

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

THE SAVINGS BANK LIFE : CIVIL ACTION NO. 00-3255
INSURANCE COMPANY OF :
MASSACHUSETTS :
 :
v. : Philadelphia, Pennsylvania
 : August 29, 2000
SBLI MUTUAL LIFE INSURANCE : 12:55 o'clock p.m.
COMPANY, INC. :
.

AFTERNOON SESSION
PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE ROBERT F. KELLY
UNITED STATES DISTRICT COURT JUDGE

- - -

APPEARANCES:

For the Plaintiff: THOMAS S. BIEMER, ESQUIRE
Dilworth Paxson LLP
3200 Mellon Bank Center
1735 Market Street
Philadelphia, PA 19103-7595
-and-
MONA PATEL, ESQUIRE
MICHAEL WALSH, ESQUIRE
Greisinger Walsh & Maffei, LLP
155 Federal Street, Suite 1700
Boston, MA 02110

For the Defendant: GARY A. ROSEN, ESQUIRE
ROBERTA JACOBS-MEADWAY, ESQUIRE
Akin, Gump, Strauss, Hauer & Feld, LLP
One Commerce Square, 22nd Floor
2005 Market Street
Philadelphia, PA 19103

- - -

Courtroom Deputy/ESR: Thomas Garrity

Transcribed by: Geraldine C. Laws, CET
Tracey J. Williams, CET
Diane Gable

(Proceedings recorded by electronic sound recording; transcript provided by AAERT-certified transcribers.)

(Plaintiff's Exhibit Numbers 95, 101 through 104, and 106 through 110 received in evidence.)

MR. ROSEN: Your Honor, the defendant calls Michael White.

THE AUDIO OPERATOR: Raise your right hand and state your name, please.

THE WITNESS: Michael White.

MICHAEL WHITE, Defendant's Witness, Sworn.

DIRECT EXAMINATION

BY MR. ROSEN:

Q How are you presently employed, Mr. White?

A I am chairman and CEO of Michael White Associates, a wholly-owned company.

Q And what's the business of Michael White Associates?

A We consult to the banking and insurance industries, and general financial services; our main specialty is in the field of bank insurance.

Q Do you hold any advanced degrees?

A Yes, I do.

Q Could you tell us what those are?

A I have a doctorate in economic philosophy, four Master's degrees and a baccalaureate degree.

Q Do you hold any professional certifications in the insurance field?

A Yes, I do.

Q What are those?

A The CLU, the Chartered Life Underwriter, and the CHFC, the Chartered Financial Consultant.

Q Could you explain how one qualifies for those certifications?

A One qualifies for those certifications, in the case of the CLU designation, by taking a series of ten courses dealing with the life insurance industry, advanced estate planning, life insurance contracts and mathematics of life insurance. Upon passage of exams for each of those courses, then the designation is issued by the American College, which is located in Bryn Mawr.

Q Could you briefly summarize your professional career prior to forming Michael White Associates?

A I started in the business as a licensed insurance agent and registered representative and financial planner with IDS Financial Services, Investors Diversified Services, it's now known as American Express Financial Services, and I sold various insurance, annuity and investment products to customers. From there, while I was with IDS I moved to California and then, subsequent to my arrival in California, I was hired by E. F. Hutton & Company to become their first national insurance sales director. I spent about four years with E. F. Hutton in that capacity and in other capacities, as national product and marketing manager within the E. F. Hutton Insurance Group in California. Went to Security Pacific Corporation, specifically the insurance subsidiaries of Security Pacific. It was during

that period of time roughly about the fourth-largest bank holding company in the country. And I was recruited initially to take the bank holding company's insurance operations overseas where U.S. banking law and oftentimes foreign law was far more liberal in terms of the activities in which bank-related organizations could engage, and I did that. And also I helped to establish one of the first commercial bank annuity sales programs at Ranier National Bank, which Security Pacific acquired in the latter 1980s.

After that, I was offered the senior endowed chair at the American College where the CLU and ChFC designations are issued, that was the Frank M. Engel Distinguished Chair and I took the post as graduate professor of economics, international markets and financial institutions, and at that time I founded my company.

Q Where is the American College located?

A It's located in Bryn Mawr, Pennsylvania.

Q Is it specialized in any area of education?

A It specializes in insurance and financial services education. It was founded in 1927 by one of the University of Pennsylvania's outstanding professors, Solomon Hebner (ph.), and then eventually split off as an independent, fully-accredited college and moved to Bryn Mawr in the 1960s.

Q Have you been involved in planning or teaching any educational programs on insurance for bankers?

A Yes, I have.

Q Could you tell us briefly about those?

A I serve as the professor of retail delivery of insurance products and services for the American Bankers Association's Stonier (ph.) Graduate School of Banking, which is at Georgetown University in Washington, DC. And I am currently the lead instructor for a series of quarterly seminars designed for community bank CEOs which is sponsored by the Independent Community Bankers Association, the ICBA, the Independent Community Bankers Association of America.

Q Do you hold any positions with trade associations devoted to bank insurance?

A Yes, I do.

Q Could you tell us what those are?

A Well, I have served since 1991 on the board of directors of the Financial Institutions Insurance Association, the FIIA. The FIIA is a non-profit trade association, it is the largest non-profit trade association devoted exclusively to the marketing and sale of insurance products through financial institutions. In my capacity with the FIIA during those ten years, I served as President of the association for two years, and then the board also asked me to serve subsequently as the managing director, for six years I served as managing director and stepped down only recently in that capacity. I also have been involved with the International Insurance Society and a member of the board of governors, am, an elector to the International Insurance Hall of Fame which is housed at the

University of Alabama, and I currently serve -- the oldest international life insurance company trade association, many of whose members sell insurance through banks, the Pacific Insurance Conference, the PIC, and I serve as one of a four-person executive steering committee, a member of the executive committee, which consists of about 30 to 36 senior executives of insurance companies located or doing business in the Pacific Rim, and I also serve as treasurer of that organization.

Q Have you edited any journals or publications devoted to bank insurance?

A Yes, I have.

(Pause.)

Q Mr. White, I've handed you my only copy of an exhibit marked as D-241, I wonder if you could hold it up so the Court can see it and just tell us briefly what that is?

A This is the Summer 1998 issue of Bank Insurance Marketing Magazine.

Q And what position did you hold with that publication as of that time?

A I founded that magazine in 1992, served as publisher for six years, and during its entire life have served as contributing editor and continue to serve in that capacity.

Q And the publication, it's still being published quarterly?

A It is, yes.

Q Have you published any books in the area of bank insurance?

A Yes.

(Pause.)

Q Mr. White, I've handed you one of only two copies I have of Exhibit D-238, and could you tell the Court what that is?

A This is a publication entitled, "The crisis in life insurance: How to solve it with freedom of choice and free market competition," I wrote this. It's also known as the FIIA Bank Insurance White Paper, 1995. I researched and wrote this in 1994 and early 1995, it was published in 1995. Q Are you the sole author of that White paper?

A Yes, I am.

Q Mr. White, could you tell us what the publication marked as D-239 is?

A This is a book entitled, "The Sales and Marketing Guide to Bank Insurance," it was published by the National Underwriter Company.

Q And are you the sole author of that?

A I am.

Q When was that published?

A I think the copyright on it is 1998, but it was issued in early 1999.

Q And could you just tell us who the National Underwriter Company is?

A The National Underwriter Company is probably the country's leading insurance publishing house, they publish the industry's well-known weekly trade newspaper, also called the National

Underwriter, and they publish many books and monographs and other resources for the insurance industry.

Q And I've put before you, Mr. White, an exhibit marked as D-240, could you tell us what that is?

A This is "A Comprehensive Guide to Bank Insurance."

Q And are you the author of that?

A I am.

Q When was that published?

A Around the same time as the other.

Q That's, again, 1999?

A Yes. The copyright is probably 1998, but again issued in early 1999.

MR. ROSEN: Your Honor, if I could just have a moment? I can't, find the witness copy of one of these books, if I could just have a second?

THE COURT: All right. (Pause.)

MR. ROSEN: Your Honor, first I'd like to offer Mr. White as an expert in the field of bank insurance.

THE COURT: Do you wish to

MR. WALSH: Your Honor, we object to testimony by an expert witness. I'm not sure what the -- what the testimony is going to be directed towards, so we reserve the right to make further objections, but at this point the objection is that there was no disclosure made of any kind that there was going to be an expert witness called, and Rule 26 requires that

disclosure, and therefore we're totally unprepared to cross-examine an expert witness here today.

THE COURT: Yes?

MR. ROSEN: Your Honor, there's been no exchange of any exhibit lists or any witness lists in this case, the disclosure rule --

THE COURT: Normally we don't have that in a preliminary injunction hearing.

MR. ROSEN: And in fact, as that rule requires 90 days, this case wasn't even filed 90 days ago. And as I said, your Honor, there was no exchange of witness lists or exhibit lists, I think that was a tactical decision on the plaintiff's part and I don't think that they can show any substantial prejudice here.

MR. WALSH: Well, I think we can show substantial prejudice. Expert testimony is a separate category of discovery and is treated separately from all other categories of discovery, there's an affirmative obligation of disclosure under Rule 26 with respect to expert testimony that doesn't exist with respect to lists of witnesses. I don't have any problem with them not listing witnesses, it's the fact that this witness is an expert witness, that's what creates the issue here under Rule 26. And, yes, there's a 90-day notice requirement with respect to trial, but of course that period can be abbreviated when required. We've had -- it's not as though we got a week's notice and we were supposed to get 90 days, under the circumstances

that wouldn't be unreasonable, it's as if we got notice here and now before the Court, that's unfair.

MR. ROSEN: Your Honor, the disclosure rule he's referring to requires a series of disclosures, none of which have been done in this preliminary injunction context.

THE COURT: I'm going to allow the testimony. And we may have to allow you to do something else in response, we'll see. But I will allow the testimony, objection overruled.

BY MR. ROSEN:

Q Mr. White, based on your experience in the field of bank insurance, where do consumers get their information about life insurance?

A They would typically obtain information through professional insurance people, advisors, insurance agents and through the media.

Q Now, prior to your engagement with respect to this litigation were you familiar with Savings Bank Life Insurance?

A Yes.

Q And how did you become familiar with Savings Bank Life Insurance?

A Over the course of the years of study and becoming familiar with my industry.

Q In the course of your consulting work have you dealt specifically with anyone associated with Savings Bank Life Insurance?

A Yes.

Q And who was that?

A In what fashion do you mean, have I dealt?

Q Have you, for example, addressed any groups related to Savings Bank Life Insurance?

A Yes, I have addressed the SBLI Managers Association several times in the 1990s.

Q And who are they?

A They are the managers of SBLI programs within the State of Connecticut.

Q Mr. White, do you recognize D-146?

A Yes.

Q And could you tell us what that is?

A That is a letter addressed to me from Mario Bartoli, who at the time was the president of the SBLI Managers Association.

Q Now, do you recognize the letterhead on this document?

A Yes.

Q And in particular the SBLI logo on the upper left?

A Yes.

Q And do you know as to what company or organization that logo was used?

A Well, I -- I know that I would attribute it to the managers in Connecticut because I knew who Mario Bartoli was.

Q And where did you actually speak to this group?

A In Connecticut.

Q In your work, academic work and consulting work, have you become familiar with how the term SBLI is used by insurance and banking professionals?

A Yes.

Q And how is it used?

MR. WALSH: Objection, relevance.

MR. ROSEN: Your Honor, in proving whether a term is acting as a trademark or whether it's become a generic public domain sort of phrase one of the circumstantial pieces of evidence that can be considered is how that term is used in the trade. And we've already looked at mass media publications like Consumers Reports and the like, here we have somebody who will be able to talk specifically as to how it's used in specialized publications, used by certified life' underwriters and the like.

MR. WALSH: Your Honor, the genericness inquiry goes to the understanding of the consuming public with-respect to the word in question, and typically whenever there is expert testimony presented on the issue of genericness it's limited to the presentation of consumer surveys. There are cases, they're exceptional, where the consuming public consists of experts and, therefore, there are cases where a jargoned term in a particular industry may be generic based on the understanding of what would otherwise be regarded as an expert group because, due to the nature of that particular product at issue, that's what counts, that's the consuming public. But here we're talking about life insurance and what matters is not the understanding of bankers

or the understanding of this witness, or even the understanding of my client or Mr. Rosen's client, what matters is the understanding of the consuming public, the population at large, people who would buy life insurance, that's the inquiry. If there is expert testimony to be presented on that, it would be in the form of a consumer survey of what those people understand, what the bankers think is irrelevant.

THE COURT: Yes, Mr. Rosen?

MR. ROSEN: I don't disagree that the ultimate inquiry is what the public thinks, but we've had Mr. Gaffney and Mr. Sheridan both testify earlier in this proceeding that one of the important ways the public gets their information in this area is from insurance brokers and professionals and agents and CLUs, Mr. white has just confirmed that a moment ago. Yes, surveys are important, we had one survey in this case, which they now disparage as having been a dumb question, but surveys are not the only way you get at the issue of the public perception. Like in any other field, sometimes it's the circumstantial evidence that's actually more reliable than the so-called direct evidence, and surveys are certainly not the exclusive means by which the Court can reach a conclusion as to whether a term principally operates as a generic name of a product or principally operates to designate Savings Bank Life Insurance of Massachusetts, which is the contention here.

THE COURT: All right. I think it goes to the weight, I will admit it.

BY MR. ROSEN:

Q I think my last question, Mr. White, was if you could explain how the term SBLI is used by insurance and banking professionals?

A It's typically used as a generic acronym for Savings Bank Life Insurance. It's commonly understood except where the context is normally quite clear and the referent is normally cleared spelled out, you know, for the audience. Apart from specific contextual use such as SBLI of New York or SBLI of Massachusetts, it would be treated as a generic term designed to denote a system for selling life insurance through savings banks.

Q Now, are you familiar that in recent years the various SBLI organizations have adopted new means of distributing their life insurance in addition to or instead of through savings banks?

A I'm aware that they're doing more direct marketing. And I'm aware of course that in Massachusetts, I guess not quite ten years ago, they converted their SBLI state system into a stock-owned insurance company and that New York has gone through similar reforms here recently, and that Connecticut has had its own SBLI company for some time, and that the emphasis is moving more and more to direct marketing it would appear.

Q Has that change in emphasis in any way changed the way the term SBLI used -- SBLI is used among professionals?

A No -- you're talking about insurance and banking professionals?

Q Yes.

A No, they would still refer to the system, the concept, the products, the distribution as being an SBLI program, they would use the term generically unless they were specifically wanting to refer to a unique, particular company or system such as New York, Connecticut or Massachusetts.

Q Now, Mr. White, I'd like to go over some specific examples with you.

MR. ROSEN: Your Honor, some of these are in the book previously marked as D-79, and I wanted to give you either an opportunity to pull it out or we could probably get you another one.

THE COURT: If I can avoid getting another one, I'll be all right.

(Pause.)

THE COURT: No, I've got it. All right.

BY MR. ROSEN:

Q Now, Mr. White, we looked a few moments ago at three books of your own, do they deal at all with Savings Bank Life Insurance?

A I'm sorry, I couldn't hear the last part.

Q We looked a few moments ago at three books of your own, do they deal at all with Savings Bank Life Insurance?

A They refer to SBLI.

Q Could you turn to the tabbed book which I placed in front of you a few moments ago, D-79?

A Mm-hmm.

Q Let's begin with Tab 22. (Pause.)

Q Now, is that an excerpt from the White paper we looked at a few moments ago?

A Yes.

Q Published in 1995?

A Yes.

Q And looking at Page 39 which is excerpted there, how did you use the term SBLI in this publication?

A I used it generically.

Q And what do you mean by that?

A As not referring to a particular company but to a system, a program of distribution of life insurance through savings banks.

Q Now, could you turn to Tab 30? And is that an excerpt from "The Sales and Marketing Guide to Bank Insurance," which we looked at a few-moments ago?

A Yes, it is.

Q And turning to the excerpts from Pages 81 to 82, how did you use the term SBLI in that book?

A Well, I used it in two ways actually, I used it both generically and then I had a specific reference. I talked about SBLI as a type of life insurance business as one of the best buys, best life insurance buys in America, and then I

indicated that all three states, Massachusetts, New York and Connecticut, had adopted SBLI systems. So there I'm referring to the three specific states, but also talking about generic, the generic SBLI system.

Q Now, by the way, when you wrote this book were you aware of there being any trademark dispute

A No, I wasn't.

Q -- between any of these entities?

A No, I wasn't.

Q And could you tell us a little about who the audience for the sales and marketing guide was?

A The readership audience for the book?

Q Yes.

A It would have been banking and insurance professionals by and large, insurance agents, insurance company executives, bank executives, marketing people.

Q And could you turn to Tab 31? Is that an excerpt from "The Comprehensive Guide to Bank Insurance, we looked at a few moments ago?

A Yes it is.

Q And turning to the excerpts from Pages 55 to 56 reproduced there, how did you use the term SBLI in that book? (Pause.)

A Well, again, I used it in two ways. I started off talking about the history of Savings Bank Life Insurance, which initially began through Justice Brandeis, efforts in the state of Massachusetts, and then I go on to talk about the SBLI system

generically, again then specific to New York, specific to Connecticut, Connecticut has also adopted an SBLI system, New York adopted its SBLI law in 1938. And then going on again -- I'm not sure which source I've quoted there, but today the three states' SBLI systems insure nearly one million people with nearly 50 billion of total life insurance in force, again talking about SBLI generically in that sense.

Q And, again, as of the time that you wrote that book were you aware of any trademark disputes amongst any of those organizations?

A No, I was not. I might just add then that second paragraph on Page 56 the reference to the FDIC, also treating SBLI in a generic fashion, and what kind of a risk it represents to the deposit insurance fund.

Q And other than the speaking you did for the SBLI Managers Association which you testified to a few moments ago had you ever been engaged to perform any services for any of these three organizations at the time you wrote that book?

A No, I was not, I have not, I am not.

Q Other than here today?

A Other than here today.

Q Now, I'd like to turn you back in the book to Tab 1.

(Pause.)

Q And could you tell us about the book that's excerpted here?

A This is, "Marketing Life Insurance, Its History in America," by J. Owen Stalson (ph.), recognized to be a classic history of marketing of life insurance in its early days and through the turn of the century.

Q And could you turn to the final page of the exhibit where Page 570 of the book is reproduced? And could you read into the record the last paragraph above Heading Number 2, the Wisconsin State Fund?

A On Page 570?

Q Yeah.

A "Still profiting... "?

Q Yes.

A "Still profiting from the influence of Justice Brandeis, the SBLI idea has now spread to New York where an SBLI law went into effect on April 6th, 1938. Connecticut too has now in 1941 passed an SBLI law. How the system is to operate if it spreads to states which do not have so many mutual savings banks as these eastern states do remains to be seen."

Q And what is the date of that Stalson text?

A The text was published in 1942 and republished in 1969.

Q I'd like you to turn to Tab 9. Earlier you explained what the national underwriter organization was -

A Mm-hmm.

Q -- are you familiar with a publication called the National Underwriter?

A Yes, this would be their weekly newspaper.

Q And do you know who the audience for that newspaper is?

A Again, the insurance industry, and increasingly a broad range of financial services executives and personnel.

Q Now, directing your attention to the second column on the first page of text which has 6244 at the bottom, and looking in particular at the third and fourth full paragraphs, how is the term SBLI used in the National Underwriter, March 29th, 1975?

A In the third and fourth full paragraph starting with, "Besides Massachusetts"?

Q I'm not limiting you to that, I'm just trying to direct you to the most pertinent --

A Okay. Well, it's used generically that first sentence, "Besides Massachusetts, only New York and Connecticut have SBLI programs." Then it goes on to talk more specifically about the situation, the amount of -- face amount of coverage that can be issued in New York. Then it goes back to Connecticut, "which has been writing SBLI only since the 1930s, limits policies to,, -- I believe that's \$5,000 per individual. "Although legislation to allow SBLI has been introduced in a number of states, it has always been defeated," again it's used generically there.

Q Could I direct you now to Tab 17 in the same book?

(Pause.)

Q And if we're in the same place, that's an excerpt from the June 19th, 1986 New York Times?

A Yes.

Q Do you know whether the New York Times is read widely by insurance and banking professionals?

A I imagine it is. It's a well-known newspaper.

Q And how is the term SBLI used in that article?

A Oh, Lord. With the fine print I'm not sure. Well, on the table it appears as if it is used quite specific to New York Savings Bank Life Insurance, and compares the New York SBLI coverage amounts, permissible coverage amounts to other insurance companies. I'm not sure in the rest of the article here. It opens talking about state-chartered savings banks in New York, and having the right to issue some life insurance policies. So that would appear to be a specific context in which SBLI is referring to New York, SBLI of New York.

Q Could you turn to tab 20? Are you familiar with the Life Association News?

A Yes, I am.

Q what is that publication?

A Life Association News is the official magazine of what used to be known until recently as the National Association of Life Underwriters, the largest life insurance agent trade association. I think they're now called the National Association of Financial Services Professionals. They just recently changed their name.

Q And looking at the article which is reproduced from page 62 of the July 1993 issue, how does the Life Assurance News use the term SBLI?

MR. WALSH: Objection. He's asking the witness now to characterize and interpret documents that don't require any particular expertise but just reading them, and the witness is giving his interpretation.

MR. ROSEN: Well, if there's a stipulation that it refers to New York Savings Bank Life Insurance, then that's fine.

MR. WALSH: There's a stipulation that it says what it says and any witness can't add to that.

MR. ROSEN: I'll accept that stipulation.

MR. WALSH: Okay.

BY MR. ROSEN:

Q Now, Mr. White, I have a few additional exhibits that didn't make it to press with that book. Are you familiar with D-149?

A Yes.

Q Can you tell us what that is?

A This is a textbook entitled Marketing Life and Health Insurance published for the FLMI education program. It's another professional insurance designation offered by the Life Office Management Association, one of the large leading life insurance company and financial services company trade associations.

Q And are you familiar with whom this text is directed to or by whom it is used?

A Again, it would be for insurance -- people in the insurance industry most likely studying for their FMLI

designation. It would have been a course used for their marketing -- it would have been a text used for their marketing course in the FMLI program.

Q Now, does it deal with Savings Bank Life Insurance?

A Yes, it does.

Q And directing you to the text beginning at page 310. Could you tell us how this textbook uses the term SBLI?

MR. WALSH: Objection, your Honor. Same objection as before.

MR. ROSEN: Provided there is no objection to the exhibit going on in its entirety based on the witness' qualification of it, I don't need to ask any additional questions on it.

THE COURT: All right, fine.

BY MR. ROSEN:

Q Are you familiar with Exhibit D-150, Mr. White?

A Yes, I am.

Q What is that?

A It is the summer 1998 issue or portion thereof of Bank Insurance Marketing Magazine.

Q And is that the same magazine you testified to your involvement with a few moments ago?

A Yes, it is.

Q And turning your attention now to page II. By the way, do you know Andrew Singer, the author of this article?

A Yes, I do.

Q Who is he?

A He is the current publisher and editor-in-chief of this magazine.

Q Turning your attention to page 11. Could you read into the record the two paragraphs that follow the heading, Moving Beyond SBLI?

A "Because it is a New York Savings Bank, Dime has been able to sell Savings Bank Life Insurance, SBLI, for decades. But this low-cost term and whole life insurance program that is only available in three states, New York, Connecticut and Massachusetts has not, in the view of some institutions, kept up with the times. SBLI doesn't offer 10 year, 15 year level term life insurance, for instance, or estate planning products. "In 1995 and 1996 Dime began to look for additional life products. This quest was accelerated in the wake of Dime's January 1995 merger with Anchor Bank, an institution with 18 branches in New Jersey. SBLI could not be sold in New Jersey, so Dime began offering more conventional life insurance. It worked to a certain level, recalls Matel (ph). The bank said mmm, maybe we can sell things other than SBLI."

Q Mr. White, I'd like to turn your attention back to the book with the tabs one last time and turn your attention to tab 35. This is an excerpt from the website of the Life and Health Insurance Foundation for Education. Are you familiar with that organization?

A Yes, I am.

Q Could you tell us who they are?

A This is a nonprofit organization that was founded by six or seven of the leading life insurance trade associations, I believe including LOMA, the American Council for Life Insurance, ACLI, LIMRA, the NALU that I mentioned a moment ago. It was designed to promote -- there was a feeling that there was a need on the part of the public for education, insurance education and understanding, so it was designed to fill that perceived gap.

Q Turning the page, could you read into the record, sir, the entry on Savings Bank Life Insurance?

A Yes. This would be from their glossary. "Savings Bank Life Insurance, SBLI, in the United States life insurance coverage sold by authorized savings banks to people who live or work in the state in which the insurance is sold. Savings Bank Life Insurance is permitted in three states: Massachusetts, New York and Connecticut."

MR. ROSEN: Your Honor, I'd like to offer into evidence the following material from D-79, tab 1, tab 9, tab 17, tab 22, 30, 31, 20 and 35, as well as Exhibits 146, 149, 150 and 238 through 241. I'm sorry, 240 was the last one.

THE COURT: Any objection?

MR. WALSH: Your Honor, we object to the admission of tab 35 to D-79 on the grounds that there is no foundation here, that this particular glossary that comprises tab 35 is anything other than a publication intended for insurance professionals as opposed to the consuming public at large. Whatever SBLI may mean

to insurance professionals, that is not the test for genericness.

MR. ROSEN: Again, your Honor, it's really the same argument that the public gets its information from insurance professionals so what insurance professionals understand a term to mean is pertinent.

THE COURT: I will admit it. The argument goes to the weight of the evidence rather than to its admissibility. So they are admitted.

MR. ROSEN: Your Honor, there is a 241, according to my assistant, so I move the admission of that one. That's what happens when you improvise. That was the magazine that there was only one copy of.

(Exhibit D-79, tab 1, tab 9, tab 17, tab'22, tab 30, tab 31, tab 20 and tab 35 admitted into evidence.)

(Exhibits D-146, 149, 150 and 238 through 241 admitted into evidence.)

THE COURT: You may cross-examine.

MR. WALSH: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. WALSH:

Q Good afternoon, Mr. White.

A Good afternoon.

Q My name is Michael Walsh and I represent the plaintiff in this case, the Savings Bank Life Insurance Company of

Massachusetts. When were your services retained by the defendant?

A I guess about five weeks ago.

Q And who retained your services at that time?

A Mr. Rosen.

Q And have you been working on this particular project for the last five weeks?

A Off and on.

Q And have you done any consumer surveys of any kind in order to educate yourself about what the purchasing public thinks the SBLI symbol means?

A No.

Q Let me show you one of the documents that Mr. Rosen directed your attention to. I'd like to direct your attention back to it. It's in the big compilation that's been marked as D-79. And he showed you or directed your attention to tab 9 among other documents that he showed you. And he asked you to look specifically at the third and fourth paragraphs in the second column. Do you have that before you now?

A Yes, I do.

Q And you looked at it and said that as you interpreted this particular document it was using SBLI in a generic sense to refer to the product in those two paragraphs, right?

A SBLI programs, yes, generically.

Q Okay. Now let me ask you to look at the very next paragraph.

A Starting with "Today"?

Q Yeah, starting with "Today" in the very first sentence.

A Mm-hmm.

Q Why don't you read it into the record.

A Sure. "Today SBLI is the looth largest life insurer in the US and is the fourth largest in Massachusetts where it writes five percent of all life insurance sold.,,

Q That's not a generic use of SBLI, is it? A No, it's a fairly --

Q It's a fairly specific --

A Sure, it's linked to Massachusetts.

Q So at least as it's used in that paragraph you would agree with me that the author of this article is using SBLI to refer specifically to the Savings Bank Life Insurance Company of Massachusetts, correct?

A Yes, yes.

Q And as I understand your testimony, you have seen uses of this symbol in the professional literature which you would characterize as generic, referring to the product being sold by these organizations; correct?

A Yes.

Q You've seen uses in the literature referring to one or more of the particular organizations that sell those products, correct?

A Yes.

Q And you've seen uses that refer specifically to the Massachusetts organize, just as the one to which I just directed your attention, correct?

A Correct.

Q And you've seen uses that refer specifically to the New York and Connecticut organizations as well, correct?

A Yes.

Q Are you aware, by the way, Mr. White, that a common generic term, meaning a term that's understood by the public at large to be synonymous with the product itself cannot be registered as a trademark?

A I'm no expert in trademark law, so that I wouldn't know.

Q Are you aware that the United States Patent and Trademark Office has granted a federal registration of the SBLI symbol?

A To the SBLI Company of Massachusetts, that's what I understood this case was largely about.

Q So you were told that fact?

A Yes.

Q Are you aware that the New York organization as well sought and obtained a registration of the SBLI acronym?

A I understand that they have, and it certainly wouldn't surprise me.

Q And it wouldn't surprise you in view of your awareness of the fact that they have used it to designate themselves as the origin for their products?

A Sure. And sometimes people or organizations retaliate in kind. If the roles were reversed, I would be testifying against SBLI of New York because I find SBLI to be a generic symbol of Savings Bank Life Insurance.

Q I guess my question though went not to what you find but what the New York organization did.

A Mm-hmm.

Q Let me just ask you a question or two about your answer. Do you have some information that was given to you that the New York filing of SBLI for trademark registration with the State of New York was in any way retaliatory and had nothing to do -

A No.

Q You don't know why the mark was registered, right?

A No, no.

MR. ROSEN: Your Honor, Mr. Walsh has been interrupting witnesses a lot this morning. I think he should let witnesses finish their answers.

MR. WALSH: Are you done with that answer?

THE COURT: Well, he said no.

MR. WALSH: He said no, no.

THE WITNESS: No, I don't have any inside information on that. I'm just thinking of human nature, that's all.

BY MR. WALSH:

Q Okay. But you're not here to give testimony about why the New York people registered a trademark and you have no information about that at all, right?

A No, that's correct.

Q You testified about the glossary definition of SBLI as it appears in tab 35 to Exhibit D-79 which is a website intended primarily for use by insurance professionals, correct?

A No, that's not correct.

Q And what is your understanding of the purpose of this website?

A Well, professionals may turn to it, but it's designed primarily for consumers.

Q Let me show you some other glossary material that is intended primarily for use by the consuming public at large, and I'll ask you to take a look at that and see if we can find any reference to SBLI. Let me show you first what I've marked as Exhibit P- 113 which for the record is the Second Edition of Funk and Wagnalls Standard Dictionary. And it's before you now. Let me direct your attention to page 708. Do you have it?

A I do.

Q And that's the page on which if there was a definition of SBLI in that dictionary it would appear, given the ordering of the words, correct?

A Yes.

Q Do you find any definition of SBLI on that page?

A No.

Q Let me show you another dictionary. This is the Merriam Webster Dictionary. It's the 1997 Edition and I've had it

marked as Exhibit P-114. Let me direct your attention to page 653. Are you there?

A Yes, I am.

Q And if you look on that page you'll see a number of definitions of terms or acronyms that begin with S and the next letter of which is B, right?

A Yes.

Q You can see one definition for small s, small b.

A Small s, small b? Maybe I don't follow -- oh, okay, I see where you are, yes.

Q Do you see it?

A Yes.

Q And then the very next definition is for capital S, small b, right? Do you see it?

A Yes.

Q All right, that has a different meaning, correct?

A Yes.

Q And then the very next entry is for capital S, capital B, correct?

A Yes.

Q And the very next entry is SBA, referring to the Small Business Administration, correct?

A Yes.

Q There is no entry in that dictionary for SELI, is there?

A No, there is not.

Q Let me show you another dictionary which I've had marked as Exhibit P-111. This is the New American Webster Handy College Dictionary, New Third Edition. P-111 in before you now. Let me direct your attention to page 595. Are you there?

A Yes.

Q Thank you. Page 595 is where the definition of SBLI would be if in fact SBLI were a defined term in that dictionary; correct?

A If it were a defined term in this dictionary I imagine it would be on this page.

Q And is it there?

A No, it is not.

Q Look if you would at page 763.

A I have it.

Q And that page is in the midst of a section dealing with the definitions of abbreviations, correct?

A Yes.

Q And if there were a definition for the abbreviation SELI, it would appear on page 763, given the alphabetical ordering, correct?

A Yes, it would.

Q Is there a definition of SBLI on that page?

A There is not.

Q Let me show you one final dictionary which is the American Heritage Dictionary. This is the Third Edition and it's been marked as P-112.

A Mm-hmm.

Q And turn if you would to page 731 of that dictionary. Are you there?

A Not yet.

Q Okay, tell me when you are, please.

A I am now.

Q And you'll see the definitions of several abbreviations and acronyms that begin with SB.

A Yes.

Q You don't see SBLI on that page?

A I do not.

MR. WALSH: No further questions. Thank you, your Honor.

THE COURT: Okay, any redirect?

MR. ROSEN: No redirect.

THE COURT: Thank you.

THE WITNESS: Thank you.

MR. WALSH: Thank you, Mr. White. (Witness excused.)