
2 Q. Well, it's addressed to you, isn't it?  
3 A. I must be on the wrong one. I'm sorry. Which one  
4 are we on?  
5 Q. 67.  
6 A. Oh, I was on 68. I'm sorry. I apologize.  
7 Q. All right. And do you recognize that?  
8 A. Yes.  
9 Q. What is that?  
10 A. It's a letter Bill wrote to me. I was on vacation  
11 his last week there, so it was just kind of what was  
12 happening.  
13 Q. Would you just read it to me, please.  
14 A. Have you ever tried to read Bill's handwriting?  
15 THE COURT: Maybe you should identify for the  
16 record which part it is and whose handwriting that she's  
17 going to be reading.  
18 Q. (By Mr. Fericks) If you would read the part that  
19 is Bill Cox's writing.  
20 A. Okay. Says: "Elaine: Clifford, Chandler and  
21 Sorensen, our checks. These are to pay off \$19,592 on  
22 AFCO, Sadler, the difference to Grant. Grant can have  
23 Pratt and Holman when closed to pay off AFCO and pay off  
24 Sadler," and then there's the dollar amounts there.  
25 Q. You went through that pretty fast. It indicates,

1 by the way, the other writing on this page is your hand-  
2 writing?

3 A. Yes.

4 Q. Is it your personal notes that you took?

5 A. Yes.

6 Q. And I think at one point you told me that one of  
7 those notes is your shopping list?

8 A. That's right.

9 Q. Broccoli, cheese, oranges?

10 A. Don't give away my diet. Come on.

11 MR. FERICKS: All right. Your Honor, could we  
12 admit this document into evidence?

13 MR. HOWE: I don't have any objection.

14 THE COURT: Exhibit 67 is received.

15 Q. (By Mr. Fericks) Okay. So the document, then,  
16 says: "Elaine: Clifford and Chandler and Sorensen are our  
17 checks," right?

18 A. Right.

19 Q. What does that mean, "our checks"?

20 A. I would assume that they are our fees. I can't  
21 recall for sure.

22 Q. And "our" is Home Savings here?

23 A. Yes.

24 Q. And this is Cox's letter to you, right?

25 A. Yes.

1 Q And do you know how Cox came up with that? I  
2 mean, how does he know those are "our checks"? Did he make  
3 an agreement with somebody about that?

4 A I don't know.

5 Q And then these are to pay off AFCO and Sadler.  
6 The difference of \$19,592 and some odd cents, something  
7 given to Grant, right?

8 A It was.

9 Q Was given to Grant, okay. So you're going to pay  
10 AFCO, you're going to pay Sadler, and the rest is going to  
11 be given to Grant. Now, I'm looking up here at Exhibit 83,  
12 and I see Clifford, I see Chandler, I see Sorensen, and they  
13 are to pay AFCO and Sadler, and the difference is supposed  
14 to be given to Affleck, and the difference is \$19,592 and  
15 some cents, right?

16 A Right.

17 Q So Exhibit 83, then, does it incorporate the mean-  
18 ing or some of the information that is there on Exhibit  
19 No. 67?

20 A Yes.

21 Q And is that the way you remember it transpired?

22 A I can't remember. It's been a long time ago.

23 Q Do you know if it transpired differently than how  
24 it says here?

25 A I would assume this is what happened.

1 Q Then "Grant can have Pratt, and he can have  
2 Holman." I don't see those on Exhibit No. 83. Does he just  
3 get the funds from Pratt and Holman?

4 A I would assume we did not require the check -- we  
5 would have cut the check to Pratt and Holman, and what they  
6 did with it was their --

7 Q So what you're going to pay off is Sadler, as  
8 indicated on here, \$23,630.08, and then \$52,179.08 left to  
9 AFCO, right?

10 A Right.

11 Q All right. Would you take a look at Exhibit No.  
12 66. Do you recognize that document?

13 A Yes.

14 Q Now, isn't that just the computer account for  
15 Home Savings construction loans?

16 A Yes.

17 Q And that shows the draws on a construction loan,  
18 right?

19 A Right.

20 Q Did you have anything to do with filling out the  
21 records or putting data in on this particular account?

22 A Probably

23 Q And it shows that this shows the account number,  
24 then Affleck, and then the date, and it shows 11-16-81,  
25 \$100,000." Is that the direct loan to AFCO; do you know?

1 and then we're going to deposit another -- as it says here --  
2 "\$23,287," and that is the last item on that account, right?  
3 A. Yes.  
4 Q. And that brings it to zero, right?  
5 A. Yes.  
6 Q. Home Savings no longer has any money outstanding  
7 to AFCO, right?  
8 A. Right.  
9 Q. Bill Cox gave you that note, Exhibit No. 67, while  
10 you were on vacation, right?  
11 *E. Line Record* A. Yes.  
12 Q. That was Christmas?  
13 A. Just after.  
14 Q. Just after Christmas?  
15 A. Right.  
16 Q. 1981?  
17 A. Right.  
18 Q. You came back and you had these instructions to  
19 take these checks and apply them the way Bill had told you  
20 to do?  
21 A. Right.  
22 Q. Larry Glad was gone by that time, wasn't he?  
23 A. Yes.  
24 Q. Bill Cox was gone then, too, wasn't he?  
25 A. Yes.

1 Q What was going on with these loans? I mean,  
2 Glad isn't there, Cox isn't there. Was Grant Affleck around?  
3 A No.  
4 Q Was Valerie Kosta around?  
5 A No.  
6 Q Who was there?  
7 A Me.  
8 Q Just you?  
9 A And a processor.  
10 Q And another processor to do with -- to deal with  
11 these documents. Was Fred Smolka around?  
12 A No.  
13 Q Was Howard Bradshaw, the president, was he around?  
14 A No.  
15 Q Just Elaine Reese was there to finish things off?  
16 A Right.  
17 Q And you had to meet these commitments or Home  
18 Savings would lose its money on the commitment, right?  
19 A Yes.  
20 Q Now, four sets of loans came back to you notarized,  
21 didn't they?  
22 A Three.  
23 Q Three sets?  
24 A Yes.  
25 Q And they had been sent out for closing and they

1 were brought back. Who brought them back?

2 A. I don't remember.

3 Q. All of a sudden they appeared on your desk?

4 A. Right.

5 Q. Okay.

6 A. They could have been there when I got back from  
7 vacation. I don't know.

8 Q. They weren't notarized?

9 A. No.

10 Q. So you notarized them, right?

11 A. Right.

12 Q. And you had to do that because Home Savings and  
13 Loan would have lost money if you hadn't?

14 A. Right.

15 Q. And Bill Cox wasn't there to ask him what to do  
16 any more, was he?

17 A. No.

18 Q. Fred wouldn't return your phone calls and tell you  
19 how to handle it, would he?

20 A. No.

21 Q. You tried to contact the borrowers by telephone  
22 to confirm that they had actually signed the document?

23 A. Yes, I did.

24 Q. You got a hold of the Deveys, didn't you?

25 A. Yes.

1 Q And they were your neighbors, your dance  
2 instructor --

3 A He's a music teacher.

4 Q But the other ones you just had to prepare the  
5 signatures and hope for the best?

6 A Right.

7 Q So Deveys was one item. Was one of them Hancock;  
8 do you remember?

9 A I know Holman was one.

10 Q Holman was one of them?

11 A Yes. Devey was one of them.

12 Q Was Charlier one of them?

13 A I don't know.

14 Q Would the documents reflect your notarization and  
15 your name?

16 A Yes.

17 Q I'll try to find those at our next break. Now,  
18 before we had gotten to this period where there was just  
19 nobody around, right?

20 A Right.

21 Q And basically there wasn't a captain for the ship  
22 any more?

23 A Right.

24 MR. HOWE: Objection to the form of the questions,  
25 Your Honor.



1 THE COURT: Sustained. The answer will be  
2 stricken.

3 Q. (By Mr. Fericks) You were the captain of the  
4 ship, then, right?

5 MR. HOWE: Same objection.

6 THE COURT: Sustained.

7 Q. (By Mr. Fericks) Before we got to that point,  
8 Larry Glad had been fired and you knew about it, right?

9 A. Yes.

10 Q. And that was in mid-December, wasn't it?

11 A. I believe so.

12 Q. Why was he fired?

13 A. I'm not positive. I only had hearsay.

14 Q. Didn't you previously tell me that he was fired  
15 because he didn't do his job and he never ~~showed~~ up for work?

16 A. Yes. But again, that's hearsay.

17 Q. Well, you were at work, weren't you?

18 A. Yes.

19 Q. You didn't see him very much?

20 A. No.

21 Q. He really wasn't there to even help with those  
22 AFCO loans, even in December, was he?

23 A. No.

24 Q. And Bill was present throughout the entire month  
25 of December; Bill Cox, wasn't he?

1           A.     Yes.

2           Q.     But he had already given his notice that he was  
3 going to quit on December 31, hadn't he?

4           A.     Yes.

5           Q.     And you talked to Bill about that. He was going  
6 to start his own business, wasn't he?

7           A.     Yes.

8           Q.     What was Bill's attitude during December?

9           A.     You'll have to ask Bill.

10          Q.     I mean, just what your impression was. Did he  
11 have a short-timer's attitude?

12          A.     Yes.

13          Q.     Didn't Bill really have kind of a bad attitude in  
14 general about Home Savings?

15          A.     To some extent, yes.

16          Q.     And he had previously had difficulty with the  
17 management at Home Savings, hadn't he?

18          A.     Yes.

19          Q.     Tell me about that difficulty.

20          A.     Well, certain situations stick in my mind. One  
21 that was typical was that when Bill had gone to Fred and  
22 Howard, he told me he was going up to tell them they needed  
23 to sell their Ginnie Mae futures. He came back and said,  
24 "They won't let me sell them." The next thing, you know,  
25 the market moved against us and they go in a board meeting

1 and find out what's happened, and Fred and Howard said that  
2 Bill was all to blame for the whole situation. They took no  
3 responsibility for it, even in light of the fact that he --

4 Q. Ginnie Mae futures, is that some kind of a high-  
5 falutin transaction in the banking community where you  
6 understand that Bill wanted to sell and Howard and Fred said,  
7 "Don't sell"?

8 A. Right.

9 Q. And as a result of not selling, Home Savings lost  
10 money?

11 A. Yes.

12 Q. And that was blamed on Bill at the board of  
13 directors meeting?

14 A. Yes.

15 Q. So Fred and Howard hadn't backed Bill up on their  
16 decision, right?

17 A. No.

18 Q. And Bill was upset about that?

19 A. Yup.

20 Q. And you say that was fairly typical of Howard  
21 and Fred, they just didn't back you up after you had done  
22 what you were supposed to do?

23 A. That's it, yes.

24 Q. Now, Fred and Howard didn't really know much about  
25 how to run a mortgage department either, did they?

1           A     No.

2           Q     They had a number of events where they would call  
3 you up and say things that just didn't bear upon the situa-  
4 tion? Their comments were just totally off base, weren't  
5 they?

6           A     Yes.

7           Q     Can you remember what those were?

8           A     Are you talking about whatchamacalit, that I told  
9 you about?

10           MR. HOWE: Can we have a foundation for this,  
11 Your Honor, about all these things she told Mr. Fericks  
12 about?

13           THE WITNESS: We have had a conversation before.

14           THE COURT: Let's proceed with question and answer.

15           THE WITNESS: Which I've also told Home Savings'  
16 attorney the same thing.

17           THE COURT: The way we are going to proceed is by  
18 question and answer. If Mr. Howe wants to ask you about  
19 that, he can ask you when it is his turn.

20           Q     (By Mr. Fericks) Bill was pretty frustrated at  
21 Home Savings, wasn't he?

22           A     Yes.

23           Q     And he was looking to get out?

24           A     Yes.

25           Q     He had given his notice in early December and had

1 a short-timer's attitude?

2 A. Yes.

3 Q. Was that one of the reasons Bill left, was because

4 he was frustrated with the upper management?

5 A. Yes.

6 Q. Did that bother you that Bill was going to leave?

7 A. Yes, it did.

8 Q. Why?

9 A. I had worked for Bill since I'd been in the

10 mortgage business, or the same place he had, and there was

11 no one to take his place.

12 Q. But you still had business to do on the AFCO loans?

13 A. Right.

14 Q. Would you please take a look at Exhibit No. 20?

15 Do you remember anything about that document?

16 A. I believe it was read to me by Howard Bradshaw

17 over the telephone.

18 Q. Over the telephone?

19 A. Yes.

20 Q. Tell me about that. Where were you when it was

21 read to you?

22 A. I was at home.

23 MR. HOWE: Excuse me, Your Honor. I'm going to

24 object at this point in time. I think this is far beyond

25 the scope of direct examination.

1 that, didn't I? Perhaps it pays to keep my mouth shut  
2 occasionally.

3 Q (By Mr. Fericks) Elaine, where were you when you  
4 had this letter read to you?

5 *Elaine Rose* A. I was at home.

6 Q And what were you doing at home?

7 A I'd just had a baby.

8 Q You had a baby? When?

9 A February 26th, 1982.

10 Q This was your second baby, wasn't it?

11 A Yes.

12 Q How old was your first baby?

13 A She was 13 months old.

14 Q And you were married at the time?

15 A Yes.

16 Q And your husband was unemployed?

17 A Yes.

18 Q And you were home recuperating from having a baby?

19 A Yes.

20 Q And you got a phone call from whom?

21 A What?

22 Q You got a phone call from whom?

23 A Fred Smolka and Howard Bradshaw were both on the  
24 line.

25 Q They were both on the line together?

1           A.     Yes.

2           Q.     What happened?

3           A.     They read me this letter and they proceeded to  
4 tell me that it was all my fault that the documents were  
5 forged, the credit records were ordered wrong, appraisals  
6 were ordered wrong, and basically they told me that it was  
7 all my fault that AFCO was filing bankruptcy.

8                     I had nothing to do with the credit records of  
9 appraisals or anything to that effect.

10          Q.     Did that indicate to you that they really didn't  
11 know what they were talking about?

12          A.     It upset me enough that I almost believed them.  
13 But, no, they couldn't have known what they were talking  
14 about.

15          Q.     Was that another indication to you that Fred and  
16 Howard were willing to let these activities go on until  
17 something went wrong, and then --

18                     MR. HOWE:  Objection to the form of the question.

19                     THE WITNESS:  Yes.

20                     MR. HOWE:  Let's save closing argument for closing.

21                     MR. FERICKS:  She testified that that was standard  
22 management procedure.

23                     THE COURT:  Overruled.  It's cross-examination.

24          Q.     (By Mr. Fericks)  And that was just par for the  
25 course as far as you were concerned?

1 A. Yes.

2 Q. These same things had happened to Bill?

3 A. Yes.

4 Q. And Fred still wouldn't return your phone calls?

5 A. It was too late.

6 MR. FERICKS: No further questions, Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. HOWE:

9 Q. Ms. Reese, do you have Exhibit 83 there before you,

10 please? Do you have that before you?

11 A. I do.

12 Q. All right. Were you aware of the agreement or

13 any agreement between AFCO and Home Savings with regard to

14 the repayment of the \$100,000 loan?

15 A. Not really.

16 Q. You weren't privy to that, were you?

17 A. No.

18 Q. So you didn't know specifically what they had

19 agreed to as far as when -- when I say "they," what AFCO

20 had agreed to in making repayments on that loan.

21 A. Right.

22 Q. You have been in the lending business for many

23 years, haven't you?

24 A. Yes.

25 Q. And you understand what the effect of an