

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY**

**IN THE COURT OF COMMON PLEAS**

<b>DAVID W. CARUSO, JR., et al</b>	<b>: CIVIL TRIAL DIVISION</b>
	<b>:</b>
	<b>: February TERM, 1998</b>
<b>vs.</b>	<b>: NO. 1060</b>
	<b>:</b>
	<b>:</b>
<b>NEUMANN MEDICAL CENTER, et al.</b>	<b>:</b>

**FINDINGS and ORDER**

The following Pleadings and Responses are before this Court:

1. Plaintiffs Carusos' Second Amended Complaint
2. Defendant Commonwealth of Pennsylvania, Medical Professional Liability Catastrophe Loss Fund's Motion For Partial Summary Judgment of Plaintiff's Count I: Bad Faith allegation in their Second Amended Complaint, Control # 101793, filed October 23, 2002.
3. Plaintiffs' Response to #101793 and Cross Motion For Partial Summary Judgment, Control # 112088, both filed on November 22, 2002..
4. Co-Defendant Medical Inter-Insurance Exchange's Response to Plaintiffs' Cross Motion For Partial Summary Judgment of Plaintiffs' Count IV: bad faith

allegation against Medical Inter-Insurance Exchange and its own Cross Motion for Partial Summary Judgment, filed December 23, 2002.

5. Defendant CAT Fund's Answer to Plaintiffs' Cross-Motion For Partial Summary Judgment, filed December 23, 2002.

6. Plaintiffs' Response to Defendant MIIX's Cross-Motion For Summary Judgment, filed January 10, 2003.

7. Plaintiffs' Reply to Defendant CAT Fund's Response to Cross-Motion For Summary Judgment, and Plaintiffs' Response to the CAT Fund's Reply to Plaintiffs' Response to the CAT Fund's Motion for Summary Judgment, filed January 10, 2003.

### **FACTUAL AND PROCEDURAL HISTORIES OF CARUSO**

The instant matter arose out of an underlying medical malpractice cause of action, *Caruso v. Neumann Medical Center, et al.*, As a result of professional services rendered in March, 1997 by hospital and physicians defendants, David W. Caruso, Jr. was rendered permanently brain injured and totally incapacitated.

On August 4, 2000, the negligence action was tried to a jury presided over by the Honorable Alfred J. DiBona, Jr., in the Court of Common Pleas, Philadelphia County, February Term 1998, No. 1060.

On August 22, 2000, the jury returned a verdict in favor of Caruso for \$49,594,684.00, which the trial court, in keeping with a joint tortfeasor release executed with other defendants prior to trial, molded down to \$24,797,342.00. Caruso filed a Petition For Delay Damages, which the Court granted in the amount of \$3,383,225.00. On August 31, 2000, judgment on the compensatory and delay damages was entered against remaining Defendants.

On January 25, 2001, five months after the jury verdict, Caruso filed a

Motion For Leave To File An Amended Complaint, seeking to add the Medical Professional Liability Catastrophe Loss Fund (hereinafter “CAT Fund”) and Medical Inter-Insurance Exchange (hereinafter “MIIX”) as additional Defendants in the underlying negligence suit.

On March 9, 2001, the Court granted the Carusos’ motion. Both the Cat Fund and MIIX separately filed for review of that motion to the Pennsylvania Superior Court, which denied both petitions. On April 9, 2001 Caruso filed the Amended Complaint, alleging six counts, three against the CAT Fund and three against MIIX. On April 30, 2001, MIIX filed an Answer and New Matter. On March 12, 2002, Caruso filed a Motion For Partial Summary Judgment On The Pleadings, and on April 11, 2002, MIIX filed a Cross-Motion For Judgment On The Pleadings. On May 13, 2002 and July 22, 2002, the Court (not this writer), without opinion, denied both motions respectively.

On October 23, 2002, the CAT Fund filed a Motion For Partial Summary Judgment, on the grounds that the CAT Fund is not liable for bad faith under 42 Pa. C.S.A. § 8371. Caruso then filed a Cross-Motion For Partial Summary Judgment against the CAT Fund, as well as against MIIX, despite the fact that MIIX was not a party to the CAT Fund’s motion. On December 23, 2002, MIIX filed a Response to Carusos’ Cross-Motion For Partial Summary Judgment and included its own cross-motion. On January 10, 2003, Carusos filed a Response to MIIX’s Cross-Motion For Summary Judgment, as well as Reply to the CAT Fund’s Response and a Response to the CAT Fund’s Reply.

On January 23, 2003, all parties to this litigation presented oral arguments before this Court.

## JURISDICTIONAL ISSUE

If an original Complaint had been filed against the CAT Fund, the matter would arguably have come before the Commonwealth Court under its original jurisdiction, which, in Pennsylvania, grants the Commonwealth Court jurisdiction over “[a]ll civil actions or proceedings against the Commonwealth or any officer thereof, acting in his official capacity...” 17 PS § 211. 401(a)(1).<sup>1</sup> It has long been settled that “the CAT Fund is an executive agency of the Commonwealth statutorily mandated by Article VII of the Health Care Services Malpractice Act.”

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<sup>1</sup>On January 24, 2001, the Carusos filed a Motion for Leave to File A Second Amended Complaint, docketed as 96-01011796. On February 23, 2001, the CAT Fund and MIIX filed separate Answers to that Motion. On February 28, 2001, the Carusos’ Motion was assigned to the Honorable Arnold New.

On March 2, 2001, the Carusos filed a Reply to MIIX and a Response to the CAT Fund.

On March 8, 2001, the 96-01011796 Motion of the Carusos was reassigned to the Honorable Alfred J. DiBona, Jr. On March 9, 2001, Judge DiBona granted the Carusos’ Motion to Amend the Complaint.

On March 23, 2001, MIIX filed a Petition for Reconsideration of the Court’s March 9, 2001 Order, which Petition was assigned to Judge DiBona on March 26, 2001.

On April 6, 2001, the CAT Fund filed a Petition for Reconsideration of the Court’s March 9, 2001 Order, and on April 10, 2001, that Petition was assigned to Judge DiBona.

On April 9, 2001, the Carusos filed their Second Amended Complaint.

On April 20, 2001, the Carusos filed an Answer to the CAT Fund’s Petition for Reconsideration.

On April 24, 2001, the Court denied MIIX’s Motion for Reconsideration. On the same day, the Court denied the CAT Fund’s Motion for Reconsideration.

On April 30, 2001, MIIX filed an Answer and New Matter to Carusos’ Second Amended Complaint.

On May 4, 2001, the CAT Fund filed Preliminary Objections to the Carusos’ Second Amended Complaint, and on June 4, 2001, the Carusos filed an Answer to the CAT Fund’s Preliminary Objections, docketed as 42-01042842.

On June 20, 2001, the Carusos filed a Reply to MIIX’s New Matter.

On June 25, 2001, the Court denied the CAT Fund’s Preliminary Objections, thereby denying the CAT Fund’s petition to remove this case to the Commonwealth Court.

Under the doctrine of coordinate jurisdiction, this Court must abide by the decision of the earlier court and is bound by its jurisdictional ruling. *See Commonwealth v. Starr*, 541 Pa. 564, 664 A.2d 1326 (1995) The instant matter was thus assigned to this Court.

*Butterfield v. Giuntoli*, 448 Pa. Super. 1, 17, 670 A.2d 646, 654 (1996) The statute creating the CAT Fund as an agency of the Commonwealth is 40 Pa.C.S. § 1301.701 *et seq.* Thus, the Supreme Court of Pennsylvania has determined that “[t]he Commonwealth Court of Pennsylvania has exclusive jurisdiction to hear and determine controversies involving the CAT Fund, an agency of the Commonwealth.” *Willet v. Pennsylvania Medical Catastrophe Loss Fund, PHICO Ins.Co. v. Pennsylvania Medical Catastrophe Loss Fund*, 549 Pa. 613, 616, 702 A.2d 850, 851, note 1 (1997) (citation omitted)

In the instant matter, the Carusos, on April 9, 2001, filed an Amended Complaint, amending the original negligence cause of action by naming the CAT Fund and MIIX as additional Defendants. Specifically, in Counts I and IV of the Amended Complaint, the Carusos allege bad faith against the CAT Fund and against MIIX, respectively.

This matter has come, therefore, before this Court, in the Court of Common Pleas, in Philadelphia County, as the Court of original jurisdiction of the underlying medical negligence complaint.

### **LEGAL BACKGROUND FOR ANALYSIS OF BAD FAITH CLAIMS**

In what follows, this Court sets forth the reasons for its holding that the CAT Fund cannot be held liable for bad faith claims under 42 Pa.C.S. § 8371. In analyzing the issue of the CAT Fund’s liability for bad faith under § 8371, this Court’s opinion will focus on whether the CAT Fund is an insurance carrier and whether the CAT Fund and its health care provider participants entered into an insurance contract as required by § 8371.

In arriving at its holding that the CAT Fund cannot be held liable for bad

faith because the CAT Fund is not an insurance company that issues policies of insurance, this Court has relied upon several Pennsylvania rulings, which it considers instructive to analyze. *Cowden v. Aetna Casualty and Surety Co.*, 389 Pa. 459, 134 A.2d 223 (1957) and *Gedeon v. State Farm Mutual Automobile Ins. Co.*, 410 Pa. 55, 188 A.2d 320 (1963) are significant because those courts considered various obligations incumbent upon insurance companies, as well as the nature of the insurance contract entered into between an insurance company and its client. In *Finkbiner v. Medical Professional Liability Catastrophe Loss Fund*, 119 Pa.Cmwlth. 243, 546 A.2d 1327 (1988), *affirmed* 523 Pa. 101, 565 A.2d 157 (1989), the Court explicitly defined the CAT Fund as an executive agency of the Commonwealth and, thus, not as an insurance company, with no contract of insurance existing between the CAT Fund and its health care provider participants.

This Court first notes *Cowden*, which is an automobile accident case wherein a passenger in an automobile was injured when the automobile collided with a truck that the truck driver (John R. Cowden) had brought to a stop, leaving it at least partially on the highway. Cowden's truck had caught fire, and Cowden had climbed under the truck to extinguish the fire with a fire extinguisher. The fire extinguisher caused a cloud of smoke to billow up from under the truck, evidently obscuring the truck from the view of the automobile driver, although the injured passenger, who had noticed the clouds of smoke, had verbalized warnings to the driver to be careful about what dangers possibly lay ahead. Seriously injured in the accident, the passenger brought joint suit against the driver of the automobile and against the truck driver Cowden.

Cowden carried insurance with Aetna Casualty and Surety Company on his truck against public liability in the maximum amount of \$25,000. Aetna had contractual rights to assume the defense of Cowden, including investigating,

negotiating, and settling any claims against its policy holder. Cowden was being sued for \$75,000. Following notice that Cowden was being sued, Aetna took to Cowden's defense.

Moreover, Aetna suggested to Cowden that he retain independent counsel at his own expense to protect his personal interest above the \$25,000 maximum limit of his policy. Cowden did not retain independent counsel.

The case was tried three times. The first trial ended in a mistrial; the second, in a \$100,000 verdict for the plaintiff-passenger against the car driver and against Cowden. At this post-trial point, Cowden did retain counsel for himself. On Cowden's behalf, Cowden's trial lawyer (whom Aetna had supplied), Aetna's newly retained lawyer, and Cowden's personal lawyer collaborated to present motions for a new trial and for a judgment n. o. v.<sup>2</sup> Although the Court refused the motion for judgment n. o. v., it awarded Cowden a new trial on the ground that the great weight of the evidence indicated that Cowden was not negligent. The Court also remarked that the amount of the verdict was excessive.

Since the insurance company for the driver of the automobile had paid its insured's full limit of \$10,000, and since that insured had no additional attachable assets, Cowden was left to shoulder the excess verdict alone, if that verdict would be allowed to stand.

The passenger-plaintiff and Cowden brought cross appeals to the Pennsylvania Superior Court from the Order granting a new trial. The Superior Court affirmed the lower court's holding that granted a new trial, and a new trial ensued. During this third trial, Cowden's personal attorney, who had been

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<sup>2</sup>A judgment n.o.v. is a judgment *non obstante veredicto*, that is, a judgment notwithstanding the verdict, which is a judgment entered for one party even though a jury verdict has been rendered for the opposing party. See BLACK'S LAW DICTIONARY, 7th ed (1999).

attending the trial, decided that Cowden should settle the case and, after communicating his concern with his own firm, communicated to plaintiff-passenger's attorney Cowden's desire to settle for \$45,000, possibly for \$42,500. Cowden's personal attorney informed Aetna's attorney by letter, personally delivered, of the settlement offer. That letter informed Aetna's counsel, *inter alia*, that Cowden would contribute \$7,500 to effect the settlement and requested Aetna to negotiate with plaintiff-passenger's attorney along those settlement lines and to pay the \$25,000 limit of the insurance policy. The letter also contained a warning to Aetna that any failure on Aetna's part to settle would result in Cowden's holding Aetna responsible for any amount over \$7,500 that Cowden might be required to pay.

Aetna's attorney did not respond to this letter but later testified that, as a result of it, he considered Cowden to have become an adversary. Aetna's attorney did contact Aetna's claims manager, who called a meeting with all Aetna principals to discuss Cowden's letter and the course of the trial. Aetna's principals decided to proceed with the trial.

One day before the end of the trial, Cowden's personal attorney, in a second letter to Aetna's attorney that, since he had received from plaintiff-passenger a firm offer to settle for \$45,000, reiterated his initial positions of his first letter and stated that Cowden would contribute \$10,000 to effect a settlement. Aetna's attorney communicated this second letter to Aetna's claims manager but also persuaded him that Aetna stood a good chance of winning the case. No settlement was effected. The trial concluded. The jury returned a verdict against Cowden and in favor of the plaintiff-passenger for \$90,000. The plaintiff-passenger agreed to take \$80,000, and no appeal was taken from the verdict.

Cowden then brought suit against Aetna to recover from Aetna \$35,000, with interest, since \$35,000 was the amount Cowden was required to pay over and

above the \$10,000 he had been willing to contribute towards a settlement.

The Pennsylvania Supreme Court, therefore, addressed the legal question of the nature and extent of the duty an insurer owes to its insured against liability for personal injury to others where the insured, by the terms of the policy, cedes to the insurer the right to control litigation, including possible settlement of the claim against the insured, when it is apparent that a recovery, if adversely obtained, will exceed the maximum limit of the insurer's liability under the policy.

This precise issue was before the Pennsylvania Supreme Court as a matter of first impression in Pennsylvania, although our Supreme Court addressed the issue against a background of “[a] considerable volume of case law [that] has developed on this point in the past several decades [in this country].” *Cowden*, 389 Pa. 459, 468, 134 A.2d 223, 227 (1957) The *Cowden* Court noted that the great weight of authority evidenced by that volume of case law holds “that an insurer against public liability for personal injury may be liable for the entire amount of a judgment secured by a third party against the insured, regardless of any limitations in the policy, if the insurer's handling of the claim, including a failure to accept a proffered settlement, was done in such a manner as to evidence bad faith on the part of the insurer in the discharge of *its contractual duty*.” *Id.*, 134 A.2d at 227 (emphasis not in original)

In *Cowden*, our Supreme Court recognized that a peculiar relationship exists between the parties to an insurance contract “where control over litigation covered by the policy is vested in one of the parties.” *Id.* at 469, 134 A.2d at 228. The *Cowden* Court appropriated as its own the long-accepted Pennsylvania Supreme Court holding, “When the company voluntarily undertook the defense of [the insured] in pursuance of its privilege under the policy, it assumed a position of trust and confidence which called for an exercise of the utmost good faith, particularly in view of the possible conflict of interest between the insurer

and the insured such as later developed.” *Id.*, 134 A.2d at 228 (citing *Perkoski v. Wilson*, 371 Pa. 553, 556, 92 A.2d 189, 191 (1952 ))

Reasoning, therefore, that the relationship between the parties to an indemnity contract is so distinctive, the *Cowden* Court imposed upon the insurance company’s counsel a duty of “a high degree of good faith in [counsel’s] conduct.” *Id.*, 134 A.2d at 228. Specifically , the contract between Cowden and Aetna had “create[d] an agency relationship in its provision for the insurer’s exercise of control over the disposition of claims against the insured (within the policy’s limits) whether that be by settlement or litigation.” *Id.* at 470, 134 A.2d at 228.

“The nature of the obligation of the insurer in a situation such as this, and its duties where its own interest conflicts with the interest of the insured, are not problems of easy solution,...” *Bell v. Commercial Ins. Co. of Newark, New Jersey*, 280 F.2d 514, 515 (1960) (applying the law of *Cowden* to the matter *sub judice*) When there is no likelihood for a favorable verdict or a settlement, the insurer and the insured assume interests that “are in effect substantially hostile.” *Id.*, 134 A.2d at 228. In Pennsylvania, “[T]here is no absolute duty on the insurer to settle a claim when a possible judgment against the insured may exceed the amount of the insurance coverage.” *Id.*, 134 A.2d at 228. Nevertheless, Pennsylvania courts have required “that the insurer consider in good faith the interest of the insured as a factor in coming to a decision as to whether to settle or litigate a claim against the insured.” *Id.*, 134 A.2d at 228. Specifically, “the insurer must accord the interest of its insured the same faithful consideration it gives to its own interest.” *Bell*, 280 F.2d at 515. Although the extent to which an insurer must go in taking the insured’s interest into account has been variously decided, the *Cowden* Court held that “the fairest method of balancing the interests is for the insurer to treat the claim as if it were alone liable for the entire amount.” *Cowden*, 389 Pa. at 470-

471, 134 A.2d at 228 “The insurer is not bound to submerge its own interest, but the decision to expose the insured to personal pecuniary loss must be based upon a bona fide belief by the insurer, predicated upon all the circumstances of the case, that it has a good possibility of winning the lawsuit.” *Bell*, 280 F.2d at 515-516  
The *Cowden* Court explained:

While it is the insurer’s right under the policy to make the decision as to whether a claim against the insured should be litigated or settled, it is not a right of the insurer to hazard the insured’s financial well-being. Good faith requires that the chance of a finding of nonliability be real and substantial and that the decision to litigate be made honestly. *Id.* at 471, 134 A.2d at 228.

The *Cowden* Court specifically considered whether Aetna had acted in bad faith, because, in that case, “*bad faith, and bad faith alone*, was the requisite to render the defendant liable.” *Id.* at 471-472, 134 A.2d at 229 (emphases in original) The *Cowden* Court held that Cowden failed to prove with clear and convincing evidence that Aetna failed in its duty of good faith by refusing to settle the case and by deciding to continue the trial to its conclusion. Since Aetna’s representatives had good reasons to think that Cowden would be found not to be liable, their decision not to settle was neither arbitrary nor hazardous to Cowden’s financial well-being but, given all the facts of this litigation, reasonable. In affirming the lower court’s holding, the *Cowden* Court cited from the lower court’s opinion written by Judge Columbus: ““A careful review of all the circumstances in this case leads inevitably to the conclusion that the defendant’s decision not to compromise was the result of the honest, considered judgment of its trial lawyer, claims manager and associate counsel.”” *Id.* at 476, 134 A.2d at 231.

“In *Cowden*, the determination was in favor of the insurer, for the reason that the insured failed to carry his burden, recognized under the law of

Pennsylvania, to prove ‘bad faith’ by ‘clear and convincing evidence’ and not mere insinuation.’ *Bell*, 280 F.2d at 516. Thus, the *Cowden* Court affirmed the lower court’s decision against Cowden and in favor of Aetna that Aetna had no duty to pay a jury’s verdict in an amount that exceeded Cowden’s policy limit of \$25,000 and that Aetna, which had rightful control over all settlement and negotiation matters, did not act in bad faith by refusing to settle when Cowden, through his personal attorney, had so offered to settle.

Several years after *Cowden*, the Pennsylvania Supreme Court addressed another claim against an insurance company for allegedly breaching its covenant to defend its insured. *See Gedeon v. State Farm Mutual Automobile Ins. Co.*, 410 Pa. 55, 188 A.2d 320 (1963) The plaintiff-appellant was driving an automobile which was involved in an accident that killed his passenger wife. In most unusual circumstances, in his capacity as administrator of his wife’s estate, the plaintiff-appellant instituted suit under the Wrongful Death Act, naming himself as the defendant tortfeasor. A trial resulted in a verdict of \$51,318.90 favorable to himself as plaintiff-appellant and administrator of his wife’s estate, and against himself as defendant tortfeasor.

Then, in his individual capacity, the plaintiff-appellant instituted an action of assumpsit against his insurance carrier, claiming the \$51, 380.90 judgment as the damages resulting from the insurer’s breach of its covenant to defend him. A non-jury trial found in favor of the insurer. The appeals court sitting en banc, though divided, affirmed, offering three reasons for its decision:

(1) that the policy was not in force on the day of the accident because of a failure to pay premiums; (2) that even if the policy were in force, obligations to members of the insured’s household were specifically excluded from coverage; (3) that even if there were a breach of appellee’s contractual obligation to defend, appellant had shown no damages resulting from such breach. *Gedeon*, 410 Pa. at 57-58, 188 A.2d at 321.

The *Gedeon* Court identified three duties in this matter: 1) a covenant to indemnify; 2) a covenant to defend; and 3) a fiduciary duty to defend with due care. The *Gedeon* Court focussed its attention upon the third duty. As in *Cowden*, so in *Gedeon*: By the express terms of the contract, the insurer had appropriated all rights to handle all claims against the insured, including the right to settle. In *Gedeon*, the Court recognized that incident upon a covenant to defend “The insurer assumes a fiduciary position towards the insured and becomes obligated to act in good faith and with due care in representing the interests of the insured.” *Gedeon*, 410 Pa. at 59, 188 A.2d at 322. Thus, the *Gedeon* Court held that “[i]f the insurer is derelict in this duty, as where it negligently investigates the claim or unreasonably refuses an offer of settlement, it may be liable regardless of the limits of the policy for the entire amount of the judgment secured against the insured.” *Id.*, 188 A.2d at 322.

In light of its careful discrimination of the various duties an insurer has to its insured, the *Gedeon* Court affirmed the lower court’s decision on the grounds that the plaintiff-appellant, because he had confused the various covenants, did not prove a breach of a duty to defend with due care. Furthermore, since the plaintiff-appellant had himself conducted the defense of the wrongful death action, he could show no damages resulting from the unproved breach to defend with due care.

In a case with factual predicates similar to the present matter of *Caruso*, the Supreme Court of Pennsylvania sustained the Commonwealth’s demurrer and held, against Finkbiner, that the CAT Fund cannot be held liable, as a private insurance company could be so held, for a bad faith refusal to settle. *Finkbiner v. Medical Professional Liability Catastrophe Loss Fund*, 119 Pa.Cmwlth. 243, 546 A.2d 1327 (1988), *aff’d* 523 Pa. 101, 565 A.2d 157 (1989) The legal issue in *Finkbiner* arose out of an underlying medical malpractice suit brought by

Finkbinder against Dr. Mauriello. The doctor had secured insurance for liability, as 40 P.S. § 11301.701, *et seq* (formerly § 701 of the Health Care Services Malpractice Act) had required him to do. In his particular case, the doctor was primarily insured for \$100,000. He also had mandated coverage of \$1,000,000 through the CAT Fund. Pursuant to § 1301, counsel for the doctor informed the CAT Fund that the Finkbiners' claim could exceed the doctor's \$100,000 limit of primary insurance.

Before the trial, several incidents relative to the case transpired: 1) The doctor conceded liability; 2) The doctor's primary insurance company tendered the \$100,000 limit to the Finkbiners; 3) Negotiations commenced, involving counsels for the Finkbiners, the doctor, and the CAT Fund; 4) The CAT Fund offered to settle for \$500,000; 5) Finkbinder refused the CAT Fund's offer and demanded \$3,000,000; 6) Although the CAT Fund increased its offer to \$900,000, Finkbinder demanded \$1,000,000; 7) Counsel for the doctor repeatedly advised the CAT Fund to settle for \$1,000,000; 8) The CAT Fund refused to settle for \$1,000,000.

The case went to trial.

The jury returned a verdict in favor of Finkbinder for more than \$2,000,000. At this point, the CAT Fund paid the \$1,000,000 limit of its liability, leaving the doctor solely liable to Finkbinder for the remaining \$900,000<sup>3</sup> of the jury verdict, as well as for an additional \$600,000 in delay damages, which the judge imposed. The doctor assigned his rights against the CAT Fund to the Finkbiners, who, as the

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<sup>3</sup>The *Finkbinder* Court writes, "Thus, Dr. Mauriello remains liable to the Finkbiners for approximately \$950,000 for the jury verdict and another \$600,000 in delay damages imposed by the judge." *Finkbinder*, 119 Pa.Cmwlth. at 246, 546 A.2d at 1328 According to the calculations of this Court, which are based upon the figures presented in *Finkbinder*, Dr. Mauriello should have been liable for \$900,000, not \$950,000, plus delay damages. The jury award was \$2,000,000. The CAT Fund paid \$1,000,000, and Dr. Mauriello's private insurance carrier paid \$100,000, which leaves a remainder of \$900,000.

doctor's assignees, brought a separate complaint against the CAT Fund.<sup>4</sup> To recover the doctor's outstanding liability to Finkbiner, Finkbiner brought this suit on the grounds of the CAT Fund's alleged bad faith to settle the underlying medical malpractice suit.

Citing both *Cowden* and *Gedeon*, the *Finkbiner* Court held that a cause of action against an insurance company can be brought for mishandling a claim, including a failure to accept a proposed settlement, in violation of the insurance company's contractual duty to defend the insured, as well as for a bad faith refusal to settle that violates the fiduciary position the insurer assumes when it is required to defend an insured. *Finkbiner*,

The *Finkbiner* Court identifies certain facts as being materially relevant to this case. First, 40 P.S. § 1301.701 (a) mandates that every health care provider practicing medicine in Pennsylvania must insure primarily his or her professional liability only with an insurer licensed or approved by the Commonwealth of Pennsylvania. Second, such approved insurance company is a necessary condition for participating in the CAT Fund. Third, if a health care provider does not participate in the CAT Fund, that person will suffer either the suspension or the revocation of his or her license. Fourth, the CAT Fund demands a mandatory surcharge from each health care provider who participates in the CAT Fund.

The *Finkbiner* Court held, therefore, that no contract exists between the CAT Fund and its health care providing participants, because participation is statutorily mandated, and that the CAT Fund and its Director owes no fiduciary duty to its health care providing participants. *Finkbiner*, 119 Pa.Cmwlth. at 248, 546 A.2d at 1328. Further concluding that the relationship between the CAT Fund

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<sup>4</sup>Jurisdictionally, the instant matter is to be distinguished from *Finkbiner* in that, here, the Carusos amended the original Complaint to include the CAT Fund and MIIX as Defendants. (See n.1 above.)

and its participants involves no assent to an offer, no meeting of minds, which are necessary elements to the formation of a (for example, insurance) contract, the *Finkbiner* Court held that between the instant doctor and the CAT Fund, no contract existed. The necessary consequence of this was that Finkbiner could not recover on a cause of action of bad faith refusal to settle. *Id.*, 546 A.2d at 1328.

The Court in *Finkbiner*, finding that 40 P.S. § 1301.701 defines the CAT Fund as a noninsurer and as a nonparty to a contract of insurance, holds that pursuant to that statute, the CAT Fund had fulfilled its obligations to the doctor and to the doctor's assignees when it paid the statutorily defined limit of \$1,000,000.

The *Finkbiner* Court, therefore, sustained the preliminary objections of the Commonwealth and dismissed Finkbiner's complaint with prejudice.

**LEGAL ANALYSIS**  
**OF**  
**CLAIM OF BAD FAITH AGAINST THE CAT FUND**

The first issue this Court addresses in *Caruso* is the Cat Fund's Motion For Partial Summary Judgment on Count:I (Bad Faith) of the Carusos' Second Amended Complaint.<sup>5</sup>

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<sup>5</sup>In the Agreement entered into on August 22, 2000 by the two physician defendants Drs. Antonelli and Hamaty and the Carusos, the Carusos agreed not to pursue the bad faith claims they had originally alleged against MIIX in their Second Amended Complaint. In pertinent part, that Agreement reads: "1. Defendants Hamaty and Antonelli shall cause to be paid to plaintiffs \$600,000 within twenty (20) days; 2. Defendants Hamaty and

The Pennsylvania Supreme Court has ruled that “[w]e have a summary judgment rule in this Commonwealth in order to dispense with a trial of a case (or, in some matters, issues in a case), where a party lacks the beginnings of evidence to establish or contest a material issue.” *Ertel v. Patriot-News Co.*, 544 Pa. 93, 100, 674 A.2d 1038, 1042 (1996). Thus, Pennsylvania Courts have ruled that “[t]he function of a summary judgment motion is to avoid a useless trial.” *Dillon v. Nat’l R.R. Corp. (Amtrak)*, 345 Pa. Super 126, 137, 497 A.2d 1336, 1341 (1985) (citations omitted). In Pennsylvania, the principles governing summary judgment are well-settled: “First, the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, must demonstrate that there exists no genuine triable issue of fact...Second, the record must show that the moving party is entitled to judgment as a matter of law.” *Stidham v. Millvale Sportsman’s Club*, 421 Pa. Super. 548, 558, 618 A.2d 945, 950 (1992) (citations omitted). “It is not part of the court’s function to decide issues of fact but solely to determine whether there is an issue of fact to be tried.” *Washington Fed. Sav. & Loan Ass’n v. Stein*, 357 Pa. Super. 286, 288, 515 A.2d 980, 981 (1986). “[A]ll doubts as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment.” *Breslin v. Ridarelli*, 308 Pa. Super. 179, 183, 454 A.2d 80, 82 (1982) (citations omitted). “Summary judgment may be granted only where the right is clear and free from doubt.” *First Wisconsin Trust Co. v. Strausser*, 439 Pa. Super. 192, 198, 653 A.2d.

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Antonelli shall assign to plaintiffs their bad faith and related claims against any responsible party and otherwise cooperate with the plaintiffs in the maintenance of such actions; 3. The plaintiffs agree not to execute on the personal assets of Drs. Hamaty and Antonelli; 4. The plaintiffs agreed not to pursue a bad faith action against Dr. Hamaty and Dr. Antonelli’s primary insurance carrier for their conduct to date;” (MIIX’s Answer And New Matter To Plaintiffs’ Second Amended Complaint, Ex. B)  
The Carusos’ only remaining bad faith claim is against the CAT Fund, therefore.

688, 691 (1995) (citing *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d. 466 (1979)). “The moving party has the burden of proving that there is no genuine issue of material fact.” *Id.*, 653 A.2d. at 691. In determining whether the moving party has met this burden, the Court must examine the Record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *See Elder v. Nationwide Ins. Co.*, 410 Pa. Super. 290, 294, 599 A.2d. 996, 998 (1991). Once a motion for summary judgment is made and properly supported, “a non-moving party may not avoid summary judgment by rest[ing] upon the mere allegations or denials of his pleading...” *Ertel*, 544 Pa. at 100, 674 A.2d. at 1042. Rather, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. *See Curran v. Children’s Service Center of Wyoming County, Inc.*, 396 Pa. Super. 29, 33, 578 A.2d. 89 (1990). Thus, rearticulating the Pennsylvania Supreme Court’s own well-settled ruling, the *Ertel* Court ruled that in Pennsylvania “the mission of the summary judgment procedure is to pierce the pleadings and assess the proof in order to see whether there is a genuine need for a trial.” *Ertel*, 544 Pa. at 100, 674 A.2d. at 1042 (citations omitted).

In the instant matter, the Carusos allege that the CAT Fund acted in bad faith prior to, during, and after the litigation of the underlying medical malpractice action, and that the CAT Fund should bear responsibility for paying 100% of delay damages and post-judgment interest on the verdict and indemnification for its as yet unsatisfied verdict. (*See Carusos’ Second Amended Complaint, Count I “Bad Faith Against The CAT Fund and John H. Reed in His Official Capacity As Director of the CAT Fund” and Count II “Contribution and Indemnification Against the CAT Fund and John H. Reed in His Official Capacity As Director of the CAT Fund”*)

In considering the CAT Fund’s Motion for Partial Summary Judgment on

the Carusos' bad faith allegation against the CAT Fund, this Court recalls that, in *Cowden*, the Pennsylvania Supreme Court held that an insurer against public liability for personal injury may be liable for the entire amount secured by a third party, regardless of any limitations in the policy, if the insurer's handling of a claim is done in bad faith in discharge of its contractual duty. *Cowden*, 389 Pa. at 468, 134 A. 2d at 227. See *Finkbiner*, 119 Pa. Cmwlth. at 246-247, 546 A. 2d at 1328. Indeed, the *Cowden* Court ruled that an insured can recover against an insurer, regardless of policy limitations, for negligence, fraud, or bad faith because, under an indemnity contract, the insured bargains away to the insurer the right to control any litigation on the insured's behalf. See *Cowden*, 389 Pa. at 469, 134 A.2d at 227. As a direct result of the insurer's unilateral right to control litigation, an agency-fiduciary relationship comes to exist between the insurer and the insured, and that fiduciary relationship entails a high-order obligation to proceed with the litigation in good faith, as if it were alone liable for the entire amount and under no circumstances may the insurer fail in its obligation of good faith and hazard the insured's financial well-being. *Id.* at 469-470, 134 A.2d at 228. Moreover, as this Court has set forth above, the *Gedeon* Court reinforced the *Cowden* ruling by holding that, because the insurer had claimed its bargained-for rights to handle the claims against its insured, the insurer had assumed a fiduciary position towards the insured and "becomes obligated to act in food faith and with due care in representing the interests of the insured." *Gedeon*, 410 Pa. at 59, 188 A.2d at 322.

In the Caruso matter, this Court notes that the legal purpose of the CAT Fund is defined by Act 135: 1996, the Health Services Malpractice Act, and codified by statute:

It is the purpose of this Act to make available professional liability insurance at a reasonable cost, and to establish a system through which a person

who has sustained injury or death as a result of tort or breach of contract by a health care provider can obtain a prompt determination and adjudication of his claim and a determination of fair and reasonable compensation. 40 P.S. § 1301.102. (This statute has been repealed by 2002, March 20, P.L. 154, No. 13 and is now codified in 40 P.S. § 1303.102.)

Discussing the above statute, the Pennsylvania Superior Court addressed, *inter alia*, the question of a hospital's excess liability insurance coverage for punitive damages in view of a Punitive Damages Amendatory Endorsement. *See Butterfield v. Giuntoli*, 448 Pa.Super. 1, 670 A.2d 646 (1996), *appeal denied* 546 Pa. 635, 683 A.2d 875 (1996) The *Butterfield* Court held that the primary insurance company had erred when it concluded that its own umbrella policy excluded coverage for punitive damages under the Punitive Damages Amendatory Endorsement. The primary insurance company reasoned that because the CAT Fund, which the insurance company maintained was an underlying insurer, did not insure for punitive damage claims, it could not be held liable for punitive damage claims. Citing 40 Pa. C.S. § 1301.701 *et seq.*, two Pennsylvania Supreme Court cases, and two Pennsylvania Commonwealth cases, including *Finkbiner*, the *Butterfield* Court held that the insurance company's basic error in its argument was its classification of the CAT Fund as an insurer. *Id.* at 17, 670 A.2d at 654.

Critical to this Court's finding in *Caruso* is the *Butterfield* Court's enunciation of the growing number of Pennsylvania courts that hold that the CAT Fund is not an independent private insurer but an executive agency of the Commonwealth. *See Butterfield*, 448 Pa. Super. at 17, 670 A.2d at 654; *and see Pennsylvania Medical Society Liability Insurance Company v. Commonwealth of Pennsylvania, Medical Professional Liability Catastrophe Loss Fund*, 804 A.2d 1267, 1271 (2002) (holding that the CAT Fund is not an insurer but a statutorily-

created executive agency designed only to provide the coverage enumerated in the Act); *and see* N.T. at 7-9. Moreover, as the *Butterfield* Court explained, the CAT Fund, as an executive agency of the Commonwealth, was “created to compensate victims of a tort or breach of contract by a health care provider in Pennsylvania.” *Butterfield*, 448 Pa. Super. at 17, 670 A.2d at 654.

In further support for the holding that the CAT Fund is not an insurer, Pennsylvania courts have ruled that the relationship between the CAT Fund and the health care provider participants is not a contractual relationship and that the CAT Fund is not bound by the same fiduciary duties to the health care provider participants that would bind an insurance carrier<sup>6</sup>.

Under Pennsylvania law, since the elements necessary for the formation of a contract are missing from the relationship between the CAT Fund and its health care provider participants, there is no contractual relationship between them. The CAT Fund levies annual surcharges that are mandatory. *See* 40 P.S. § 1301.701 (e) (1), § 701. (That statute has been repealed by 2002, March 20, P.L. 154, No.13, §

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The Carusos admit that there would be no cause of action for bad faith against the CAT Fund if the CAT Fund is not an insurance company under the terms of 40 Pa. C.S. § 8371. *See* N.T. at 35-36. Since the CAT Fund is in fact not an insurance carrier, as this Court sets forth above, this Court finds that it is not subject to liability for bad faith handling of claims under 42 Pa.C.S. § 8371 as an insurance company would be. Nevertheless, this Court understands that a potentially serious problem overhangs the CAT Fund’s exercise of its responsibilities towards its health care provider participants. Absent a statutorily-defined standard of conduct, one similar to the statute that regulates the conduct of insurance companies, the CAT Fund remains accountable to no one but its Director and to the discretion of the Director. Since the CAT Fund is a creation of the Legislature, it is not within the authority of this Court to define said standard of conduct, but this Court remains acutely aware that, without a legislatively defined standard of conduct regulating the relationship between the CAT Fund and the health care provider participants, the discretionary decisions of the CAT Fund’s Director, although legitimate in themselves, may proceed unchecked and, at the very least, invite capriciousness. *See* Notes of Testimony, January 15, 2003, at 21, 28-30, 33-35, 39, 44-47. (Hereinafter referred to as “N.T.”)

5104 (a)(2), and is now codified in 40. P.S. §§ 1303.711 and 1303.712.) Indeed, upon penalty of having their licenses to practice medicine in Pennsylvania suspended or revoked, health care providers have no choice but to participate in the CAT Fund. *See Gueson et al. v. Reed, et al.* 679 A.2d 284 (1996) In *Gueson*, the Commonwealth Court of Pennsylvania denied health care provider petitioners' request for relief in the form of a preliminary injunction seeking, in part, that the Court overrule the plain language of § 701 (f) that requires compliance with the provisions of § 701 (f) and allow for voluntary participation in the CAT Fund, thus denying the petitioners' request to allow for voluntary participation in the CAT Fund. *See Gueson*, 679 A.2d at 286. As the *Finkbiner* Court before *Gueson* noted, mandatory participation gainsays the elements of an offer and an acceptance reflective of a meeting of the parties' minds necessary to the formation of a contract.

“The providers' participation in the CAT Fund is not a consensual one, but is one that is required by statute. As such, there is no mutual assent between the parties and therefore no contractual relationship between a provider and the CAT Fund, as exists between an insurer and an insured.” *Finkbiner*, 119 Pa. Cmwlth. at 248, 546 A.2d at 1329.

The Commonwealth Court would extend this line of rulings in *Meier v. Maleski*, 167 Pa. Cmwlth. 458, 648 A.2d 595 (1994), *aff'd Meier v. Maleski*, 549 Pa. 171, 700 A.2d 1262 (1997) by citing the *Finkbiner* holding that “no contractual relationship [exists] between the [participant] doctor and the Fund.” *Meier*, 167 Pa. at 481, 648 A.2d at 606 n.22. In *Finkbiner*, the Court held that the Director of the CAT Fund had no fiduciary duty to settle a claim against a participant in the CAT Fund. In *Meier*, the Court later held that the Director of the CAT Fund had the quite different fiduciary, nondiscretionary duty properly to manage the CAT Fund and its funds. *Meier*, 167 Pa. Cmwlth. at 481, 648 A.2d at 606 n.22. Thus, under Pennsylvania law, there is no fiduciary relationship between

the Director of the CAT Fund and the health care provider participants in the CAT Fund and, accordingly, no fiduciary duties.

Absent a contractual relationship between the CAT Fund and the participating physicians and, thus, the Carusos as the assignees of those physicians, and absent a duty of good faith on the part of the CAT Fund to the Carusos, the Carusos cannot sustain a cause of action for bad faith against the CAT Fund. This matter was dealt with directly in the oral arguments before this Court:

THE COURT: Just one more issue.  
What about the lack of a contract between the doctors and the CAT Fund, and isn't that a fatal defect in the ability to bring a bad faith action under the bad faith statute[?]

MR. SPECTER: If the CAT Fund is not seen as an insurer under the bad faith statute then, yes, there would be no claim that would arise out of that.  
N.T. at 35.

To support their allegation of bad faith against the CAT Fund, the Carusos urge this Court to consider *The Milton S. Hershey Medical Center of the Pennsylvania State University v. Commonwealth of Pennsylvania Medical Professional Liability Catastrophe Loss*, 763 A.2d 945 (2000) (hereinafter referred to as "Hershey I") and *The Milton S. Hershey Medical Center of the Pennsylvania State University v. Commonwealth of Pennsylvania et al.*, 788 A.2d 1071 (2001) (hereinafter referred to as "Hershey II"). Those two cases hold that the Director of the CAT Fund has a fiduciary obligation to the monies of the CAT Fund. By way of contrast, the CAT Fund argues that *Pennsylvania Medical Society Liability Insurance Company v. Commonwealth of Pennsylvania, Medical Professional Liability Catastrophe Loss Fund*, 804 A.2d 1267 (2002) (hereinafter referred to as "PMSLIC") has superseded *Hershey I* by maintaining that the CAT

Fund cannot be held liable for allegedly bad faith conduct during a settlement period, as an insurance company could be, because the CAT Fund is not an insurance company.

On January 15, 2003, in oral argument before this Court, the Carusos relied upon *Meier* and *Hershey I*. N.T. at 17-18 They argued that the “CAT Fund stands in the same shoes as that of an insurance carrier with respect to the liability issue.” N.T. at 20

*Hershey I* is a case where the Hershey Medical Center (HMC) filed a Complaint against the CAT Fund for refusing to pay toward a malpractice claim under vicarious liability until the excess coverage for the directly liable health care provider was exhausted. The Complaint included eight counts and the CAT Fund filed Preliminary Objections to seven of the eight. For purposes of the instant discussion, only Count VIII, which alleged a bad faith refusal to settle, is relevant.

In discussing its reasons for denying the Preliminary Objections to the bad faith claim, the Commonwealth Court stated the following:

“In *Finkbiner v. Medical Professional Liability Catastrophe Loss Fund* 119 Pa Cmwlth. 243, 546 A.2d 1327 (1988), this Court determined that a patient could not recover from the CAT Fund for bad faith refusal to settle when there was no contractual relation between the CAT Fund and the injured physician. Despite the CAT Fund’s reliance upon case law, HMC suggests that it is now appropriate to re-examine whether the CAT Fund should be accountable under statute or common law for bad faith. This claim is worth exploring in light of two noteworthy developments.

First, the legislature has authorized punitive damages against an insurer for bad faith in actions on insurance policies. *See* Section 8371(2) of the Judicial code, 42 Pa.C.S. § 8371(2). Second, the Court’s holding that the CAT Fund does not owe a fiduciary duty to a physician ‘has no bearing on whether the Respondents [Insurance Commissioner and Director of CAT Fund] have a fiduciary duty to properly manage the CAT Fund and its income.’ *Meier*, 648 A.2d at 607 n.22.” *Hershey I*, 763 A.2d at 953.

The Carusos have seized upon that language as affording a “green light” to

pursue a bad faith claim against the CAT Fund. They further maintain that the Commonwealth Court did nothing to counter the implication of its language in *Hershey II*. In *Hershey II*, the Commonwealth Court granted summary judgment to the CAT Fund on the same issue it had earlier denied the CAT Fund's preliminary objections in *Hershey I*.

The procedural distinction that allowed the court to deny the relief and then grant the same relief in back-to-back decisions is of no moment here. What is of moment is that the bad faith action never went forward and the Court's language on the viability of the bad faith claim standing in isolation has no precedential value. Further, in light of the overwhelming jurisprudence establishing that the CAT Fund may not be vulnerable to a bad faith claim, the Carusos' reliance on this isolated language is misplaced. The significance of the holding that a bad faith claim may not be brought against the CAT Fund was reinforced by a decision of the Commonwealth Court handed down on September 18, 2002 by the full court sitting under its original jurisdiction. *See Pennsylvania Medical Society Liability Insurance Company v. Commonwealth of Pennsylvania, Medical Professional Liability Catastrophe Loss Fund*, 804 A.2d 1267 (2002) (hereinafter "PMSLIC").

In *PMSLIC*, the CAT Fund was sued by an insurance carrier on two counts. Count I, which is not relevant here, concerned the carrier's claim that the Fund improperly denied its request for coverage under § 605 of the Health Care Services Malpractice Act.

What is of particular concern here is Count II in *PMSLIC*, which alleged that the CAT Fund had acted in bad faith in denying the coverage. The CAT Fund filed Preliminary Objections to the Complaint that the Court then ruled upon. In granting the preliminary Objections to Count II, the *PMSLIC* Court opined in support thereof and, in so doing, expressed its accordance with the same body of law that this Court relies upon herein.

In *PMSLIC*, the Commonwealth Court recognized that claims for bad faith may only be brought under § 8371 of the Judicial Code as a statutory claim and that common law claims for such were not remediable. *See PMSLIC*, 804 A.2d at 1271 (*citing Williams v. Nationwide Mutual Ins. Co.*, 750 A.2d 881 (2000 Pa.Super.)) The *PMSLIC* Court noted the language of the statute, which, in relevant part, states:

“In an action arising under an *insurance policy*, if the court finds that the *insurer* has acted in bad faith toward the insured,...” (42 Pa.C.S. § 8371)

Applying the plain language of the statute, the Court held as follows and, in so holding, cited law familiar to the present opinion:

“The CAT Fund contends and we agree that the Insurance Company has failed to plead a bad faith claim because the statute requires that an action be brought under an insurance policy, and the CAT Fund is not an insurer but a statutorily-created executive agency designed only to provide the coverage enumerated in the Act.” *PMSLIC*, 804 A.2d at 1271 (citations omitted)

The *PMSLIC* Court, therefore, granted the CAT Fund’s preliminary objection relative to *PMSLIC*’s count of bad faith.

After considering the Carusos’ arguments, as well as the CAT Fund’s, this Court holds that *PMSLIC*, rather than *Hershey I* should govern in this matter.

It is the opinion of this Court that the Carusos’ reliance upon *Hershey I* is misplaced.

First, since the CAT Fund is not an insurance carrier, the bad faith statute 42 Pa. C.S. § 8371 does not apply to it. Indeed, the Carusos admit that the Legislature nowhere “directly authoriz[es] [any] claim[s] of bad faith against the CAT Fund,” even when the Legislature “established in 1996 an advisory board because of concerns about the management of the fund.” N.T. at 28

Second, the fiduciary relationship which *Hershey I* and *Meier* identify for the Director of the CAT Fund is of a different character from the fiduciary

relationship that the Carusos claim for the CAT Fund. Specifically, the courts in *Meier* and *Hershey I* maintain that the Director of the CAT Fund has a fiduciary obligation to properly manage the Cat Fund's monies, which is essentially unlike the Director's alleged but unproved fiduciary obligation to the health care provider participants in the CAT Fund, which the Carusos allege. The Carusos seek to extrapolate the CAT Fund's Director's fiduciary obligation properly to manage the monies of the CAT Fund to the Director's alleged fiduciary obligation to the health care provider participants in the CAT Fund. Yet such extrapolation cannot be supported under Pennsylvania law.

In their Cross-Motion For Summary Judgment Against MIIX And The CAT Fund, the Carusos allege that the CAT Fund breached a fiduciary duty to the physician defendants in the underlying cause of action and, thus, to them under the assignment of the physicians' rights to them to proceed against the CAT Fund. As this Court has set forth above, the *Cowden* Court held the insurer to a nonwaivable duty of good faith that derived from the creation of a fiduciary relationship between the insurer and the insured. Yet *Cowden* is inapplicable to the Carusos' case because the CAT Fund is not an insurer, and because between the CAT Fund and its participants no fiduciary relationship exists since no contract was ever formed between them.

Furthermore, as this Court also set forth above, the Court in *Gedeon* found that a fiduciary relationship between an insurer and an insured arose from the insurer's assertion of its contractual rights to handle all claims against the insured. *Gedeon* is equally inapplicable to the Caruso matter, therefore, because the participants in the CAT Fund did not bargain away their contractual rights to control the negotiations. "Thus, unlike the fiduciary relationship between the insurer and the insured, created by the terms of the policy, in *Cowden* and *Gray* [sic], the CAT Fund owes no fiduciary duty to Dr. Mauriello [or to any health care

provider participant].” *Finkbiner*, 119 Pa. Cmwlth. at 248, 546 A.2d at 1329. The *Meier* Court relies completely upon *Finkbiner* in this matter: “In *Finkbiner*, we held that the CAT Fund owed no fiduciary duty to a physician with regard to the handling of a malpractice claim made against him by a patient.” *Meier*, 167 Pa.Cmwlth. at 481, 648 A.2d at 606 n.22

Although, in the matter of Caruso, this Court is not constrained to accept as dispositive the holdings of the several earlier Commonwealth courts, sitting as the courts of original jurisdiction, it finds that their rulings--that the Cat Fund is not an insurer and that between the CAT Fund and its participants no contractual relationship exists--are persuasive. *See* N.T. at 30 (the Carusos arguing that this Court is not bound to follow Commonwealth Court rulings)

Thus, this Court, acknowledging the weight of the plain language of the statute itself, as well as the persuasive holdings of Pennsylvania courts, finds that 1) the CAT Fund is not an insurer, 2) no contractual relationship binds the CAT Fund and its health care provider participants, 3) and no fiduciary obligation towards health care provider participants exists on the part of the CAT Fund’s Director.

Since Pennsylvania’s bad faith statute pertains only to contracts arising under insurance policies, the Carusos cannot sustain their allegation of bad faith against the CAT Fund.

Consequently, after carefully examining the entire Record in a light most favorable to Plaintiffs Carusos, the non-moving party in this matter, this Court has granted Defendant CAT Fund’s Motion For Partial Summary Judgment, dismissing the Carusos’ claim for bad faith against the CAT Fund and its Director John Reed. In so doing, this Court extinguishes the claim for indemnification for any unsatisfied amount of the judgment which could only exist if the necessary “bad faith” predicate were to be found.

**LEGAL ANALYSIS**  
**OF**  
**CLAIM FOR DAMAGES AGAINST THE CAT FUND**  
**AND AGAINST MIIX**

The second matter before this Court is the Carusos' contention that the CAT Fund and MIIX are jointly and severally liable for all delay damages and for post-judgment interest.

The Carusos contend, "MIIX and the CAT Fund are jointly and severally liable for the entire amount of delay damages awarded as the doctors are jointly and severally liable for the entire amount of the verdict." (Pls' Cross-Motion Partial Summ. J. at ¶ 46; *see* Second Amended Complaint, ¶¶ 47-62). The Carusos maintain that the dispute is really between the CAT Fund and MIIX, that those two commercial entities should settle the question of delay damages and post-judgment interest between themselves, and that neither entity should be found liable for merely its proportionate share of the liability.

In response to those allegations, first, MIIX denies that the Agreement states that MIIX should be responsible for all delay damages and for all post-judgment interest, denying that it should be liable for any damages in excess of the policy limits. Second, MIIX argues that it is not obligated to pay delay damages or post-judgment interest beyond the policy limits by any controlling language of the policy. Rather, MIIX argues that it and the CAT Fund are not jointly and severally liable for all delay damages and post-judgment interest, but that each

entity should bear its own obligation separately, proportionate to its respective liability, if any, in this matter.

In Pennsylvania, the rule of joint and several liability is as follows:

Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution. 42 Pa.C.S. § 7102(b).<sup>7</sup>

In Pennsylvania, Commonwealth agencies are protected by the Sovereign Immunity Act when sued in their capacity as a party “for damages arising out of a negligent act where the damages would be recoverable under the common law or a statute creating a cause of action if the injury were caused by a person not having available the defense of sovereign immunity.” 42 Pa.C.S.A. § 8522(a); see 42 Pa.C.S.A. § 8521 (introducing sovereign immunity generally) The extent of sovereign immunity is subject, however, to the qualifications “set forth in subsection (b) and only to the extent set forth in this subchapter, and within the limits set forth in section 8528 (relating to limitations on damages),....” § 8522(a) In particular, 42 Pa.C.S.A. § 8528(b) places specific dollar amount limitations on amounts recoverable against Commonwealth parties.

Notwithstanding the limitations on recoverable damages provided for by § 8522, this Court recognizes that Pennsylvania courts have imposed on the CAT Fund and on insurance companies both delay damages and post-judgment interests in excess of their policy limits. In *Montgomery Hospital v. Medical Professional*

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The instant action has not matured into a contribution claim, for no payment has been made for which anyone is seeking contribution. The action remains in its essence a claim for indemnification.

*Liability Catastrophe Loss Fund*, 686 A.2d 432 (1996), for example, the Commonwealth Court held that the CAT Fund can be held liable to pay post-judgment interest in excess of its statutory limit. *See Montgomery Hospital v. Medical Professional Liability Catastrophe Loss Fund*, 686 A.2d 432, 435 note 4 (1996) (citing *King v. Boettcher*, 537 Pa. 574, 645 A.2d 219 (1994), *reh'g denied* (Pa. August 31, 1994); and *Woods v. Department of Transportation*, 163 Pa.Cmwlth. 379, 641 A.2d 633 (1994), *appeal denied*, 540 Pa. 605, 655 A.2d 993 (1995)) The Pennsylvania Supreme Court held that delay damages were properly awarded against a Commonwealth agency even though the total liability would exceed the agency's statutory cap when our Supreme Court rejected the argument that Pennsylvania's Sovereign Immunity Act does not allow for the imposition of delay damages against a Commonwealth agency. *Willet et al v. Pennsylvania Medical Catastrophe Loss Fund*, 549 Pa. 613, 625, 702 A.2d 850, 855-856 (1998). "To the extent that the Sovereign Immunity Act is inconsistent with Rule 238, it is suspended." *Id.*, 702 A.2d at 856. "[T]here is no statutory provision that would exempt the CAT Fund from paying prejudgment delay damages." *Id.* at 625, 702 A.2d at 856 Specifically, "the CAT Fund may be held liable for an amount above its statutory limit of \$1 million per occurrence." *Id.* at 625-626, 703 A.2d at 855.

Although the CAT Fund is a Commonwealth party, in the instant matter it is not being sued as a negligent party in a tort action and is, therefore, not covered for these purposes by the Sovereign Immunity Act.<sup>8</sup>

The Pennsylvania Supreme Court has held that "[d]elay damages are a form of pre-judgment interest designed [to] compensate a prevailing plaintiff for the loss of funds that the jury verdict reflects were owed to plaintiff if the funds were promptly received." *Willet*, 549 Pa. at 623, 702 A.2d 855 n.7 The purpose of Pa.

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<sup>8</sup>Whether the CAT Fund would be subject to the limitations of the Sovereign Immunity Act if it were vulnerable to a suit for bad faith is an issue not addressed here.

R.C.P 238 is “to indemnify the plaintiff for the money he would have earned on his award if he had promptly received it...” *Colodonato v. Consolidated Rail Corp.*, 504 Pa. 80, 86, 470 A.2d, 475, 479 (1983). “The purpose of the rule is to both compensate the plaintiff for the delay in receiving funds and to encourage the prompt resolution of meritorious claims.” *Willet*, 549 Pa. at 623, 702 A.2d at 855 n.7 The plain language of Rule 238 “clearly reflects a primary desire to encourage pre-trial settlement.” *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. 52, 59, 436 A.2d 147, 151 (1981) The *Colodonato* Court quotes the now settled holding that “Rule 238's ‘fundamental goal [is that] of prompting meaningful negotiations in major cases so as to unclutter the courts.’” *Colodonato*, 504 Pa. at 88, 470 A.2d at 479 (quoting *Laudenberger v. Port Authority of Allegheny County*, [496 Pa.] at 60, 436 A.2d at 151)

The Pennsylvania Superior Court has held that “Rule 238 mandates the imposition of delay damages for the period of time, as provided in the Rule, during which there has been no qualified offer of settlement proposed by the defendant, and the plaintiff did not cause the delay.” *J.W.S. Delavau, Inc. v. Eastern America Transport & Warehousing, Inc.*, 810 A.2d 672, 686 (2002). Indeed, the *Delavau* Court, affirming the trial court’s holding, ruled that “Rule 238 requires the defendant/appellant to pay delay damages even though that party was not at fault [for causing a delay].” *Delavau*, 810 A.2d at 687. ““Where the defendant has not made an adequate settlement offer pursuant to Rule 238(b)(1) and the plaintiff has not caused the delay of the trial as noted in Rule 238(b)(2), there is no basis on which to deny the plaintiff an award of delay damages.”” *Delavau*, 810 A.2d at 687.

Thus, “damages for delay shall be added to the amount of compensatory damages awarded against each defendant or additional defendant found to be liable to the plaintiff in the verdict of a jury, in the decision of the court in a

nonjury trial or in the award of arbitrators appointed under section 7361 of the Judicial Code, 42 Pa.C.S. § 7361, and shall become part of the verdict, decision or award.” Pa.R.C.P. 238(a)(1)

In an analogous situation involving the issue of whether a Commonwealth agency could be liable under the theory of joint and several liability for all the delay damages where the Commonwealth was a negligent party in a tort action, the Pennsylvania Supreme Court’s holding in *Allen* is instructive for the instant matter. See *Allen v. Mellinger*, 567 Pa. 1, 784 A.2d 762 (2001) (overruling *Woods v. Commonwealth, Dept. of Transp.* 531 Pa. 295, 612 A.2d 970 (1992) that held that delay damages are simply added to the verdict of the jury rather than to the compensatory damages awarded against each defendant). In overruling *Woods*, the *Allen* Court “re-examine[d] the interplay between the procedural rule governing delay damages in civil actions (Pa.R.C.P.238) and the statutory provisions governing sovereign immunity (42 Pa.C.S. § 8521 et seq.) and joint and several liability (42 Pa.C.S. 7102(b)).” *Allen*, 567 Pa. at 4, 784 A.2d at 763.

In *Allen*, the plaintiff commenced a personal injury suit against an automobile driver who, while speeding, collided into plaintiff while she was turning across traffic into the parking lot of a shopping establishment. Plaintiff also named as defendant the Pennsylvania Department of Transportation, which had recently painted lines on the highway that, plaintiff alleges, directed her to turn at an unsafe location. Plaintiff sought damages for injuries sustained in the accident.

While finding that the plaintiff was 20% at fault, the Commonwealth Court found each defendant 40% at fault and awarded the plaintiff total monetary damages of \$2,883,366. The Court granted, *inter alia*, Penndot’s motion to conform the verdict to its statutory cap of \$250,000. The Commonwealth Court also granted plaintiff’s motion for delay damages calculated only on Penndot’s

share of the original verdict. Appeal was taken, but the Commonwealth Court affirmed. An appeal to the Supreme Court followed.

In *Allen*, the Pennsylvania Supreme Court ruled, “[T]he Sovereign Immunity Act serves to limit the Commonwealth party’s exposure to joint and several liability.” *Allen* 567 Pa. at 9, 784 A.2d at 766 “Where the limitation on compensatory damages has been reached, the plaintiff can recover from the Commonwealth party only those delay damages attributable to the Commonwealth.” *Id.*, 784 A.2d at 766. This Court understands the *Allen* Court’s holding to mean that damages that are attributable to Commonwealth parties are subject to limitations on the Commonwealth party’s liability in a case. Thus, the Supreme Court in *Allen* held that, in causes of action in tort, the rule of joint and several liability does not apply to a defendant that is a Commonwealth party:

“[D]elay damages recoverable from Commonwealth parties are limited to those calculated based upon the statutory cap. Additionally, we hold that as is the case with compensatory damages, Commonwealth parties are not jointly and severally liable for delay damages which exceed those calculated on the statutory cap.” *Id.* at 12-13, 784 A.2d at 768-769

As this Court has explained above, a fundamental goal of Rule 238 is to promote meaningful pre-trial settlements by encouraging the prompt resolution of meritorious claims, and absent qualified offers of settlement, Rule 238 justifies mandated delay damages. Here, the Carusos’ trial commenced on August 4, 2000. On August 14, 2000, ten days after the commencement of the trial, MIIX tendered its full policy limits. Although this tender was made eight days before the jury entered its verdict on August 22, 2000, MIIX had not engaged in any meaningful pre-trial offers of settlement.

This Court, therefore, concludes that delay damages should be imposed upon MIIX. Pursuant to this Court’s reading of the plain language of 40 P.S. § 1301.702(j), which statute the Court analyzes in detail in what immediately

follows, the percentage of those delay damages should reflect MIIX's own proportionate share of liability in this matter. Thus, since the statute so explicitly holds a basic insurance carrier responsible for its proportionate share of delay damages and post-judgment interest, this Court is not persuaded by MIIX's position that it is not responsible for any amounts in this matter that exceed the policy limits.

At this point, the question before this Court is how to determine the amount of Rule 238 damages to be assessed against MIIX and against the CAT Fund. The Pennsylvania Supreme Court has ruled that "rule 238 delay damages are in essence 'an extension of the compensatory damages necessary to make a plaintiff whole.'" *Colodonato*, 504 Pa. at 88, 470 A.2d at 479 (quoting *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. at 66, 436 A.2d at 154) The *Colodonato* Court held, "Rule 238 provides compensation to a plaintiff for delay in receiving the monetary damages owing as a result of defendant's tort." *Id.* at 86, 470 A.2d at 479.

In establishing the CAT Fund, the General Assembly set up the parameters of the Fund's liability for indemnification for damages if a plaintiff were to be covered under the Healthcare Services Malpractice Act. The General Assembly specifically provided for delay damages and post-judgment interest, which would be in excess of the CAT Fund's primary liability. Further, the CAT Fund can be held liable for delay damages, since it was named as a defendant in the Carusos' Second Amended Complaint. "Rule 238 only allows an award of delay damages against a 'defendant found to be liable to the plaintiff in the verdict of the jury.'" *Lahav v. Main Line OB/GYN Assos., et al*, 556 Pa. 245, 250-251, 727 A.2d 1104, 1106 (1999) The statute at issue here reads:

Delay damages and postjudgment interest applicable to the fund's liability

in a case shall be paid by the fund and shall not be charged against the insured's annual aggregate limits. The basic insurance carrier or self-insurer shall be responsible for its proportionate share of delay damages and post-judgment interest. 40 P.S. § 1301.702(j). (This statute was repealed by 2002, March 20, P.L. 154, No.13, and is now codified in 40 P.S. §§ 1303.713 and 1303.714.)

The analysis of whether the CAT Fund can be subject to joint and several liability for the full award of delay damages must begin with the relevant statute establishing such liability. The clear language of the statute states that only those defendants with causal negligence can be subject to the dictates of same. No one argues that the CAT Fund is a negligent tortfeasor, so that on this basis alone the CAT Fund cannot be joint and severally liable. The question arises, "Does the CAT Fund 'stand in the shoes' of the tortfeasor who would be jointly and severally liable?" The answer to this question must be "No" because no contract for indemnification exists between the tortfeasor and the CAT Fund. As this Court has set forth above, the CAT Fund is an executive agency of the Commonwealth created to provide statutorily prescribed compensation to victims of tortious medical malpractice. Further, the General Assembly provided that the CAT Fund's liability for delay damages was "applicable to the fund's liability in a case."

Thus, the plain language of § 702(j) requires the CAT Fund to pay delay damages and post-judgment only "applicable to the fund's liability in a case." Pennsylvania rules of statutory construction demand that "[g]eneral words shall be construed to take their meanings and be restricted by preceding particular words." 1 Pa. C.S.A. § 1903(b) To interpret § 702(j), this Court adheres to the rule of statutory construction requiring that "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage." 1 Pa. C.S.A. § 1903(a) Moreover, a Court's construction of a statute is guided by the presumptions "[t]hat the General Assembly does not intend a result

that is absurd, impossible of execution or unreasonable.” (1 Pa.C.S.A. § 1922(1)), and “[t]hat the General Assembly intends the entire statute to be effective and certain.” 1 Pa. C.S.A. § 1922(2)

Here, “applicable to the fund’s liability in a case” are general words and not “technical words...[that] have acquired a peculiar and appropriate meaning....” 1 Pa. C.S.A. § 1903(a) They grammatically qualify the preceding language of “delay damages and post-judgment interest,” leading to the inference that if the CAT Fund must pay delay damages and post-judgment interest in a particular case its obligation should be based upon its individual liability in that case. It is reasonable to assume that the General Assembly had this plain grammatical meaning in mind when it chose the general, nontechnical qualifying language, and this Court respects that plain meaning.

How, then, does the construction of the General Assembly’s plain language affect the underlying action? We know that the CAT Fund has paid in accordance with its statutory mandate the amount of \$900,000 per health care provider, totaling \$1,800,000. In determining “proportionate share,” this Court raises the question, “Proportionate to what?” In answer to the question, this Court notes that since delay damages were calculated upon the compensatory damage award, it is logical to conclude that this same basis will serve in determining proportionality. Specifically,

$$\begin{array}{r} \text{The Cat Fund's Obligation.....} \quad \$1,800,000 \\ \hline \text{The Compensatory Award.....} \quad \$24, 797,342 \end{array} = 0.07258 = 7.258\%$$

Determining that the CAT Fund is liable for 7.258% of the compensatory

award, this Court can then apply this percentage to determine the CAT Fund's liability for its share of delay damages. Specifically,  $\$3,383,225 \times 7.258/100 = \$245,554$ .

In concluding as it has done above, this Court has as its "polestar" the rule that "the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a)

According to common and approved usage, "proportionate" means something like a comparative relationship between things or magnitudes as to size, quantity, or parts; a relative size or extent; or a portion or a part in its relation to the whole. It would, therefore, be unreasonable and absurd to construe "proportionate" to mean "entire and whole." Further, this Court's construction of "proportionate share" is consistent with the rulings in *Lahav v. Main Line Ob/Gyn Assos., P.C.*, 556 Pa. at 252, 727 A.2d at 1107 n.4 (holding that, although its decision has limited applicability, delay damages against the CAT Fund are only applicable to the Fund's liability in a case and that the basic insurance carrier shall be responsible for *its* proportionate share of delay damages) (emphasis added)); and in *Elliott-Reese*, 805 A.2d 1253, 1257-1258 (2002) (holding that the CAT Fund is not obligated to "drop down" and assume responsibility for sums the primary carrier is statutorily liable for but remains responsible "for *only its proportionate share* of delay damages and post-judgment interest as they relate to excess coverage" (emphasis added)).

The only reasonable construction of this statute leads this Court to the conclusion that the CAT Fund and MIIX cannot be held jointly and severally liable for delay damages. Each should be held responsible, at the most, only for its own separate and independent proportionate share of those damages.

Since liability under 702(j) presupposes liability under Rule 238, this Court reads Rule 238 together with the statute and finds no inherent incompatibility

between them.

Indeed, without the possibility that an insurance carrier could be held liable to pay more than its policy limits, there would be no real incentive or motivation for the carrier to engage in meaningful pre-trial settlement negotiations. The absence of such consequences for failure to settle during pre-trial discussions would lead to the evisceration of Rule 238 and of the several holdings of Pennsylvania courts cited above that have ruled on this issue. Specifically,

$$\begin{array}{r} \text{MIIX's Obligation.....} \$600,000 \\ \hline \text{The Compensatory Award.....} \$24,797,342 \end{array} = 0.02419 = 2.419\%$$

Determining that MINX is liable for 2.419% of the compensatory award, this Court can then apply this percentage, as it did with the CAT Fund, to determine MINX's liability for its share of delay damages. Specifically,  $\$3,383,225 \times 2.419/100 = \$81,840.21$

In the instant matter, this Court refuses to accept the Carusos' contention that the CAT Fund and MIIX should be held liable for 100% of delay damages under the theory of joint and several liability.

Therefore, this Court grants the CAT Fund's petition for summary judgment on the count of joint and several liability against it and MIIX. This Court, however, holds the CAT Fund liable for its proportionate share of the overall liability in this case.

This Court also sustains MIIX's petition for summary judgment on the count of joint and several liability against it and the CAT Fund. This Court, however, holds MIIX liable for its proportionate share of delay damages.

**ORDER**

AND NOW, to wit, this                    day of April, 2003, it is hereby Ordered and Decreed that for all the reasons set forth above, this Court grants Defendant CAT Fund's Motion For Partial Summary Judgment on Count I of Plaintiff Carusos' Second Amended Complaint, thereby dismissing the Carusos' allegation of bad faith against the CAT Fund.

This Court finds that Defendants CAT Fund and MIIX are not 100% liable for delay damages and post-judgment interest, but that their liability is to be determined by a calculation of their respective proportionate shares of liability in this case. Counsel to submit a Motion to Mold the Verdict in accordance with the above, with a request to modify any judgment entered herein to take into account monies paid heretofore.

**BY THE COURT:**

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**ALLAN L. TERESHKO, J.**

**cc: Counsel**  
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