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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT  
SUCV2005-1360 OF THE TRIAL COURT

\*\*\*\*\*  
MARCIA RHODES, HAROLD RHODES, INDIVIDUALLY, \*  
HAROLD RHODES, ON BEHALF OF HIS MINOR CHILD \*  
AND NEXT FRIEND, REBECCA RHODES, \*  
Plaintiffs, \*  
VS. \*  
AIG DOMESTIC CLAIMS, INC. f/k/a AIG TECHNICAL \*  
SERVICES, INC., NATIONAL UNION FIRE INSURANCE \*  
COMPANY OF PITTSBURGH, PA., and ZURICH \*  
AMERICAN INSURANCE COMPANY, \*  
Defendants, \*  
\*\*\*\*\*

JURY-WAIVED TRIAL - DAY 11

BEFORE: GANTS, J.  
BOSTON, MASSACHUSETTS  
MARCH 8, 2007

PAULA PIETRELLA  
FAYE LEROUX

APPEARANCES

BROWN RUDNICK  
M. Frederick Pritzker  
Daniel J. Brown  
Margaret M. Pinkham  
Attorneys At Law  
One Financial Center  
Boston, MA 02111

FOR: The Plaintiffs Marcia Rhodes, et al.

ROBINSON & COLE, LLP  
Gregory P. Varga  
Elizabeth C. Sackett  
Stephen Goldman  
Attorneys At Law  
1 Boston Place  
Boston, MA 02108

FOR: The Defendant Zurich American Insurance  
Company

ZELLE McDONOUGH, LLP  
Anthony Zelle  
Brian McDonough  
Attorneys At Law  
4 Longfellow Place, 35th Floor  
Boston, MA 02114

FOR: The Defendants AIG Domestic Claims and  
National Union Fire Insurance Company

THE McCORMACK FIRM, LLC  
Mark E. Cohen  
Robert Maselek  
Attorneys At Law  
1 International Place  
Boston, MA 02110

FOR: The Defendants AIG Domestic Claims and  
National Union Fire Insurance Company

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Arthur Kiriakos (Resumed)				
(By Mr. Cohen)		5		
(By Mr. Goldman)		93		

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PROCEEDINGS

(In court at 10:20 a.m.)

THE COURT OFFICER: This Honorable Court is in session. You may be seated.

THE COURT: Good morning. Welcome back. Ms. Sackett, you were to report about the Red Sox, I believe?

MS. SACKETT: I'm sorry to say that Matsuzaka was not there the day I was there.

THE COURT: Oh.

MS. SACKETT: It was a split squad.

THE COURT: Really. All right. Well, I hope your trip was not otherwise in vain.

Okay. Let's get back to work. I believe Mr. Kiriakos is on the stand.

MR. COHEN: Your Honor, before I start with Mr. Kiriakos, when we were here last time you invited us to file something with regard to the annual report issue, and we have something. We'd just like to file that, if that's okay. I don't think there's any need to discuss it.

THE COURT: I'm sorry. The annual report issue.

MR. COHEN: The plaintiff sought to introduce

the annual report of National Union and also Zurich. We had a discussion as to whether that was admissible or not, to show the wealth of the defendants.

THE COURT: I remember now. I think I recall saying that I did much carry the way --

MR. COHEN: You did say that, your Honor.

THE COURT: -- so it's not going to be a major consequence in terms of my decision.

Okay. So that's been filed?

MR. COHEN: It's about to be.

THE COURT: All right. So I will address that in turn. As I mentioned, I think there's no risk that the case will in any major way hedge on the outcome of that matter. So with that, we can proceed.

ARTHUR KIRIAKOS. (Resumed).

CROSS-EXAMINATION BY MR. COHEN. CONTINUED:

Q Good morning, Mr. Kiriakos.

A Good morning.

Q Since we were together last, have you had the opportunity --

THE COURT: Actually, because so much time has passed, let me just remind you that you are still under the oath that you took -- what day was it?

MR. PRITZKER: The 16th, your Honor.

February 16.

THE COURT: February 16 was when we were last here? Okay. So that oath remains in effect, as I think you know.

THE WITNESS: Yes, sir.

THE COURT: Okay. Proceed.

(By Mr. Cohen)

Q Since we were together last, have you done anything further to prepare for your testimony?

A Just reread the -- my initial in response to interrogatories and my affidavit.

Q And one of the documents that you didn't review in this case was the trial transcript in the accident trial, right?

A Correct.

Q And you also didn't review any medical records, other than the discharge summary for Mrs. Rhodes at UMass Medical Center, right?

A Correct.

Q Now, I have a couple of other questions about your background, Mr. Kiriakos. Can you tell us why you left AIG?

A Another business pursuit, my own ADR company at the time. I was involved with a gentleman by the name of

John Wallace.

Q Well, did you leave AIG on your volition?

A At that time, I was laid off.

Q Well, isn't it true that you were terminated for unsatisfactory performance?

A That's not my recollection, sir.

Q Let's see if I can refresh your recollection. I'd like to show you a document and it's entitled "Termination Notice," and let's see if that can refresh your recollection.

A This is the first I've ever seen of this piece of paper, sir.

Q Okay. Well, whether you've seen it before or not, does it refresh your recollection as to whether you were fired by AIG for unsatisfactory performance?

A The person that I met with, the two people, advised me I was being laid off. Those are the words they used.

Q Who were the two people?

A A man by the name of Dennis Wallace. I don't remember. There was another woman. I do not recall her name.

Q Do you recall that Dennis Wallace put you on a written warning a month before you were terminated?

A If he did, and you've got that document, I don't recall it specifically. No, I do not.

1 Q Well, in any event, the termination notice that I just  
 2 gave you to look at, that refers to you, correct?  
 3 A Yes, it does, sir.  
 4 Q And it gives the reason for the termination, and it has  
 5 unsatisfactory performance, correct?  
 6 A It says unsat perform -- I can't read what the word is  
 7 above it.  
 8 Q Well, it says unsat performance, right?  
 9 A Yes, it does.  
 10 Q But that doesn't refresh your recollection as to why  
 11 you left.  
 12 A I never got this before today, sir.  
 13 MR. COHEN: Can we mark that for  
 14 identification, your Honor?  
 15 THE COURT: You may.  
 16  
 17 (Exhibit H, marked for I.D.; Termination  
 18 Notice.)  
 19  
 20 (By Mr. Cohen)  
 21 Q Now, Mr. Kiriakos, do you recall that we talked about  
 22 the list of Superior Court cases that you testified  
 23 about -- that you testified in, and you gave us a list  
 24 and we went through the list last time, right?

1 A Yes.  
 2 Q Were there any Superior Court cases that you didn't put  
 3 on that list that you testified in as an expert?  
 4 A Not that I can recall, sir, no.  
 5 Q Well, do you recall testifying as an expert witness for  
 6 a plaintiff in a case called Johnson v. Hingham Mutual?  
 7 A No. It was McNeil v. Hingham Mutual.  
 8 Q Well, I'm referring to a case called Johnson v. Hingham  
 9 Mutual.  
 10 A Then I had the plaintiff's name wrong.  
 11 Q Okay.  
 12 A That was in Norfolk County, if I can remember  
 13 correctly.  
 14 Q That was before Judge Healy, right?  
 15 A I couldn't remember the name of the judge, sir.  
 16 Q Do you recall that Judge Healy issued a written opinion  
 17 in that case?  
 18 A I recall that all I was told by the plaintiff's  
 19 attorney what the decision was. I never saw the  
 20 opinion.  
 21 Q Okay. I'd like to show you a copy of Judge Healy's  
 22 opinion in that case and --  
 23 MR. COHEN: Your Honor, for the record, the  
 24 citation is 2002 Westlaw 35487563. It's a 2000

1 opinion.  
 2 (By Mr. Cohen)  
 3 Q And referring to the second page of the opinion, the  
 4 first full paragraph -- are you with me?  
 5 A Yes, I am.  
 6 Q Do you see where it says: Although plaintiff's expert,  
 7 Arthur Kiriakos, was well-qualified, his opinions about  
 8 the defendant's investigation and evaluation of the  
 9 claim were exaggerated and not at all convincing. He  
 10 jumped too readily to the conclusion that liability was  
 11 reasonably clear. The court doubts whether Mr.  
 12 Kiriakos would himself have made any settlement offer  
 13 prior to the Chapter 93A demand letter or any larger  
 14 offers afterwards if he had been handling this case for  
 15 the insurer.  
 16 Do you see that?  
 17 A Yes, I do, sir.  
 18 Q And also, later in the opinion, if you go down to about  
 19 the middle of the third paragraph, do you see: Mr.  
 20 Kiriakos's opinion about the settlement value of this  
 21 case was not convincing.  
 22 A It says that. Yes, it does, sir.  
 23 Q Does that refresh your recollection about your  
 24 testimony in that case?

1 A I remember the case clearly. I've never seen this  
 2 document before today.  
 3 Q But that's not a case that was listed on your CV,  
 4 right?  
 5 A No. I had the plaintiff's name wrong.  
 6 Q Now, in your testimony in the Johnson case, do you  
 7 recall that you characterized the insurance company's  
 8 conduct as outrageous, unacceptable, and the worst you  
 9 had seen in more than 20 years of claims handling?  
 10 MR. PRITZKER: Objection.  
 11 THE COURT: Overruled.  
 12 A Yes, I do.  
 13 (By Mr. Cohen)  
 14 Q Obviously, the judge didn't agree with that  
 15 characterization because he found for the plaintiff,  
 16 right?  
 17 MR. PRITZKER: Objection.  
 18 THE COURT: Sustained.  
 19 (By Mr. Cohen)  
 20 Q Now, I'd like to ask you about your experience with  
 21 spinal cord injury cases.  
 22 A Certainly.  
 23 Q You said that you worked on a number of them for  
 24 Commercial Union, right?

1 A Yes, sir.

2 Q And were those cases -- how many of those cases were  
3 there?

4 A Estimate, 50.

5 Q And those were cases involving a football helmet  
6 manufacturer called BIKE?

7 A Correct.

8 Q And those cases involved, I take it, head and neck  
9 injuries, correct?

10 A Correct.

11 Q So they didn't involve lower back or paraplegic  
12 injuries, right?

13 A No, they did not.

14 Q Can you recall anything about any paraplegic cases that  
15 you've actually worked on in your career?

16 A Yes, I can.

17 Q Okay. Tell me.

18 A In 1983, I worked on a motor vehicle accident in  
19 Boston. It was a left-hand turn on Park Street, I  
20 think, from Brookline Avenue, where the passenger  
21 fractured her thoracic spine. She was unbelted and  
22 intoxicated.

23 Q Anything more recent than 1983?

24 A A foundry incident in Ohio -- it was Part B claim --

1 primary insurer?

2 A My knowledge would be secondhand. I've never actually  
3 looked at the premium charge. If you tell me that it's  
4 true, it's true.

5 Q You don't disagree with that?

6 A No, I do not.

7 Q Now, do you agree with the proposition that within the  
8 Commonwealth of Massachusetts there are no universal  
9 accepted industrywide claims handling practices  
10 involving primary or excess umbrella claims?

11 A Yes, I do.

12 Q And that, in fact, was something you wrote in your MCLE  
13 article, right?

14 A Correct.

15 Q Now, are you familiar with something called the guiding  
16 principles for excess and primary insurers?

17 A I've never seen them.

18 Q So whether you've seen them or not, have you ever heard  
19 of them?

20 A No, I have not.

21 Q There are three general phases of an insurance claim's  
22 handling, correct? There's first the investigation  
23 phase; second, the evaluation phase; and, third, the  
24 negotiation phase, right?

1 working for Hartford Insurance. I do not remember the  
2 name of the employee.

3 Q Are those the only two?

4 A Those are the two I can remember sitting here right now  
5 by name.

6 Q By the way, do you currently work for an outfit called  
7 the Central Bureau of Investigation out of Canton,  
8 Massachusetts?

9 A I've done part-time work for them. I'm not an  
10 employee, no.

11 Q And that's an investigative agency, right?

12 A Correct.

13 Q And you're out taking witness statements for them,  
14 right?

15 A On a rare occasion, yes.

16 Q Now, I'd like to ask you about claims handling  
17 practices in general.

18 First off, do you agree that an excess  
19 insurer has a right to rely on the primary insurer to  
20 properly conduct the defense and investigation of a  
21 case?

22 A It's a two-part question. I'll answer yes to both.

23 Q And do you understand that an excess insurer typically  
24 charges much less for much more coverage than does a

1 A Yes, sir.

2 Q And in order to properly evaluate a case, you have to  
3 finish the investigation, obviously, right?

4 A The investigation is ongoing throughout the life of the  
5 file, sir.

6 Q True. But you can't fully evaluate the case until  
7 you've done the investigation.

8 A That's not always true.

9 Q Well, is it sometimes true?

10 A Sometimes true.

11 Q And before you can negotiate a settlement in a case or  
12 dispose of the case, you have to have evaluated it  
13 first, right?

14 A Yes, sir.

15 Q Now, let's talk about the investigation phase.

16 There are three parts of that as well:  
17 coverage, liability and damages, right?

18 A Yes.

19 Q And in terms of coverage, one of the issues that  
20 sometimes comes up is the priority of coverage between  
21 insurance companies, right?

22 A Yes, sir.

23 Q In other words, which company comes first and which  
24 company comes second, or whether they share in the



1 loss, right?

2 A Yes, sir.

3 Q And are you aware that as a general rule an excess  
4 insurance policy is excess over all primary coverage.

5 A Yes, I am aware.

6 Q And that's what's known as a true excess policy, as  
7 opposed to a primary policy that has an excess other  
8 insurance clause.

9 A Correct.

10 Q And one of the things that you have to determine in  
11 order to assess the priority of coverage is the  
12 attachment point of the excess carrier, right?

13 A Did you say "attachment point"?

14 Q Attachment point, right. Are you familiar with that  
15 term?

16 A No, I'm not.

17 Q Okay. Are you familiar with -- that just means when  
18 the excess company starts paying, whether there is X  
19 amount below it or not, right?

20 A I understand.

21 Q So that's something that the excess insurer has to know  
22 in order to assess what its obligations are, right?

23 A Yes, sir.

24 Q And in order to do that, it's necessary, is it not, to

1 A Yes, sir.

2 Q And in order to do a necessary and proper investigation  
3 of the plaintiffs' damages, you have to obtain all the  
4 medical documentation relating to the plaintiffs' past  
5 medical condition, the current condition, and the  
6 future prognosis, right?

7 A Say that again, sir? I'm sorry.

8 Q In order to properly investigate a personal injury  
9 case, you have to know -- you have you receive the  
10 documents concerning the plaintiff's past medical  
11 condition, present condition and the future prognosis,  
12 right?

13 A If the case warrants it, yes, you do.

14 Q Well, certainly a case in which nineteen and a half  
15 million dollars in damages is being demanded, it would  
16 warrant getting that documentation, right?

17 A Warrant a thorough investigation, yes, sir.

18 Q And in fact, do you recall that in your MCLE article,  
19 you said that a damages' investigation, quote, must,  
20 and you put "must" in all capitals, be completed on  
21 each and every claim. And "each and every" you also  
22 had in all capitals. Did you say that?

23 A Yes, I did, sir.

24 Q And you also said that you need to gather, quote, any

1 get any other insurance policies that may provide  
2 coverage to the insureds, right?

3 A Yes.

4 Q Because, as you just said, any primary policies will be  
5 below the excess policies, right?

6 A Yes.

7 Q Now, in this case, in order to determine what its  
8 attachment point would be, AIG needed to know what  
9 primary coverage was available to Mr. Zalewski and  
10 Penske and DLS, right?

11 A Yes.

12 Q And do you know when AIG actually obtained the Penske  
13 policies?

14 A No, I do not.

15 Q Okay. Are you aware that they obtained the Penske  
16 policies for the first time in June 2004?

17 A I'll accept that as the date.

18 Q Okay. And are you aware that AIG requested those  
19 policies in the first letter that they wrote to  
20 Crawford in April 2003 -- 2002, excuse me.

21 A Yes, I am.

22 Q Now, the second phase of the investigation, or the  
23 second aspect of the investigation, is the plaintiffs'  
24 damages, right?

1 additional information that may or will impact the  
2 evaluative caption, right?

3 A Yes, sir.

4 Q And you agree with that, right?

5 A Yes, I do.

6 Q And that includes obtaining medical releases, right?

7 A Yes, it does.

8 Q And that includes obtaining all relevant medical  
9 records and bill, right?

10 A Yes, sir.

11 Q And including if it's a case in which there's a  
12 psychological injury claimed or an exacerbation of a  
13 psychological injury, you want to obtain the  
14 psychological records, correct?

15 A If there is an assertion or an allegation, yes.

16 Q And you also want to be able to identify what the  
17 amount of special damages are, right?

18 A Yes, sir.

19 Q And whatever documents you need to determine the future  
20 prognosis, right?

21 A Yes, sir.

22 Q And you want to confirm the extent to which there are  
23 permanent medical disability issues, right?

24 A Yes, sir.

1 Q And you want to determine what the plaintiff's family  
2 background is, correct?  
3 A Depending on the type of case, yes.  
4 Q And that's something you said in your article, right,  
5 that there should be an outline of the plaintiff's  
6 family background, injury, diagnosis, prognosis, and  
7 medical costs. Do you recall that?  
8 A Yes, I do.  
9 Q Okay. Now, do you agree that in determining what the  
10 damages are, it's essential for an insurer to have that  
11 medical information that we just talked?  
12 A Essential, not always.  
13 Q Well --  
14 A You may not need every document. Each case is  
15 individual.  
16 Q Okay. In a case like the Rhodes case, it's essential  
17 to have the medical documents, right?  
18 A Essential for whom, sir? Which carrier are we  
19 referring to in this case?  
20 Q Well, my clients.  
21 A And that's AIG?  
22 Q Hm-hmm.  
23 A It would have been essential given the size of the case  
24 to have all the documents, yes.

1 Q And isn't it true that based on standard industry  
2 practice, a claims adjustor can't get authority from a  
3 supervisor without learning and documenting all the  
4 relevant facts.  
5 A I can't make that global statement. Not every carrier  
6 is like that.  
7 Q Some carriers would give authority when all the facts  
8 aren't known?  
9 A Some carriers give a lot of authority to adjustors,  
10 sir. Depends on the case.  
11 Q Now, let's talk about the Rhodes case for a minute.  
12 You're familiar with Crawford's role in the case,  
13 right?  
14 A Yes, I am.  
15 Q They were the third-party administrator for GAF the  
16 insurer, right?  
17 A Yes, sir.  
18 Q And it's true, is it not, that Crawford never obtained  
19 any medical authorization from Mrs. Rhodes, right?  
20 A Correct.  
21 Q And they didn't obtain Mrs. Rhodes' medical records or  
22 bills, right?  
23 A Correct.  
24 Q They didn't have an IME performed, right?

1 Q And that's because you can't know the damages unless  
2 you have all the medical information, right?  
3 A I don't know about every piece of paper, but you want  
4 the most important pieces. You're going to want the  
5 conclusionary information from treating physicians.  
6 Q Now, one of the things that is customary in the  
7 insurance industry in order to investigate a personal  
8 injury case is to conduct an independent medical  
9 examination when you have a seriously injured  
10 plaintiff, right?  
11 A It's not just for serious injury. It's an  
12 investigative tool, sir.  
13 Q Right. And that's a good practice to do that, right?  
14 A If the case so warrants it, yes, it is.  
15 Q Okay. Well, when you have a case where there's a  
16 serious and permanent injury, it would be warranted,  
17 right?  
18 A You know, again, once again I'm going to say if the  
19 case warrants it and the time line requires it.  
20 Q Well, another tool that insurers frequently employ in  
21 investigating cases is to depose the witnesses, right?  
22 A Absolutely, sir.  
23 Q And especially the plaintiff or plaintiffs, right?  
24 A Depending on the case, yes, sir.

1 A Correct.  
2 Q They didn't engage a life care planner or any other  
3 expert for that matter. And they didn't determine what  
4 Mrs. Rhodes' medical prognosis was, right?  
5 A Correct.  
6 Q Wouldn't all those things have been good practices for  
7 Crawford to do?  
8 A If directed by an insurer, certainly.  
9 Q Well, whether they were directed by the insurer or  
10 weren't directed by the insurer, they were running the  
11 claim, so shouldn't they have taken upon themselves to  
12 do that or request that the insurer do that?  
13 A They would have to request authorization, sir. They do  
14 not have the authority to do those type of items, those  
15 investigative items.  
16 Q Do you have any indication that they requested such  
17 authority?  
18 A Not that I can recall reading, no.  
19 Q Now, would you agree that the time to obtain an  
20 independent medical examination is once all of the  
21 medical evidence is obtained?  
22 A Not necessarily.  
23 Q Well, do you agree that it's customary under standard  
24 industry practice to do an IME only after all of the

1 medical evidence is obtained?

2 A I can't say that there's a standard practice that way,

3 sir. It's a case by case basis depending on the

4 employee -- pardon me, the plaintiff's condition.

5 Q Do you recall testifying in a deposition in a case

6 called Parker v. American liability, I think it is?

7 The underlying case was Parker v. DeVillo.

8 A That was the other AIG case. Yes, I do.

9 Q Let me show you your deposition in the Parker case.

10 I'm going to refer you to page 23. And starting with

11 line 18 -- are you with me?

12 A Yes, sir.

13 Q It says: Now, it is customary under standard industry

14 practice for an insurer to rely upon the results of a

15 report by the independent medical expert following his

16 review of the medical evidence?

17 And your answer was yes, right?

18 A Yes, sir.

19 Q And do you agree with that testimony?

20 A Certainly.

21 Q In fact, it would be below the standard of care if you

22 tried to settle a serious and permanent personal injury

23 case without having an IME, right?

24 MR. FRITZKER: Objection.

1 A It didn't say that. It said a medical expert.

2 THE COURT: Overruled.

3 (By Mr. Cohen)

4 Q Well, that was another question. I wasn't referring to

5 your -- I was referring to your deposition.

6 A Oh, so you're referring to this case now. Is that what

7 you're asking now?

8 Q I'm referring in general, when you have a serious and

9 permanent injury and you have a substantial amount of

10 damages that are being claimed, it would be below the

11 standard of care not to determine what t prognosis is

12 by getting an IME, right?

13 A At times, it's required, sir. If we're going to talk

14 about this case, it becomes -- I don't see the need for

15 it. It becomes a red herring. The damages are what

16 they are. It's not required in every case.

17 "Customary" doesn't mean every one.

18 Q So in this case, all you needed to know, Mr. Kiriakos,

19 is that Mrs. Rhodes was a paraplegic and she was rear-

20 ended. Is that your testimony?

21 A That is a beginning point.

22 Q Well, that wasn't the end point, was it?

23 A No, it's not.

24 Q Because you had to determine her level of functioning

1 and prognosis and the amount of medicals. All those

2 things had to be determined, right?

3 A I don't know if you need an IME for that, sir. I mean,

4 there's other doctors that are just as, I guess --

5 "responsible" is the wrong word -- have just as much

6 credibility. I don't know if I need an independent

7 evaluation to tell me what someone's already telling

8 me.

9 Q Okay. So basically you're saying that the insurance

10 company should rely upon the plaintiff's own doctors

11 and shouldn't get their own view of the case?

12 A I'm saying it's a case by case basis, period. This

13 case, it didn't require it.

14 Q Okay. Well, one of the issues in this case was the

15 extent to which Mrs. Rhodes was going to be able to

16 engage in activities of daily living in the future,

17 wasn't it?

18 A Certainly.

19 Q And whether she would be able to transfer herself,

20 right?

21 A Yes, sir.

22 Q Whether she would be able to go to the grocery store

23 and go shopping and cook. That was going to affect her

24 damages, right?

1 A Yes, sir.

2 Q And why wasn't it necessary, then, to get an

3 independent medical view of whether she would be able

4 to do those things?

5 A Sir, I didn't say it wasn't necessary. It may not be

6 necessary. And the same questions can be posed to the

7 treating physician to get the same answer.

8 Q But the treating physician is not an independent

9 person, correct? That's somebody that the plaintiff

10 goes to.

11 A But I don't know why the weight would be different. At

12 times I'll agree with you, but I'm not agreeing in this

13 case.

14 Q Well, let me ask you this. Was it bad faith in this

15 case for AIG to want to get an IME?

16 A Now you're asking me to leave to the statutory

17 requirement. Am I correct? I don't know if I can

18 answer that. I don't think it was bad faith, but I'm

19 not an attorney and I'm certainly not a judge to make

20 that decision.

21 Q Was it below standard industry practices in this case

22 for AIG to ask for an IME?

23 A Below standard?

24 Q Yes.

1 A No.

2 Q And was it below the standard industry practices for

3 AIG to request that Mrs. Rhodes be deposed in this

4 case?

5 A Below the standard, no.

6 Q And was it below the standard for AIG to request that

7 Rebecca Rhodes be deposed in this case?

8 A Again, I'm going to use the word "below." No.

9 Q And you're aware, are you not, that the plaintiffs'

10 settlement demand from December 2003 to the time of the

11 mediation in 2004 was nineteen and a half million

12 dollars, right?

13 A I recall eighteen and a half million, sir.

14 Q Okay. Well, I think it was nineteen and a half. But

15 whether it was eighteen and a half or nineteen and a

16 half, that's a lot of money, right?

17 A It certainly is, sir.

18 Q And certainly when that kind of settlement demand is

19 being made, it's incumbent on an insurance company to

20 properly investigate a case.

21 A Certainly.

22 Q Now, one of the reasons why an insurance company wants

23 to depose witnesses is to see how they come across as a

24 witness on the witness stand, right?

1 are you aware that they testified in the present case

2 that they were all concerned about, quote, screwing up,

3 unquote, their testimony?

4 A Say that word again, I'm sorry?

5 Q Screwing up.

6 A I apologize, I couldn't hear you with the echo.

7 No, I'm not aware of their testimony.

8 Q Well, that's something that a plaintiff has reason to

9 be concerned about, right?

10 A In the abstract, yes.

11 Q If a plaintiff doesn't come across as likeable,

12 believable, honest, then they might get less money than

13 they otherwise would, right?

14 A It's possible.

15 Q Now, let's talk about the evaluation of a case. In

16 order to properly evaluate a case, you need to take

17 into account various factors, right?

18 A Yes, sir.

19 Q And some of those factors are objective and some of

20 those factors are subjective, right?

21 A Yes, sir.

22 Q And one of the -- strike that.

23 The objective factors are the bills, the

24 medical bills, the lost wage information. If there is

1 A Yes.

2 Q And you want to make sure that the witness, whether

3 it's a party or whatever, is believable, correct?

4 A Certainly.

5 Q You want to make sure that they're not exaggerating,

6 correct?

7 A Yes, sir.

8 Q You want to make sure that they're telling the truth?

9 A Yes, sir.

10 Q And you want to make sure that they come across as

11 likeable as well, right?

12 A Yes, sir.

13 Q And the only way to really assess that is to take their

14 deposition, isn't it?

15 A The only way to assess that? No, I don't agree with

16 you.

17 Q Well, you do you agree it's the best way to assess it?

18 A No. I agree that it's, I guess, the legal way to, you

19 know, from a discovery perspective to assess it. I

20 don't say it's the best way to assess it.

21 Q It's certainly a reasonable way to assess it, though,

22 right?

23 A It's one way. I'll agree with you that far.

24 Q Now, let's talk about -- oh, by the way, the Rhodeses,

1 any, you can look at that and you can see exactly what

2 it is or isn't, at least for the past costs, right?

3 A Yes, sir.

4 Q And then there are a bunch of subjective factors that

5 you have to consider, right?

6 A Yes, sir.

7 Q And those include what jurisdiction you're in, right?

8 A Yes, sir.

9 Q In fact, in the insurance business, we talk about some

10 jurisdictions being liberal and some jurisdictions

11 being conservative, right?

12 A Yes, sir.

13 Q And that means when you talk about a liberal

14 jurisdiction, it means they're more prone to award

15 higher verdicts than a conservative jurisdiction,

16 right?

17 A Yes.

18 Q And in Massachusetts, some jurisdictions are more

19 liberal than other jurisdictions, right?

20 A Are we referring to the venues inside of the

21 jurisdiction?

22 Q Yes.

23 A Yes, sir.

24 Q And Suffolk County, this court here, has a reputation

1 of being a rather liberal jurisdiction, right?

2 A Yes, it does.

3 Q And that's because it's an urban area and urban areas

4 tend to award higher verdicts, right?

5 A Yes, they do.

6 Q And the more suburban or rural parts of Massachusetts

7 are generally considered more conservative.

8 A Yes, they are.

9 Q Such as Norfolk County?

10 A Yes, sir.

11 Q Now, another factor that you take into account is the

12 quality of the experts on both sides, right?

13 A Yes, sir.

14 Q And also the quality of the attorneys, right?

15 A Yes, sir.

16 Q And also what judge is going to decide the case.

17 A Yes, sir.

18 Q And also the medical information that we talked about

19 previously, right?

20 A Yes, sir.

21 Q And these are all subjective matters, right?

22 A Those are subjective, yes.

23 Q And different insurance adjustors can disagree on how

24 those objective factors play a role in any given case,

1 right?

2 A Yes, sir.

3 Q And two different adjustors looking at the same

4 information might in fact disagree as to the settlement

5 value of a case, right?

6 A Certainly.

7 Q That's not unusual, right?

8 A Yes, sir.

9 Q Ultimately, in determining what the settlement value

10 is, it comes down to the adjustor's subjective judgment

11 as to what a claim is worth, right?

12 A Taking into account both objective and subjective

13 factors, yes.

14 Q Now, in order to properly evaluate a case, you also

15 need to determine the plaintiff's future medical needs,

16 if in fact they're claiming an ongoing or permanent

17 injury, right?

18 A Yes, sir.

19 Q And in a paraplegic case, one tool to do that is to

20 obtain a life-care plan, correct?

21 A Yes, sir.

22 Q And another tool to do that is to have a medical doctor

23 review the future medical needs, right?

24 A Yes, sir.

1 Q Now, how the experts will be liked by a jury, that's

2 also something relevant?

3 A Yes, sir.

4 Q Are you aware that the expert depositions in the Rhodes

5 case weren't taken until May of 2004?

6 A Yes, I am.

7 Q Until that happened, you couldn't determine how the

8 experts were going to come across, right?

9 A You're right.

10 Q Another factor that insurance companies look at is the

11 resolve of the plaintiff and their families to get

12 better, right?

13 A Yes, sir.

14 Q And also how the plaintiff interacted socially both

15 before and after the accident, right?

16 A Yes.

17 Q And, again, as we talked about before, if there is a

18 prior psychological condition whose claims have been

19 exacerbated, you want to know what the base line was

20 and how bad the exacerbation has been, right?

21 A Certainly.

22 Q So that was all reasonable information in the Rhodes

23 case for AIG to want to look at in order to evaluate

24 the case, right?

1 A Yes, sir.

2 Q Now, when you're determining the settlement of a case,

3 you're generally looking at a range, right?

4 A Yes.

5 Q You can't come up with a specific number as to the case

6 is worth exactly this amount of dollars, right?

7 A Yes.

8 Q And that's because different juries can reach different

9 conclusions as to the value of a case.

10 A Are you talking jury value or are you talking

11 settlement value?

12 Q Well, settlement value is based in part on what a jury

13 is going to do, right?

14 A Not necessarily, no.

15 Q How so?

16 A Because the settlement value is just that. It's the

17 value -- it could be early on in the case, and then it

18 evolves over time during the case; and the closer you

19 get to trial, the value or the settlement value is now

20 increased. It's not a stick-in-the-mud, standalone set

21 of numbers, sir.

22 Q But regardless of that, in order to determine at

23 whatever points in time what the settlement value is,

24 you have to consider might a jury award in the case,

1 right?

2 A At the very end, yes. What the jury outlook or what

3 the jury's impact might be or value might be. You

4 don't do it early on. There's no need to.

5 Q Okay. Have you ever done a mock trial as part of your

6 claims handling experience?

7 A Yes, I did.

8 Q And a mock trial is when they bring in different panels

9 of jurors and they hear the same evidence from exactly

10 the same people?

11 A Correct.

12 Q And it's typical, is it not, that when you do a mock

13 trial, the different panels will come to very different

14 conclusions about the evidence, right?

15 A Yes, they do.

16 Q Now, in evaluating a case, would you agree that an

17 insurance company owes an obligation to not only the

18 claimant but to its policyholders?

19 A Yes, it does.

20 Q And it owes an obligation to its shareholders?

21 A Yes, sir.

22 Q And it owes an obligation to its reinsurers, right?

23 A Yes, sir.

24 Q And you also agree, do you not, that the claims handler

1 A Yes, it is.

2 Q An adjuster who has more experience might disagree with

3 an adjuster with less experience as to the settlement

4 value of the case, correct?

5 A It's possible.

6 Q Okay. Now, let's talk about the mediation -- the

7 negotiation phase of the case.

8 You're a believer in mediations, right?

9 A Yes, sir.

10 Q Obviously, because you formed a mediation company,

11 right?

12 A Yes, sir.

13 Q And you agree, don't you, that mediation is a good

14 practice for parties to engage in to try and settle a

15 case when they're not able to do it on their own,

16 right?

17 A Yes, sir.

18 Q And that's because when you have a mediation, the

19 neutral can sit down and he can tell both parties about

20 the strengths of the other party's position and the

21 weaknesses of their position.

22 A Yes, sir.

23 Q And hopefully to get them to compromise, right?

24 A Yes, sir.

1 is the one that should make the call on settlement and

2 not abandon that to defense counsel, right?

3 A Yes, sir.

4 Q So you can certainly get input from defense counsel but

5 ultimately it's the insurance company that has to make

6 the decision as to what to offer.

7 A Yes, sir.

8 Q And similarly, the insurance company shouldn't be

9 taking what the plaintiff's counsel says at face value,

10 right?

11 A On a demand now we're talking? Is that what we're

12 talking?

13 Q In order to determine the settlement value.

14 A Correct. If we're talking about demand, correct.

15 Q And the same question with regard to an excess insurer.

16 It has to make its own decision and not rely on what

17 the primary insurer or TPA says, right?

18 A Yes, sir.

19 Q Now, there are times, are there not, when a more

20 experienced adjuster is going to disagree with a less

21 experienced adjuster as to settlement value, right?

22 A Yes, sir.

23 Q And the experience of an adjuster in any case is

24 important, right?

1 Q So it's perfectly appropriate, is it not, for an

2 insurance company to suggest that a case be mediated,

3 right?

4 A Yes, sir.

5 Q Now, are you familiar with structured settlements?

6 A Yes, I am.

7 Q And I assume that in your jobs in the insurance

8 industry, you've put together structured settlements on

9 occasion.

10 A Yes, I have.

11 Q Could you tell the court what a structured settlement

12 involves?

13 A From the financial side or from the claims side?

14 Q I'm not sure what you're --

15 A Because financially I understand the banking piece of

16 it too, you know, having an MBA.

17 Q Why don't you tell me both sides.

18 A I'll make it simple. From a claims perspective, it's

19 pay a certain dollar amount, settlement value, and you

20 give the money over to the structured broker who

21 invests the money into a life insurance carrier who

22 will then -- it will yield a greater sum of money to

23 the plaintiff. And the yield is tax-deferred. And,

24 actually, I'm sorry, let me rephrase that. There is no

1 tax liability on the money that's been deferred.  
 2 Q So you buy an annuity and the annuity pays you  
 3 periodically, whatever the period is that's agreed  
 4 upon, right?  
 5 A Correct, sir.  
 6 Q It can be every month. It can be every year. It can  
 7 be lump sums mixed in there as well.  
 8 A As creative as the parties wish.  
 9 Q And whatever payments are being made, those aren't  
 10 going to be taxable, right?  
 11 A Correct.  
 12 Q And that's a big advantage to a plaintiff, because if  
 13 they're paid a lump sum settlement and they put it in  
 14 the bank, all the interest is then taxable, right?  
 15 A Correct.  
 16 Q And, in fact, would you agree that a plaintiff gets  
 17 more bang for his buck for the same amount of money  
 18 with a structure than a lump sum settlement just  
 19 because of that?  
 20 MR. PRITZKER: Objection.  
 21 THE COURT: Overruled.  
 22 A Would I agree the plaintiff gets more bang for the --  
 23 are you saying they're getting more money -- for a  
 24 \$100,000 investment, they're getting \$125,000.

1 protracted period of time?  
 2 A Yes, I'll agree with that.  
 3 Q And the plaintiff often starts off with a figure that's  
 4 much higher than the plaintiff anticipates settling  
 5 for, right?  
 6 A Yes, sir.  
 7 Q And the insurance company often leads off with a figure  
 8 that's much lower than the insurance company  
 9 anticipates having to pay, right?  
 10 A Yes, sir.  
 11 Q And that's the process of negotiation that goes on in  
 12 certainly at least most claims, right?  
 13 A Yes, sir.  
 14 Q There's a great deal of back and forth before the  
 15 parties eventually reach a number, right, that they can  
 16 both agree upon?  
 17 A Yes, sir.  
 18 Q And in the course of the negotiations, the plaintiff  
 19 counsel has an obligation to negotiate in good faith,  
 20 right?  
 21 A The obligation is from the insurer side. Obligation to  
 22 whom? Who would the plaintiff attorney have an  
 23 obligation to?  
 24 Q To the defendant and insurer.

1 (By Mr. Cohen)  
 2 Q Exactly.  
 3 A To put it that way, yes. They get more yield.  
 4 Q So it's beneficial to both sides to have a structured  
 5 settlement, right?  
 6 A Yes, it is.  
 7 Q And it's not bad practice for an insurance company to  
 8 suggest a structured settlement.  
 9 A No, it's not.  
 10 Q And, obviously, the plaintiff can take it or leave it  
 11 if they want to, right?  
 12 A Yes, sir.  
 13 Q Now, do you agree that -- strike that.  
 14 Are you familiar with the concept of bad  
 15 faith?  
 16 A Yes, I am.  
 17 Q And would you agree that bad faith requires more than  
 18 negligence?  
 19 A Certainly.  
 20 Q And do you agree that bad faith requires more than a  
 21 simple difference of opinion over the value of a case?  
 22 A Yes, I do.  
 23 Q And do you agree that it's usual in negotiating a claim  
 24 that settlement negotiations may occur over a

1 A No, I don't agree with you. I think the plaintiff  
 2 attorney has an obligation to their client to convey an  
 3 offer. I can't reach beyond that, because I don't know  
 4 from an ethical standpoint where it goes.  
 5 Q Well, I'd like you to turn to your deposition in the  
 6 Harper case. If you look on page 79, and I believe  
 7 we're starting on line 8.  
 8 A You said eight, sir?  
 9 Q Line 8, page 79, line 8.  
 10 A Go right ahead, sir.  
 11 Q Question: At some point in time, the plaintiff's  
 12 counsel will -- let me ask the question this way.  
 13 Plaintiff's counsel has an obligation to negotiate in  
 14 good faith; does he not?  
 15 MS. PINKHAM: Excuse me. Is it page 79?  
 16 MR. PRITZKER: Where are you reading from?  
 17 THE WITNESS: These pages have been split.  
 18 MR. COHEN: It should be page 79. Do you  
 19 want to see where?  
 20 MR. PRITZKER: It's not in my 79.  
 21 THE WITNESS: It's at the -- it may be at the  
 22 top.  
 23 MR. COHEN: I think the --  
 24 (By Mr. Cohen)

1 Q Okay. Let me read it again, Mr. Kiriakos.  
 2 (Reading): At some point in time, the  
 3 plaintiff's counsel will -- let me ask the question  
 4 this way. Plaintiff's counsel has an obligation to  
 5 negotiate in good faith; does he not?  
 6 And your answer was what?  
 7 A I can't find you, sir. I'm looking at 79. I'm at line  
 8 8. It says: Some cases settle at some point.  
 9 Q Thank you. I need to look at the prior page.  
 10 A Oh, I apologize. Right up here?  
 11 Q Right up there.  
 12 A All right.  
 13 Q What was your answer?  
 14 A If I can read the question.  
 15 Q I'll read it again.  
 16 (Reading): Plaintiff's counsel has an  
 17 obligation to negotiate in good faith, does he not?  
 18 A Yes. My response was yes.  
 19 Q And the fact that plaintiff's counsel has asked for  
 20 more money than he expects to receive is not an  
 21 indication of bad faith, right?  
 22 A I didn't know you were continuing.  
 23 Q Well, right now I'm asking you the question.  
 24 A Oh, I apologize. Go right ahead. I'm sorry.

1 Q Well, let me ask you this: In the Rhodes case, did the  
 2 Rhodes' demand ever come within the range that you  
 3 claim is reasonable?  
 4 A The original settlement range, or the range at the time  
 5 of trial?  
 6 Q Any range.  
 7 A I don't recall. The last demand that I read was 10  
 8 million, when the jury was out.  
 9 Q Well, actually, let's talk about the mediation first.  
 10 Are you aware that the last demand was \$15  
 11 million, plus an assumption of health insurance?  
 12 A I was not aware of that, no.  
 13 Q Well, if that was in fact the last demand, would that  
 14 have been within the range of what you thought would be  
 15 reasonable?  
 16 A No.  
 17 Q And if in fact the last demand during trial was \$11.6  
 18 million, plus the \$550,000 that already had been  
 19 recovered from the tree company, would that have been  
 20 within the range that you think is reasonable?  
 21 A From a settlement standpoint, no.  
 22 Q Now, do you agree that the point in time in which a  
 23 case settles isn't any indication of bad faith?  
 24 A Depending on the circumstances.

1 Q The fact that a plaintiff's counsel asks for more money  
 2 than he expects to receive isn't an indication of bad  
 3 faith on the plaintiff's counsel's part? And the fact  
 4 that a insurer, defense, offer less money than expect  
 5 to pay isn't an indication of bad faith on their part,  
 6 correct?  
 7 A Depends when that offer comes and depends if it's  
 8 reasonable.  
 9 Q Well, at some point in time, the plaintiff has an  
 10 obligation to come down to a figure that he's going to  
 11 accept, right?  
 12 A My understanding, sir, of the law, from a bad faith  
 13 perspective, it talks about the insurer's duty. I  
 14 don't remember ever reading anything about -- other  
 15 than, you know, this response from a case that a number  
 16 of years ago in a deposition that was, you know, again,  
 17 a different set of circumstances, I don't ever remember  
 18 reading a plaintiff attorney's obligation or duty from  
 19 a statutory standpoint.  
 20 Q Well, anyhow, that's what you testified to in the  
 21 Parker case, right?  
 22 A Again, that was a separate case, sir. The facts were  
 23 different. You know, I can't say what I meant here. I  
 24 don't know. It's a number of years ago.

1 Q And some cases settle early in the course of the claim,  
 2 right?  
 3 A Yes, sir.  
 4 Q Some cases settle at mediations, right?  
 5 A Yes, sir.  
 6 Q Some cases settle on the doorsteps of the court, right?  
 7 A Yes, sir.  
 8 Q And some cases settle during trial.  
 9 A Yes, sir.  
 10 Q And in order for a settlement to be reached, both sides  
 11 have to reach an agreement as to what a proper number  
 12 is, correct?  
 13 A Yes.  
 14 Q Sometimes that happens, right?  
 15 A Yes.  
 16 Q And occasionally it doesn't happen, right?  
 17 A Yes.  
 18 Q Now, have you been involved in handling any cases in  
 19 which the plaintiff's demand was at a figure that you  
 20 thought was much higher than the fair value of the  
 21 case?  
 22 A Certainly.  
 23 Q And in those cases, some of them didn't settle, right?  
 24 A Only a handful.



1 Q Well, some of them didn't, right?

2 A Some of them didn't.

3 Q And some of them settled right before trial, right?

4 A Some of them settled right before trial.

5 Q And some of them settled during the trial, right?

6 A Yes, sir.

7 Q And many of those settlements came about because the

8 plaintiff lowered his demand substantially before,

9 immediately before or during trial, right?

10 A And my offer was increased, yes, sir.

11 Q Now, let's turn to your opinions about the settlement

12 value of the Rhodes case. And in your expert

13 interrogatory answer, you said that -- and this is on

14 page 9: AIG's own representative noted a settlement

15 value of \$6.6 million.

16 Do you recall that?

17 A Yes, I do.

18 Q And it's your understanding, is it not, that there was

19 a meeting in March 2004, and during that meeting an AIG

20 representative named Nick Satriano agreed that the

21 settlement value was \$6.6 million.

22 A Yes, I do.

23 Q And that's partially what your expert opinion is based

24 upon, right?

1 A No. My opinion was done in the abstract. I evaluated

2 the case myself.

3 Q Well, you mentioned this multiple times in your expert

4 opinion, right?

5 A I mentioned what multiple times? My settlement value?

6 Q That AIG had agreed the settlement value was \$6.6

7 million.

8 A Absolutely.

9 Q Do you understand now where that \$6.6 million came

10 from?

11 A The actual breakdown? How we did the math or?

12 Q Well, first of all, let me ask you this: You

13 understand who came up with the \$6.6 million. Who's

14 that?

15 A Nick Satriano from AIG.

16 Q Are you aware that that number came from a gentleman

17 named Gregory Deschenes, who was defense counsel for

18 GAP?

19 A I remember reading that, yes, I do.

20 Q So it didn't come from Mr. Satriano, right?

21 A I think he was referring to the conference call, if I

22 remember correctly. Don't hold me to that.

23 Q Well, if were to tell you that Mr. Deschenes came in

24 here and testified when we were going before that what

1 that 6.6 number represented, was that he took some jury

2 verdicts, added the number of the verdicts up, took

3 some settlements and added the number of the

4 settlements up, and then divided by the amount of the

5 verdict and settlement, does that refresh your

6 recollection at all?

7 MR. PRITZKER: Objection.

8 THE COURT: Well, I heard his testimony so

9 you may answer, if that is your understanding.

10 A My recollection?

11 (By Mr. Cohen)

12 Q Yes.

13 A I didn't read the trial testimony. I already mentioned

14 that.

15 Q So that's the first time you're hearing this?

16 A To breakdown the way you just said, yes, sir.

17 Q Well, let me ask you this: I'd like you to assume that

18 that's how the \$6.6 million number was determined, that

19 what happened was that Mr. Deschenes took a bunch of

20 settlements from settlement reporters, that he added up

21 all the numbers and then he divided by the number of

22 cases. Is that a good method of determining a

23 settlement value in a case?

24 A It's a guide, certainly.

1 Q Well, if you determine the average of a bunch of --

2 THE COURT: I'm going to actually stop you

3 because you failed to use the word "comparable."

4 MR. COHEN: Okay.

5 THE COURT: So, obviously, if you just take a

6 bunch of cases randomly and --

7 MR. COHEN: Well, he said it's a good guide

8 whether it's comparable or not, I guess.

9 THE COURT: You may have understood, but it's

10 of no value to me, because the premise that you're

11 basing it on is not a fair reflection of what Deschenes

12 did. So I have to disregard the testimony based on any

13 opinion which does not reflect the facts that I find.

14 Actually, before you go, I need about a

15 minute to get some cough medicine. So why don't I do

16 that and I'll come right back, okay?

17 MR. COHEN: Okay.

18 (A brief recess was taken.)

19 THE COURT: Okay. Sorry. Let's proceed.

20 MR. COHEN: Your Honor, I'd like to have the

21 court reporter mark for identification the Parker

22 deposition of Mr. Kiriakos and the opinion of Judge

23 Healy in the Johnson case.

24 THE COURT: It can be marked for I.D.

(Exhibit I for I.D., marked; Transcript of  
Johnson v. Hingham Mutual Fire Insurance Company.)

(Exhibit J for I.D., marked; Transcript of  
Parker v. American Fidelity Insurance.)

(By Mr. Cohen)

Q Now, Mr. Kiriakos, I'd like to read you from Mr.

Deschenes' testimony, at page 54, Volume 7 of the  
transcript, about the methodology he used to come up  
with that number.

(Reading): Quote, we try to stay away from  
cases that involve product liability. We try to find  
automobile cases if possible. We look for cases where  
damages were severe and we look for cases involving  
paraplegia, if we could find those cases, and we look  
for cases where liability was probable or reasonably  
clear.

And later he said: We try to focus on cases  
in this area. We are more interested in Massachusetts  
cases than cases in other jurisdictions.

Now, is that a good methodology, do you  
think, to determine a settlement value of a case?

Q And you're not familiar with any Massachusetts jury  
verdicts or settlements involving paraplegia, right?

A When I did that analysis, I didn't even consider it.

Q And so if you'd been aware of a case called Cooper v.  
Waste Management, which was a four and a half million-  
dollar verdict right here in Suffolk County, and the  
plaintiff was a 37-year-old, single mom with T9, T10  
paraplegia, the case was tried on damages only, there  
are \$2.1 million in claim specials and she had suffered  
numerous complications, including pressure sores and  
blood clots, would that have changed your opinion as to  
the value of the Rhodes case?

A No, it would not.

Q And how about a case called Collins v. Eastern General,  
which was a \$3.75 million settlement in May 1998,  
involving a 52-year-old construction worker who was  
rendered a paraplegic after falling through a hole at a  
construction site, would that have changed your opinion  
at all?

A No, because it's six years. There's a six-year  
difference from that verdict date to the verdict date  
in this case.

Q Well, it was a two-year difference between the Cooper  
case, which was in 2002, and the Rhodes case, right?

A It's a reasonable guide, yes, it is.

Q And in doing an average, if you have one case, let's  
say, \$50 million and every other case is, say, 4 or \$5  
million, isn't the average going to be way higher than  
all the cases except for that one big case?

A Certainly.

Q And wouldn't a much better methodology, even to the  
extent the cases are comparable, to do a median of jury  
verdicts or jury settlements?

A I caution you on comparable and mainly because we don't  
know the damages and you don't know the backgrounds of  
the families. These cases that many times you review  
are a paragraph worth of information, so they have to  
be taken not just on face value, because there could be  
other circumstances that we don't know about.

Q Exactly. Jury verdicts in other cases are only of  
limited help, right, because every case is different.

A Every case is different.

Q And even the same case can get different results, as we  
just talked about with the mock juries, right?

A Absolutely.

Q Now in determining your number, you didn't consider any  
jury verdict reports or settlement reports, right?

A No. That number I calculated very early on.

A Correct.

Q And the Cooper case was in Suffolk, which you've  
already told us is a much more liberal venue, right?

A Yes.

Q Are you familiar with a 2001 settlement of a  
quadriplegic case in Massachusetts involving a 4-year-  
old boy who was injured in an auto accident when the  
driver, who was a fast food restaurant employee, fell  
asleep at the wheel of his vehicle, crossed over to the  
other side of the road and hit the plaintiff's car  
head-on and there was evidence that the employee had  
been working 84 hours a week and was tired.

A I don't remember reading that case, sir.

Q If you were aware that that case settled for \$4.6  
million, would that have any impact on your analysis of  
the Rhodes case?

A The circumstances are different.

Q And if you were aware that the loss of consortium  
claims of the child's mother, father, and sister  
settled for a total combined of \$300,000, would that  
affect your opinion as to the value of the Rhodes case  
at all?

A No, it would not.

Q And, by the way, you haven't rendered any opinion as to

1 the value of either the consortium claim of Harold  
 2 Rhodes or the loss of parental society claim of Rebecca  
 3 Rhodes, right?  
 4 A Correct.  
 5 Q Now, do you agree that an insurance company doesn't  
 6 have any obligation to make a settlement offer until  
 7 liability is reasonably clear?  
 8 A Correct.  
 9 Q That doesn't prevent an insurance company from making a  
 10 settlement offer, right?  
 11 A Correct.  
 12 Q And, in fact, cases are settled all the time where  
 13 liability and damages are disputed, right?  
 14 A Yes, they do.  
 15 Q Now, let's turn to your specific opinions in your  
 16 expert interrogatories in the Rhodes case.  
 17 One thing you said -- and this is on page 4  
 18 of your expert interrogatory answers -- from February  
 19 11, 2002 until the date of trial, from a factual  
 20 standpoint, nothing had changed, right?  
 21 A Correct.  
 22 Q And, in fact, you felt so strongly about "nothing" that  
 23 you underlined the word, right?  
 24 A Yes, I did.

1 Q Well, after February 11, Mrs. Rhodes' medical situation  
 2 changed to some extent, right?  
 3 A Yes, it did.  
 4 Q And she began the process of rehabilitation, right?  
 5 A Yes, sir.  
 6 Q And she had a number of complications and setbacks,  
 7 right?  
 8 A Yes, sir.  
 9 Q And she began to try to adapt herself to her new life  
 10 as a paraplegic, correct?  
 11 A Yes, sir.  
 12 Q And she was starting to learn how to drive, right?  
 13 A Yes, sir.  
 14 Q She was trying to lose weight, right?  
 15 A Yes, sir.  
 16 Q And her doctors were recommending that she undergo  
 17 physical therapy, including aquatic therapy, right?  
 18 A Yes, sir.  
 19 Q And those things were all ongoing at the time of trial.  
 20 In other words, she was just in the beginning stages of  
 21 her rehabilitation process then, right?  
 22 A At the time of trial?  
 23 Q Yes.  
 24 A Yes, sir.

1 Q Now, your first opinion in your expert interrogatory  
 2 answers, which by the way you told us you wrote, right?  
 3 A Yes, sir.  
 4 Q Was that Crawford acted reasonably in their  
 5 investigation, evaluation, and providing  
 6 recommendations. Crawford identified the extent of  
 7 plaintiff's injuries. Crawford's reporting of this  
 8 claim was within industry standards. Crawford's  
 9 conduct of this claim was within industry standards,  
 10 right?  
 11 A Yes, sir.  
 12 Q And is that still your opinion today?  
 13 A It certainly is.  
 14 Q And you also testified when we were here last, that  
 15 soon after the accident Crawford procured, quote, many,  
 16 many documents, unquote. Do you recall that?  
 17 A Yes, I do.  
 18 Q Well, you've already testified that Crawford didn't get  
 19 any medical authorizations, medical records or medical  
 20 bills, right?  
 21 A Yes, sir.  
 22 Q And do you think that was good practice?  
 23 A Are we talking right after the accident, what you just  
 24 referred to?

1 Q I'm talking any time after the accident during  
 2 the two-plus years Crawford was handling the  
 3 claims.  
 4 A Crawford's instruction to the carrier was their  
 5 duty is to identify the injury. Any other  
 6 direction would come from the carrier.  
 7 Q So Crawford didn't need to get medical  
 8 authorizations?  
 9 A Not unless specifically instructed, sir.  
 10 Q When you say the carrier, you're referring to  
 11 Zurich, right?  
 12 A Yes, I am.  
 13 Q And Crawford -- it was just fine that Crawford  
 14 didn't get any of the medical report or bills,  
 15 right?  
 16 A I didn't say it was just fine. Without specific  
 17 authorization they're not going to do it on  
 18 their own.  
 19 Q Well, they got the police report on their own,  
 20 right?  
 21 A Yes.  
 22 Q And why couldn't they get medical authorizations  
 23 and medical bills?  
 24 A Because you'd have to ask Crawford that, what

1 they did do and what they didn't do.  
 2 Q Well, you're the one that testified that  
 3 Crawford did everything terrific in this case,  
 4 right?  
 5 A Well, they did. They did from an investigative  
 6 factual standpoint with regard to who was  
 7 involved, who was at fault, when the accident  
 8 occurred, where it occurred, why it happened,  
 9 the extent of her injuries. Okay? I didn't say  
 10 I secured every document from a medical release  
 11 standpoint or medical records standpoint.  
 12 Q But I think you just told me a little earlier  
 13 this morning that the fact that she was  
 14 paralyzed wasn't the end of it, because it  
 15 depended on how she was going to be able to  
 16 adapt to the paralysis, right?  
 17 A From a factual standpoint, identification of  
 18 injury is the beginning. Beyond that it's a  
 19 continuum of the investigation.  
 20 Q Okay. But Crawford didn't do anything to  
 21 continue the investigation besides determining  
 22 Mrs. Rhodes was in fact paralyzed, right?  
 23 A Correct.  
 24 Q And Crawford didn't do anything to investigate

1 A In their presence, why not?  
 2 Q Okay. And that would suffice for taking their  
 3 deposition, in your opinion?  
 4 A I never said that. We're talking claims  
 5 investigation. You're talking litigation  
 6 discovery. They are different.  
 7 Q Now, at one point in time Crawford put a value  
 8 of the Rhodes accident case at five to ten  
 9 million dollars; do you recall that?  
 10 A Crawford did that; yes, I do.  
 11 Q And at the time it did that Crawford didn't have  
 12 any medical documentation whatsoever, right?  
 13 A As far as I'm aware, they did not.  
 14 Q And are you aware that Crawford's adjustor on  
 15 this case was somebody named Jody Mills?  
 16 A At one point she was the adjustor, yes.  
 17 Q Okay. And are you aware that she testified at  
 18 this trial that Crawford's liability analysis  
 19 was solely based on a feeling that she had and  
 20 she had nothing concrete to indicate what the  
 21 actual value of the case was?  
 22 A I didn't. I don't know what her testimony was,  
 23 sir.  
 24 Q Okay. Well, if she did say that -- and by the

1 the nature of Harold Rhodes' consortium claim,  
 2 right?  
 3 A No, they did not.  
 4 Q And Crawford didn't do anything to investigate  
 5 the nature of Rebecca Rhodes' loss of parental  
 6 society claim, right?  
 7 A They did not.  
 8 Q And you would agree that before Rebecca Rhodes  
 9 and Harold Rhodes were deposed, it wouldn't be  
 10 possible to put a settlement number on their  
 11 consortium claims, right?  
 12 A I can't agree with that in the abstract, no.  
 13 Q Are you also aware that -- well, in the  
 14 abstract? I was just asking you about this  
 15 specific case.  
 16 A You don't necessarily need the deposition to  
 17 know the family's relationship. I said that  
 18 earlier.  
 19 Q How are you going to find that out?  
 20 A Ask the plaintiff attorney. You can meet with  
 21 them and go interview them.  
 22 Q And do you think a good plaintiff's attorney  
 23 would say: Oh, sure, go ahead interview my  
 24 plaintiff, it doesn't have to be under oath?

1 way its in Volume 2, page 121 -- if she did say  
 2 that, would you consider that a good claims  
 3 handling practice to base a settlement number on  
 4 a feeling and nothing concrete?  
 5 A From an independent adjustor, a third-party  
 6 administrative prospective, yes. I don't hold  
 7 her responsible to gather that unless  
 8 instructed.  
 9 Q Okay. But she put a number on the case?  
 10 A Certainly.  
 11 Q And that's fine to put a number on the case  
 12 without any backup for a TPA?  
 13 A I did the same thing, sir, without looking at a  
 14 document.  
 15 Q That's what I understand, Mr. Kiriakos.  
 16 Now, are you aware that Crawford in its  
 17 reports indicated that Mrs. Rhodes was a  
 18 quadriplegic and was paralyzed from the neck  
 19 down?  
 20 A Yes, I am.  
 21 Q And that wasn't correct, right?  
 22 A Yes, it was -- it's incorrect, I'm sorry, I  
 23 apologize.  
 24 Q And are you also aware that the Crawford reports

1 say that Mrs. Rhodes suffered bipolar syndrome  
 2 as a result of the accident?  
 3 A Yes, it did.  
 4 Q And that wasn't correct either, right?  
 5 A No, it's not.  
 6 Q By the way, you're also aware that Crawford got  
 7 the amount of medical bills wrong substantially  
 8 by a factor of three?  
 9 A Yes.  
 10 Q Now, given all those things, is it still your  
 11 opinion that Crawford did a terrific job in this  
 12 case?  
 13 A As an adjuster, yes, it is.  
 14 Q Okay. Now let's go to one of your other  
 15 opinions in the case. And this is opinion  
 16 number four in your expert report. And it says:  
 17 Within the insurance industry, the primary  
 18 carrier has a duty to formally tender its policy  
 19 limits to the excess carrier in writing. Right?  
 20 A Yes, sir.  
 21 Q That's still your opinion?  
 22 A Yes, it is.  
 23 Q And now the reason for that is because when  
 24 there is a tender both the primary insurer and

1 A Yes, I am.  
 2 Q And so because of that, as far as the defense  
 3 duty goes, there was a gap in coverage, right?  
 4 A As far as the defense duty goes?  
 5 Q Yes.  
 6 A Yes.  
 7 Q Now, you also had talked in your expert opinion  
 8 about the dispute regarding who would pay  
 9 defense costs continually stalled negotiation  
 10 and further delayed disposition of this claim,  
 11 right?  
 12 A Yes, sir.  
 13 Q And are you aware that the first time Zurich  
 14 ever told AIG that it wouldn't defend, wouldn't  
 15 continue to defend the claim was in a letter on  
 16 March 29, 2004?  
 17 A Yes, I am.  
 18 Q And are you aware that -- and that's the same  
 19 date Zurich formally tendered to AIG, right?  
 20 A Yes, sir.  
 21 Q And are you aware then that on April 3, 2004,  
 22 Zurich wrote a letter to AIG and said that in  
 23 fact we are going to defend the claim?  
 24 A Yes, I am.

1 the excess insurer have to have a complete  
 2 understanding of exactly what's being tendered,  
 3 right?  
 4 A Yes, sir.  
 5 Q And that's because you can tender policy limits?  
 6 A Yes, sir.  
 7 Q A primary insurer can. And a primary insurer --  
 8 and also in some instances can try and tender  
 9 its defense to the excess carrier. In other  
 10 words, say: Take over the defense of the case,  
 11 right?  
 12 A Yes, they can.  
 13 Q Now typically in an excess policy, you'll agree  
 14 that there is no duty to defend, right?  
 15 A Yes, I will.  
 16 Q And typically in a primary policy, they're  
 17 written so that there's a duty to defend until  
 18 the policy limits are exhausted by means of a  
 19 settlement or the payment of a judgment, right?  
 20 A Yes, sir.  
 21 Q Are you aware then that in this case the Zurich  
 22 policy didn't contain such a provision but  
 23 instead said that the duty to defend could end  
 24 once Zurich decided to tender its policy limits?

1 Q So there was four days between March 29 and  
 2 April 2, right?  
 3 A Yes, sir.  
 4 Q Okay. So is it your opinion that that four-day  
 5 dispute significantly or continually stalled  
 6 negotiation and disposition of the claim?  
 7 A I think the dispute was ongoing before that,  
 8 because AIG had notice -- it may not have been  
 9 in writing -- long before of the intent to  
 10 tender.  
 11 Q Okay. Well, I think the evidence is going to  
 12 speak for itself, but there was letter from a  
 13 gentleman named Anthony Bartell; do you recall  
 14 his involvement in the case?  
 15 A Yes, I do.  
 16 Q He was coverage counsel for GAF, right?  
 17 A Yes, he is.  
 18 Q And he wrote a letter on March 18 saying, for  
 19 the first time, that Zurich got -- Zurich is not  
 20 going to continue to defend this case, right?  
 21 A Yes, he did.  
 22 Q Okay, so that makes it a 14-day dispute, right?  
 23 A In writing, yes.  
 24 Q Okay. Well, are you aware of any testimony or

1 anything not in writing that anybody from Zurich  
 2 or GAF said they weren't going to defend the  
 3 case before March 18?  
 4 A No, but AIG was aware that the tender was coming  
 5 long before and they never raised the issue.  
 6 Q They never raised the issue of who's going to  
 7 defend?  
 8 A Correct.  
 9 Q You're not aware of the correspondence that AIG  
 10 -- Nick Satriano was saying: Are you going to  
 11 defend this case after you tender or not?  
 12 A The written correspondence, what time frame are  
 13 we talking?  
 14 Q We're talking in the February-March time frame.  
 15 A Of '04.  
 16 Q Of '04, right.  
 17 A Correct. And he was aware that they were  
 18 considering tender in November of '03, and  
 19 actually even earlier than that Zurich talked  
 20 about tendering the policy. Now, it wasn't in  
 21 writing --  
 22 Q But there is a difference between tendering the  
 23 policy and tendering the defense, and just  
 24 because a primary insurer tenders the policy

1 limits it doesn't mean that they're asking the  
 2 excess insurer to take over the defense, right?  
 3 A No, it does not.  
 4 Q Now, are you aware that during this period and  
 5 early 2004, there were discussions about what  
 6 the terms of a mediation in the case would look  
 7 like?  
 8 A No, I'm not.  
 9 Q Well, are you aware that Mr. Pritzker had wanted  
 10 the defendants to make an offer before he would  
 11 agree to mediate?  
 12 A Certainly. That I am aware of.  
 13 Q Okay. And something that is referred to as a  
 14 price of admission in the business?  
 15 A Yes, it is.  
 16 Q And that generally is something that insurance  
 17 companies don't like to do, right?  
 18 A I can't agree with that. You're making a  
 19 general statement of tens of thousands of claims  
 20 now. You can't, no.  
 21 Q Well, oftentimes insurance companies don't want  
 22 to do it because it sets the floor for the  
 23 negotiations, right?  
 24 A But you have to start somewhere, so I don't know

1 if I agree with it universally, and I don't  
 2 agree with it in this case at all.  
 3 Q Okay. Now, are you aware of Mr. Pritzker's  
 4 testimony that he wanted an advance or on-  
 5 account payment before agreeing to mediate?  
 6 A No, I'm not.  
 7 Q Is that something that's unusual?  
 8 A You would have to ask Mr. Pritzker that  
 9 question. I've never actually been confronted  
 10 with that personally.  
 11 Q Okay. And before the Lazarus -- are you  
 12 familiar with the Lazarus case?  
 13 A Yes, I am.  
 14 Q There was a case before that called Thaylor?  
 15 A Yes.  
 16 Q And after the Thaylor case, what basically that  
 17 said was that an insurance company could pay  
 18 money without securing a release for its  
 19 insureds, right?  
 20 A Correct.  
 21 Q And you are aware that the Lazarus case said you  
 22 can't do that?  
 23 A Right.  
 24 Q And so between Thaylor and Lazarus it was

1 common, was it not, for plaintiff's counsel to  
 2 ask for a payment on account or an advance  
 3 without obtaining a release for the insureds,  
 4 right?  
 5 A I can't answer that.  
 6 Q Okay. But in any event, that isn't permissible  
 7 now for an insurance company or else it risks  
 8 being held in bad faith to its insureds, right?  
 9 A Correct.  
 10 Q Now, would you agree that a request to mediate  
 11 requires a reasonable time to respond?  
 12 A Certainly.  
 13 Q And it's perfectly reasonable for an insurance  
 14 company to say: No, I don't want to mediate, or  
 15 I'm not ready to mediate yet, I need more  
 16 information, right? Depending on the  
 17 circumstances.  
 18 A It depends on the circumstances, sir.  
 19 Q Okay. Now, in November of 2003, are you aware  
 20 that the amount of demand was \$16.5 million?  
 21 A Yes, I am.  
 22 Q And is it your opinion that it was bad faith for  
 23 AIG to refuse to offer 16.5 million in November  
 24 of 2003?

1 A No, it wasn't bad faith not to offer \$16.5  
 2 million.  
 3 Q And from December 2003 to August 2004, the  
 4 demand was 19.5 million, or you thought it was  
 5 18.5 million, right?  
 6 Q Correct, I thought it was --  
 7 MR. PRITZKER: Objection.  
 8 THE COURT: Overruled. I'll allow him  
 9 to say what he understood it to be.  
 10 A I understood it to be 18.5 million, sir.  
 11 (By Mr. Cohen)  
 12 Q Okay. Well, even at 18.5 million, is it your  
 13 opinion it was bad faith for AIG not to offer  
 14 that amount during that time period?  
 15 A So not to offer \$18.5 million, no that's not bad  
 16 faith.  
 17 Q And at the trial, are you aware that the lowest  
 18 offer was 11.6 million, plus the tree service  
 19 money?  
 20 A You mean the demand, I'm assuming --  
 21 Q Of the demand, right.  
 22 A Yes, I am.  
 23 Q And was it bad faith in your opinion for AIG not  
 24 to meet that demand?

1 A Not to pay 11.5? No it's not.  
 2 Q Do you agree that if a plaintiff's prognosis is  
 3 not clear, then the amount of damages can't be  
 4 reasonably clear?  
 5 A I'd have to look at the case by case. You're  
 6 saying prognosis. Be a little clearer, if you  
 7 could. I know what the word means.  
 8 Q Okay. Well, prognosis means how the plaintiff  
 9 is going to -- how their medical condition, what  
 10 their medical condition, or rehabilitation  
 11 condition is going to be in the future, right?  
 12 A Correct.  
 13 Q Okay. And if that's if that's unknown at any  
 14 particular time, in general, I'm not talking  
 15 about any particular case, liability in terms of  
 16 damages isn't reasonably clear, right?  
 17 A If it's unclear, no, it's not.  
 18 Q Okay. Now, speaking of the Crawford reports,  
 19 are you aware that from September 24, 2003  
 20 onward, all the Crawford reports indicated that  
 21 the Rhodes accident case had a value of 5 to \$7  
 22 million?  
 23 A '03 were at now, correct? You said September  
 24 '03?

1 Q '03 onward, and after that.  
 2 A Yes, you're right, yes.  
 3 Q And was that that a reasonable estimate on  
 4 Crawford's part?  
 5 A It's a reasonable range, yes, it is.  
 6 Q Well, if 5 to \$7 million is a reasonable range,  
 7 then \$5 million has to be reasonable, right  
 8 A At that give point in time it would be,  
 9 certainly.  
 10 Q Well, as I just mentioned, Crawford was giving  
 11 that number at all times, from September 24,  
 12 2003 until it ended its involvement in the case,  
 13 right?  
 14 MR. PRITZKER: Objection.  
 15 THE COURT: Overruled. I'll allow him  
 16 to answer.  
 17 A Please, sir, restate the question. I apologize.  
 18 (By Mr. Cohen)  
 19 Q Are you aware that all of the Crawford reports  
 20 that were written after September 24, 2003, gave  
 21 a range of 5 to \$7 million?  
 22 A Yes, I am.  
 23 Q And you just testified, did you not, that that  
 24 range was reasonable, right?

1 A In September of '03, that range was reasonable.  
 2 Q So therefore -- I'm not asking you just about  
 3 September of '03. I'm asking you September '03  
 4 through the last Crawford report in the case.  
 5 A Which was?  
 6 MR. COHEN: Let me look and see if I  
 7 can find that, your Honor.  
 8 (By Mr. Cohen)  
 9 Q Okay. There was a Crawford report in October 9,  
 10 2003, are you aware of that?  
 11 A Yes, I am.  
 12 Q And there was a Crawford report in November 13,  
 13 2003?  
 14 A Yes, I am.  
 15 Q And there was another, it looks like that was  
 16 the last Crawford report that actually put a  
 17 value on the case, November of 2003. Okay?  
 18 And is it your testimony that in  
 19 November 2003, \$5 million was a reasonable  
 20 settlement number for the case?  
 21 A A reasonable starting point, yes, it was.  
 22 Q Okay. Well, I wasn't asking you a reasonable  
 23 starting point. I was asking you whether it was  
 24 a reasonable settlement value.

1 A It's hard to go back, sir, and say if it was  
 2 just a reasonable value. Nobody offered it. I  
 3 can't --  
 4 Q Well, whether it was offered or not, I'm not  
 5 asking you whether it was offered, Mr. Kiriakos.  
 6 I'm asking you whether you think \$5 million was  
 7 a reasonable settlement value in November 2003  
 8 or wasn't it?  
 9 A In my opinion, it was a little lower than I  
 10 evaluated the case. And so "reasonable", I'm  
 11 going to say no to that in November of '03.  
 12 Q Okay. How you evaluate a case personally isn't  
 13 the issue here, right?  
 14 A No, it's not.  
 15 Q Okay. And you told us before that that a more  
 16 experienced claims person can disagree with a  
 17 less experienced claims person?  
 18 A I said that, absolutely. And I mean it.  
 19 Q So perhaps all your experience in the two  
 20 paraplegic cases you handled gave you a benefit  
 21 of more experience, right?  
 22 A Yes, sir  
 23 Q Now, those profit reports, incidentally, don't  
 24 indicate whether the numbers they were given,

1 whether it was 5 to \$7 million or 5 to \$10  
 2 million were settlement values or verdict  
 3 values, right?  
 4 A I'd have to see the report. But I don't recall  
 5 it saying one or the other. I just recall it  
 6 reading "value".  
 7 Q Okay. Now, in order to determine the settlement  
 8 -- strike that.  
 9 The settlement value of the case is  
 10 always going to be less than the verdict value,  
 11 right?  
 12 A Always?  
 13 Q As a general rule, yes.  
 14 A As a general rule, yes.  
 15 Q And that's because, in order to settle a case,  
 16 parties compromise, right?  
 17 A Yes, they do, sir.  
 18 Q Generally, parties aren't expected to pay the  
 19 worst-case scenario in order to settle a case,  
 20 right?  
 21 A Correct.  
 22 Q So that's why when say Mr. Deschenes came up  
 23 with a settlement verdict research and jury  
 24 verdict research, the settlements were quite a

1 bit lower than the verdicts, right?  
 2 A I'll say yes to that.  
 3 Q And that's going pretty much always be the case  
 4 if you take comparable settlements and  
 5 comparable verdicts for the same type of cases,  
 6 right? If you take enough of them, at least.  
 7 A If you take enough of the sampling, it should  
 8 come out like that, yes.  
 9 Q Now, you're aware of the involvement of McMillan  
 10 Tree Service in the Rhodes accident case, right?  
 11 A Yes, I am.  
 12 Q They were a third-party defendant, right?  
 13 A Yes, sir  
 14 Q And they were first added to the case toward the  
 15 end of 2003, right?  
 16 A Yes, sir  
 17 Q And in fact, they answered the third-party  
 18 complaint in December of 2003?  
 19 A Correct.  
 20 Q And I guess there was some discovery with  
 21 respect to them after that, right?  
 22 A Yes, there was.  
 23 Q And are you aware that one of their -- they had  
 24 insurance, right?

1 A Yes.  
 2 Q And that was a relevant matter for the truck  
 3 insurers, Zurich and AIG, to look into as to how  
 4 much insurance the tree service had, right?  
 5 A Absolutely.  
 6 Q And that was -- there was some question about  
 7 that during 2004, whether they had a million of  
 8 insurance or \$2 million or \$3 million, right?  
 9 A Yes, sir  
 10 Q And in order to determine what the exposure for  
 11 GAF and Mr. Zalewski and the other truck  
 12 defendants were, it was important to know how  
 13 much coverage McMillan had, right?  
 14 A You used the word "exposure", because the lion's  
 15 share of exposure was going to be on the  
 16 trucking company. To know exactly how much,  
 17 it's pertinent, but it's not going to change  
 18 your evaluation of the case.  
 19 Q Okay. Well, you talked about the lion's share  
 20 of exposure. Are you familiar with a concept  
 21 called joint and several liability, Mr.  
 22 Kiriakos?  
 23 A Yes, I am, sir.  
 24 Q And in Massachusetts you're aware, are you not,



1 that if a defendant is found to be just one  
 2 percent at fault, it's equally responsible,  
 3 right?  
 4 MR. PRITZKER: Objection.  
 5 THE COURT: Overruled.  
 6 MR. PRITZKER: Your Honor, this is a  
 7 third-party defendant case. This is not a joint  
 8 and several liability case.  
 9 MR. COHEN: The same principle applies,  
 10 your Honor.  
 11 MR. PRITZKER: When I say "case", I'm  
 12 talking about the third-party claim over and  
 13 against Professional Tree, and that law does  
 14 onto apply.  
 15 THE COURT: I will sustain it as to  
 16 that.  
 17 MR. PRITZKER: The witness is not an  
 18 attorney, in any event. But that's an improper  
 19 statement of law, your Honor.  
 20 THE COURT: So am I correct that the  
 21 tree service was brought in as a third party and  
 22 not as a defendant?  
 23 MR. PRITZKER: Yes, your Honor.  
 24 MR. COHEN: Right.

1 MR. COHEN: Well, it certainly is the  
 2 law, but I guess we don't have to decide that  
 3 now.  
 4 THE COURT: So you can address that.  
 5 But I will allow him to answer as to his  
 6 understanding, to the extent that it bears on  
 7 his opinion.  
 8 A If they were a direct defendant? I think  
 9 that's what you said. Am I correct, Mr. Cohen?  
 10 If they were?  
 11 (By Mr. Cohen)  
 12 Q No, I'm asking you, if there was a third-party  
 13 defendant and there's a contribution claim under  
 14 the joint tortfeasor statute against the  
 15 third-party defendant, the jury is going to be  
 16 asked how much is the defendant responsible, how  
 17 much is the third-party defendant responsible,  
 18 right?  
 19 A Yes, they would.  
 20 Q And if the jury determines that the third-party  
 21 defendant is even slightly negligent and at  
 22 fault -- causally negligent for the accident,  
 23 the third-party plaintiff will have a right to  
 24 contribution against them, right?

1 THE WITNESS: Yes, sir.  
 2 THE COURT: Okay.  
 3 (By Mr. Cohen)  
 4 Q Well, when you have a contribution claim against  
 5 a third-party defendant, if the third-party  
 6 defendant is found one percent at fault, the  
 7 third-party plaintiff is going to be entitled to  
 8 contribution, right?  
 9 MR. PRITZKER: Objection.  
 10 THE COURT: Overruled.  
 11 A Contribution and statutory obligation are not  
 12 always the same thing.  
 13 (By Mr. Cohen)  
 14 Q Well, isn't it true, Mr. Kiriakos, that if  
 15 McMillan had been involved in the trial of this  
 16 case and was found at least one percent at  
 17 fault, then the truck defendants could recover  
 18 half of whatever the judgment was from McMillan  
 19 up to however solvent or insurance it had?  
 20 MR. PRITZKER: Objection, your Honor.  
 21 Once again that's not the law. It has to do  
 22 with the degree of fault.  
 23 THE COURT: Well, you can address that  
 24 legally.

1 A The third-party plaintiff would, yes, they  
 2 would.  
 3 Q The third-party plaintiff would?  
 4 A Yes.  
 5 Q And under those circumstances, the third-party  
 6 plaintiff can recover from the third-party  
 7 defendant for half of the verdict against the  
 8 plaintiff, third-party plaintiff?  
 9 MR. PRITZKER: Objection.  
 10 THE COURT: Again, I'll allow him to  
 11 give his understanding. We can address the law  
 12 later.  
 13 A My understanding it's not a fifty-fifty split,  
 14 sir. It's a proportionate share and it's based  
 15 upon -- it's going to be based upon  
 16 affordability of coverage.  
 17 (By Mr. Cohen)  
 18 Q It's based on what?  
 19 A Affordability of coverage and solvency of the  
 20 businesses. It's not black and white. That's  
 21 my understanding. Claims person, not attorney.  
 22 Q Okay. I'll move on from that. In any event,  
 23 are you aware that one of the insurers for the  
 24 third-party defendant was a company called

1 Specialty National?  
 2 A Yes.  
 3 Q And the other insurer was a company called One  
 4 Beacon?  
 5 A Yes, sir.  
 6 Q And one was a general liability insurer and one  
 7 was an auto insurer, right?  
 8 A Yes, sir.  
 9 Q And are you aware that they are currently  
 10 fighting with each other up on the First Circuit  
 11 over who's going to pay what share of \$550,000  
 12 settlement?  
 13 A No, I'm not, sir.  
 14 Q Are you aware that One Beacon wasn't even given  
 15 notice of the case until July 2004, one month  
 16 before the mediation?  
 17 A No, I'm not, sir.  
 18 Q In setting up the mediation for the Rhodes case,  
 19 you would agree, would you not, that you wanted  
 20 the tree service's insurers there, because  
 21 they're a potential source of contribution,  
 22 right?  
 23 A I would want all parties there, yes, sir.  
 24 Q And not only were they a potential source of

1 contribution, but they actually contributed and  
 2 paid the Rhodes \$550,000, right?  
 3 A Yes, sir.  
 4 Q Are you also aware that Specialty National had  
 5 this case reserved at its million dollar policy  
 6 limits and gave its counsel authority to pay up  
 7 to 800,000 at the mediation?  
 8 MR. PRITZKER: Objection.  
 9 THE COURT: Overruled. I'll allow him  
 10 to say whether he knows. It's not part of the  
 11 evidence yet.  
 12 A I'm not aware. No, I'm not.  
 13 (By Mr. Cohen)  
 14 Q Now, I'd like to ask you about the post-trial  
 15 period in the Rhodes case.  
 16 Do you agree that, as a general rule,  
 17 when there's an adverse verdict, whether it's  
 18 against a plaintiff or a defendant, much of the  
 19 time or most of the time that party files a  
 20 motion for a new trial and for a judgment  
 21 notwithstanding the verdict?  
 22 A Yes, I do.  
 23 Q Okay. So that's pretty much standard operating  
 24 procedure after a trial, right?

1 A Yes, it is.  
 2 Q And it's not unreasonable for an insurance  
 3 company to authorize its counsel or the  
 4 insurance counsel to file post-trial motions,  
 5 right?  
 6 A No, it's not unreasonable.  
 7 Q Okay. And then after that, if there are  
 8 appellate issues, in order to protect appellate  
 9 rights, you have to file a notice of appeal  
 10 within 30 days after the post-trial motions are  
 11 decided, right?  
 12 A Now, you're asking me for discovery knowledge.  
 13 I don't have that period of time. I don't have  
 14 notice -- if you're telling me it, I'll answer  
 15 yes, but I don't know that be true.  
 16 Q Okay. Well, are you aware that there's  
 17 something called a notice of appeal that gets  
 18 filed in order to preserve appellate rights,  
 19 whatever period of time it is?  
 20 A Yes, I am.  
 21 Q Now, you're not claiming that you're qualified  
 22 to render an opinion on the merits of the appeal  
 23 in the Rhodes case, right?  
 24 A No, I am not.

1 Q Okay. And in order to determine whether an  
 2 appeal is proper, an insurance company or any  
 3 other party needs to investigate the merits of  
 4 the appeal, right?  
 5 A Certainly.  
 6 Q In fact, the same three phases of handling a  
 7 claim apply in the appellate period, as you  
 8 talked about in the pretrial period:  
 9 investigation, evaluation and disposition,  
 10 right?  
 11 A Certainly.  
 12 Q And in order to properly evaluate the merits of  
 13 an appeal, it's important, is it not, to get the  
 14 trial transcript?  
 15 A Yes, it is.  
 16 Q And it's especially important if the appeal is  
 17 based on presumed evidentiary or alleged  
 18 evidentiary errors that were made during the  
 19 trial, right?  
 20 A Yes, it is.  
 21 Q Because how can you tell whether there was an  
 22 evidentiary error made by the trial judge unless  
 23 you have your counsel analyze the trial  
 24 transcript, right?

1 A Yes.

2 Q Do you know when the trial transcript was  
3 received by AIGDC?

4 A No, I do not.

5 Q Okay. Do you know that it wasn't received by  
6 AIG until after the Rhodes case was already  
7 settled?

8 A No, I did not.

9 Q Okay. Now, there were some settlement  
10 negotiations that continued after the trial of  
11 the Rhodes case, right?

12 A Yes, sir.

13 Q And are you familiar with the executive claims  
14 summaries that were done by AIG in connection  
15 with the Rhodes case?

16 A Yes, I am.

17 Q And was that something that you did when you  
18 were at AIG?

19 A Sir, I don't recall the actual document name.  
20 And I didn't handle -- I didn't do that. I was  
21 a manager. I did not do the specific document.

22 Q I see. But in any event, there was some  
23 document that was used in order to assess the  
24 merits of a claim and what it might be worth or

1 not worth, right?

2 A Certainly.

3 Q And that's typical in all insurance companies,  
4 right?

5 A Yes, it is.

6 Q Now, are you aware that in the Rhodes case there  
7 was an executive claims summary that was done  
8 before the trial?

9 A Yes, I am.

10 Q And in that document, AIG evaluated the total  
11 value of the case including the contribution it  
12 expected from the tree service as \$4.75 million,  
13 right?

14 A Yes, I recall that.

15 Q And after the trial they did -- after the trial  
16 they did another executive claims summary and  
17 they evaluated the case as being worth net of \$9  
18 million to AIG, not including the payment by  
19 Zurich -- or excuse me -- \$7 million -- let me  
20 start again.

21 In the executive claims summary after  
22 the trial, are you aware that AIG said that the  
23 value at that time was \$7 million of AIG'S  
24 money, plus Zurich's \$2 million, plus what the

1 tree service had paid?

2 A Yes, I am.

3 Q And in fact, Zurich ended up paying something  
4 more than \$2.3 million because it paid some  
5 interest on top of its policy limits. Are you  
6 aware of that?

7 A I'm aware of that, sir.

8 Q So essentially in the appellate period, AIG  
9 evaluated the case as being worth virtually a  
10 little bit less than \$10 million, right?

11 A In total value, yes, it did.

12 Q Out of a judgment of approximately \$12 million,  
13 right?

14 A With interest, yes, sir.

15 Q And you mentioned that there was some settlement  
16 negotiations that were ongoing during that  
17 period of time and during that period of time  
18 various offers were made by AIG, right?

19 A Yes, sir.

20 Q And until the time that the case actually  
21 settled -- do you recall that being in June of  
22 2005?

23 A Yes, sir.

24 Q The position that was being taken by the

1 plaintiffs were that they wouldn't negotiate a  
2 penny off of the judgment, right?

3 A Yes.

4 Q And in fact, AIG was in essence bidding against  
5 itself in that period, because it kept raising  
6 its demand even though its offer -- even though  
7 the demand wasn't moving at all, right?

8 A Yes.

9 Q Okay. Now, \$9.85 million out of about \$12  
10 million is something a little less than  
11 five-sixths, so that's 80 to 85 percent of the  
12 total amount of the judgment, right?

13 A Yes, sir.

14 Q Okay. Would that have been a reasonable number to  
15 offer, in your opinion?

16 A Certainly.

17 Q Okay.

18 THE COURT: Okay, let's take our morning  
19 break. I've worked out with the court reporters, who  
20 are going to have a changing of the guards, it's only  
21 going to be a five-minute break to try to make up some  
22 time that we lost for the early morning. So we'll take  
23 a break for five minutes.

24 (A recess was taken.)

1 THE COURT OFFICER: Court is back in session.  
 2 Please be seated.  
 3 THE COURT: Okay, please proceed.  
 4 (By Mr. Cohen)  
 5 Q I'm almost done, Mr. Kiriakos, just a couple more  
 6 questions.  
 7 Are you aware of how many cases the AIG claim  
 8 directors in this case were handling on a day-to-day  
 9 basis?  
 10 A No, I'm not.  
 11 Q Okay, if I were to tell you that the testimony has been  
 12 that they handled approximately 40 cases, is that a  
 13 reasonable amount of cases for an excess claims  
 14 handler?  
 15 A I can't answer that. I've already testified that I've  
 16 never worked in an excess office.  
 17 Q Okay. When you were working in primary for AIG, you  
 18 were handling, I believe, 800 to 1,000 claims, right?  
 19 A I wasn't handling; my office was, yes, sir.  
 20 Q But you were responsible for those, right, as a  
 21 supervisor?  
 22 A Yes.  
 23 Q Now, was it reasonable for AIG to expect that it was  
 24 likely that the tree service would pay its policy

1 limits, its insurers would pay their policy limits to  
 2 settle the case?  
 3 A I can't answer that.  
 4 Q Mr. Kiriakos, yes or no, do you think you're as well  
 5 qualified to offer a settlement number, what should  
 6 have been the settlement number of this case, as  
 7 somebody who was a Superior Court judge for several  
 8 years?  
 9 MR. PRITZKER: Objection.  
 10 THE COURT: Sustained.  
 11 MR. COHEN: That's all I have.  
 12 THE COURT: Okay. Who from Zurich is going  
 13 to be questioning? Mr. Goldman.  
 14 MR. GOLDMAN: Thank you, your Honor.  
 15 CROSS-EXAMINATION BY MR. GOLDMAN:  
 16 Q Good afternoon, Mr. Kiriakos.  
 17 A Good afternoon.  
 18 Q I just want to ask a few questions about your  
 19 background. I know you went into it in some depth with  
 20 Mr. Cohen, but going through the different jobs that  
 21 you've had since you graduated from Boston State  
 22 College, you were a claims adjuster with Kemper for  
 23 about three and a half years, correct?  
 24 A Correct.

1 Q And what is the maximum settlement authority you had  
 2 while you were a claims adjuster?  
 3 A Back then, I cannot recall, sir.  
 4 Q Do you recall whether it was over a million dollars  
 5 A It was not.  
 6 Q It was less than a million dollars?  
 7 A Yes, it was.  
 8 Q Was it less than \$100,000?  
 9 A Yes, it was.  
 10 Q And was it less than \$50,000; do you recall that?  
 11 A I'm going to say yes to that.  
 12 Q Okay. Do you recall if it was less than \$25,000?  
 13 A I can't recall that, sir.  
 14 Q Okay. So it was something less than \$50,000, but  
 15 you're not sure how much less; is that right?  
 16 A Correct.  
 17 Q Okay. And that was between 1980 and 1984, right?  
 18 A Correct.  
 19 Q And during that time you handled automobile claims,  
 20 right?  
 21 A Not just automobile, but they were one, yes.  
 22 Q Okay. And then you went over to Hanover and you were  
 23 there for about a year and a half, correct?  
 24 A No, it was more like two and a half. January '84 to --

1 Q Okay. Two and a half years. And what was the maximum  
 2 settlement authority you had while you were with  
 3 Hanover?  
 4 A My recollection it was either \$75,000 or \$100,000.  
 5 Q Okay. And then you went to Commercial Union between  
 6 June of '86 and April of 1990, correct?  
 7 A Correct.  
 8 Q And what was the maximum settlement authority you had  
 9 there?  
 10 A Half a million dollars.  
 11 Q \$500,000?  
 12 A Yes, sir.  
 13 Q Okay. Then you were at AIG, correct?  
 14 A Yes, sir.  
 15 Q We heard Mr. Cohen ask you about that. You were there  
 16 for a little over a year, correct?  
 17 A Correct.  
 18 Q And what was the maximum settlement authority you had  
 19 there?  
 20 A As I said earlier, I think Mr. Cohen identified  
 21 \$175,000 by the time I left there.  
 22 Q Okay. And after that, you went to a different kind of  
 23 business, an ADR business, right?  
 24 A Correct.

1 Q So you had nothing to do with settlement authority for  
 2 insurance companies, right?  
 3 A Correct.  
 4 Q Okay. Then you went to Adjustors Outstanding, correct?  
 5 A Correct.  
 6 Q And that was as an outside adjustor, right?  
 7 A An independent, correct.  
 8 Q Independent?  
 9 A Yes.  
 10 Q So I gather you didn't have any settlement authority  
 11 while you were in that position?  
 12 A Unless expressly given, correct.  
 13 Q And then you worked for the Hartford, correct?  
 14 A Correct.  
 15 Q And there you said you handled employment liability  
 16 claims?  
 17 A Yes, sir.  
 18 Q Those would be things like wrongful discharge of an  
 19 employee?  
 20 A In certain jurisdictions, correct.  
 21 Q Okay. And so you didn't handle any kind of automobile  
 22 or personal injury claims at all while you were there?  
 23 A Automobile, no.  
 24 Q Okay. Bodily injury claims?

1 Q Okay. So the maximum settlement authority you ever had  
 2 in any of your jobs was the \$500,000 while you were  
 3 with Commercial Union, correct?  
 4 A Correct.  
 5 Q So it would be correct then from that to conclude that  
 6 you never had the authority to offer, or to make the  
 7 decision to offer more than \$500,000 on any claim that  
 8 you've handled in your entire career; is that right?  
 9 A The decision on my own?  
 10 Q Correct.  
 11 A Correct.  
 12 Q Now, I wanted to define a few terms that you've used  
 13 during your testimony. The first one I wanted to ask  
 14 you about is "tender", the word "tender", so that we  
 15 all have an understanding of what that means. Now, Mr.  
 16 Cohen asked you during his questions whether there was  
 17 a difference between tendering policy limits and  
 18 tendering a defense and I think you responded that yes,  
 19 there is a difference; is that right?  
 20 A Yes.  
 21 Q Okay. What does it mean to tender policy limits?  
 22 A To pass the baton over to the excess carrier. To give  
 23 the amount of the coverage to the excess carrier to  
 24 work with.

1 A They would have been under the employer liability  
 2 cover.  
 3 Q If someone got hurt in the course of employment?  
 4 A Correct.  
 5 Q Again, what was the maximum settlement authority you  
 6 had at that time at that job?  
 7 A \$100,000.  
 8 Q \$100,000, okay. And then you went to an ADR firm,  
 9 correct?  
 10 A I went back to the same firm I founded.  
 11 Q Okay. And so I gather, again, you had no involvement  
 12 with settlement authority for insurance companies?  
 13 A Correct.  
 14 Q Then you went to work as a temp at the Hiller Group,  
 15 right?  
 16 A Correct.  
 17 Q And I gather you didn't have any settlement authority  
 18 while you were there?  
 19 A Correct.  
 20 Q And now you're at Broadspire, correct?  
 21 A Correct.  
 22 Q And you don't have any settlement authority there, do  
 23 you?  
 24 A No, you don't.

1 Q Okay, to say: You can use our money to settle the case  
 2 if you wish.  
 3 A That's a nice way of articulating it, yes, sir.  
 4 Q Okay. And tendering a defense means you will pay for  
 5 and control the defense?  
 6 A Correct.  
 7 Q Okay. Now, another term I just want to ask you about  
 8 was a leased automobile? What is a leased automobile?  
 9 A It's an automobile rented, for the loss of a better  
 10 phrase, under contract for use by the entity that's  
 11 renting it or leasing it, either for own purposes or  
 12 the purposes, it could be, for the business they lease  
 13 from, too.  
 14 Q Okay. And that would be not necessarily with the  
 15 driver. You just lease the vehicle itself?  
 16 A Correct.  
 17 Q Now, a hired automobile is with the driver; is that  
 18 correct?  
 19 A It can be, yes, to my understanding.  
 20 Q Okay. And that would be the difference, the common  
 21 usage, between a leased automobile and a hired  
 22 automobile?  
 23 A My understanding, yes.  
 24 Q So the hired one comes with the driver and a leased is

1 without, right?

2 A It can.

3 Q Okay. And you also used the term "settlement value."

4 Could you explain what that means?

5 A Settlement value is the value placed on a claim to

6 resolve it prior to trial, and it's an evolving value.

7 It changes over time.

8 Q Then you used the term "exposure value" and you said

9 that's different from settlement value, right?

10 A Certainly.

11 Q And what is exposure value?

12 A Exposure value would be the ultimate exposure on a

13 case. It might be your reserve.

14 Q It would be your worst-case analysis?

15 A Yes, some companies call it jury verdict, sir.

16 Q Okay. Well the difference between worst case and jury

17 verdict, jury verdict would be your prediction of what

18 the jury might do, right?

19 A Right, but they use the same phrase. That's what I'm

20 saying to you. You're right. The exposure factor is

21 the ultimate worst-case scenario.

22 Q Okay. So the exposure value would not necessarily be

23 the same number that you would put on a case for

24 purposes of determining how much you would offer in a

1 making an honest mistake, that would also give you an

2 incorrect exposure value, correct?

3 A Correct.

4 Q Now, when you're playing with several million dollars

5 of money, would you make decisions based on somebody

6 that you didn't know and what they told you?

7 A Such as? I guess it would -- just anybody in the

8 street or somebody else? I mean is there a

9 relationship involved?

10 Q Well, let's go to -- let's just change the subject for

11 a moment. Have you dealt with any fraudulent claims

12 during your career?

13 A Oh, certainly.

14 Q Have you dealt with claims where medical expenses were

15 fraudulently inflated?

16 A Certainly.

17 Q Have you dealt with claims where claimants claim to

18 have injuries that they in fact did not have?

19 A Yes, sir.

20 Q And have you dealt with claims where people claim they

21 had a permanent disability where in fact they did not?

22 A Yes, sir.

23 Q So would you agree that one of the things you need to

24 determine when somebody tells you that there's been a

1 settlement then; is that right?

2 A Correct.

3 Q Okay. Now, you said that you could determine the

4 exposure value that would be the worst-case scenario

5 without looking at any documents; is that correct?

6 A At any given point in time, certainly.

7 Q Certainly?

8 A Certainly.

9 Q Okay. Now if you were to do that without any documents

10 and determine the worst case scenario, what would you

11 have to rely on?

12 A The person I'm asking the information, securing the

13 information from.

14 Q Okay. So the accuracy of your evaluation of the

15 exposure value then would determine -- or would be

16 dependant upon whether the person you were speaking

17 with was giving you correct or incorrect information;

18 would that be correct?

19 A Absolutely.

20 Q And if they were not a trustworthy person and were

21 intentionally giving you false information, you would

22 end up with the wrong exposure value; is that correct?

23 A To answer your question, yes.

24 Q Okay. And if they were an honest person but also

1 paralysis resulting from an accident is whether in fact

2 that was the case?

3 A You would have to continue to investigate that, yes,

4 sir.

5 Q Okay. And another thing you would need to know would

6 be whether that paralysis was temporary or permanent,

7 correct?

8 A Yes.

9 Q That would be an important thing in order to determine

10 the exposure value of a case, right?

11 A Yes, it would be.

12 Q It would also be an important thing order to determine

13 the settlement value of a case, correct?

14 A Certainly.

15 Q Now, have you ever met Mr. Pritzker before you were

16 retained in this case?

17 A No, I had not.

18 Q Do you know whether Mr. Chaney from Crawford & Company

19 had ever met Mr. Pritzker prior to this case?

20 A Only by what I read what he wrote, and I don't know if

21 he ever personally met him, no, I do not.

22 Q Do you know whether anyone from Zurich ever met Mr.

23 Pritzker prior to his involvement with this, with the

24 underlying case at least?

1 A I don't have personal knowledge, no, I do not.  
 2 Q Now, are you aware that Mr. Pritzker made certain  
 3 mistakes in communicating details about the medical  
 4 information to Crawford?  
 5 A Yes, I am.  
 6 Q Are you aware of anything that Mr. Chaney in his  
 7 earlier reports for Crawford & Company relied on in  
 8 evaluating the damages part of the case other than his  
 9 communications with Mr. Pritzker?  
 10 A No, I'm not.  
 11 Q Are you aware, sir, that -- have you read Mr. Chaney's  
 12 deposition transcript?  
 13 A Some time ago, yes.  
 14 Q Okay. So then you're aware that he testified that he  
 15 in fact requested medicals from Mr. Pritzker, correct?  
 16 A Yes, I recall him saying that.  
 17 Q And is it your testimony, sir, that he was beyond his  
 18 authorization when he did that?  
 19 A I didn't say "beyond his authorization." I said -- I  
 20 think I said earlier that if they don't authorize it,  
 21 they don't have to do it. I think the word was "have  
 22 to."  
 23 Q Okay. So in this case, Mr. Chaney in fact did do it,  
 24 correct?

1 there were interrogatory answers and production  
 2 responses where they were produced, correct?  
 3 A Correct.  
 4 Q Okay. And was there anything improper about doing  
 5 that?  
 6 A No.  
 7 Q In fact, that is something you would expect to see in  
 8 any serious bodily injury case, correct?  
 9 A Certainly.  
 10 Q Now you said earlier, in response to Mr. Cohen's  
 11 questions, that it is important for the excess carrier  
 12 to have medical records; is that correct?  
 13 A Certainly.  
 14 Q Okay. And that is in order to determine the exposure  
 15 value of the case, correct?  
 16 A Yes.  
 17 Q And that's in order to determine the settlement value  
 18 of the case, correct?  
 19 A Yes.  
 20 Q And you also said that the excess carrier needs to  
 21 rely, in part, on the investigation of the primary  
 22 carrier, correct?  
 23 A Correct.  
 24 Q Now, you testified on both direct and cross-examination

1 A Yes, he did.  
 2 Q And by the way are you aware -- you testified during  
 3 direct examination that the Crawford -- you were  
 4 familiar with the Crawford guidelines?  
 5 A Yes.  
 6 Q Okay. And are you aware that the Crawford guidelines  
 7 for their own adjusters states that they should get  
 8 medical authorizations and medical records shortly  
 9 after getting the assignment?  
 10 A Yes.  
 11 Q Are you aware -- have you reviewed the contract between  
 12 Zurich and Crawford?  
 13 A No, I haven't.  
 14 Q Okay. I understand you haven't reviewed it, but are  
 15 you aware that that contract requires Crawford to  
 16 follow their ordinary claims procedures in  
 17 investigating claims?  
 18 A If you're telling me that's true, then I guess it's  
 19 true, because I have not reviewed it, sir.  
 20 Q Now, did Mr. Chaney do anything wrong by asking Mr.  
 21 Pritzker for medical records?  
 22 A No.  
 23 Q In fact, at some point in time the defense side of  
 24 things did ask for medical records, because we know

1 that it's your opinion that Crawford acted reasonably  
 2 in the investigation of this claim; is that correct?  
 3 A Yes, I did.  
 4 Q Okay. And you are aware, are you not, that Zurich  
 5 delegated most, if not all, of its investigative tasks  
 6 to Crawford?  
 7 A Yes, I am.  
 8 Q And there was nothing improper about that, was there?  
 9 A No, there was not.  
 10 Q Okay. And in fact in the third party administrator  
 11 world, or business, that's common, correct?  
 12 A Yes, it is.  
 13 Q And Crawford also had certain responsibilities to GAF  
 14 in addition to the responsibilities it had to Zurich,  
 15 correct?  
 16 A Yes, it did.  
 17 Q And fact, its earlier reports were to GAF, correct?  
 18 A Correct.  
 19 Q Okay. Now you said also that Crawford acted reasonably  
 20 in its evaluation of the claim; is that correct?  
 21 A Certainly.  
 22 Q And that would be its evaluation of the exposure value  
 23 or the settlement value, or both?  
 24 A It's actually both at that given point in time.

1 Q Okay. And would that also be true of its evaluation of  
 2 the potential liability of each of the defendants?  
 3 A At that given point in time, they were reasonable,  
 4 certainly.  
 5 Q Okay. Are you aware of Crawford ever incorrectly  
 6 evaluating the potential liability of any of the  
 7 defendants?  
 8 A Off the top of my head, no.  
 9 Q Okay. Now, you also said that Crawford acted  
 10 reasonably in the recommendations that it made  
 11 regarding disposition; is that correct?  
 12 A Certainly.  
 13 Q Is there any place in any of the Crawford reports where  
 14 Crawford makes a recommendation that Zurich offer \$2  
 15 million to settle the case?  
 16 A To settle it?  
 17 Q Yes.  
 18 A Not that I can recall.  
 19 Q Okay. Or to attempt to settle it?  
 20 A Not that I recall.  
 21 Q Okay. Now Zurich's obligation, to the extent it had  
 22 one on the indemnity side of things, was to tender its  
 23 policy, correct?  
 24 A Correct.

1 A Not that I can recall, no.  
 2 Q Are you aware that those best practices state that all  
 3 claimed injuries and damages are evaluated and verified  
 4 by the case manager through credible evidence and/or  
 5 the use of appropriate experts and vendors?  
 6 A Yes, I am.  
 7 Q Are you aware that those best practices also say that  
 8 file documentation will support the degree of injuries  
 9 and damages outlined in the case exposure evaluation?  
 10 A Yes, sir.  
 11 Q Now, you said also -- we just discussed a minute ago  
 12 that you were familiar with the Crawford liability  
 13 standards of excellence, right?  
 14 A Yes, sir.  
 15 Q And are you aware that those state that the  
 16 investigation of every claim must begin with a  
 17 consideration of cover?  
 18 A Yes.  
 19 Q Are you aware those also say that within 14 days of  
 20 assignment, necessary action should be taken to request  
 21 and obtain current medical records?  
 22 A Yes.  
 23 Q Now, let's look at the case as it came into Crawford in  
 24 January of 2002. At that point it was not in suit,

1 Q And once it did that, did it have an independent  
 2 obligation to offer its policy limits to settle the  
 3 case directly to the defendant?  
 4 A My understanding is you tender it to AIG. It's their  
 5 money to work with.  
 6 Q That's the common practice in the industry as to how to  
 7 do it?  
 8 A Yes, that's regular practice, yes, sir.  
 9 Q Okay. And eventually that is what Zurich did, correct?  
 10 A Yes, they did.  
 11 Q So would you agree with me then, that, the question as  
 12 to whether Zurich complied with the statute that we're  
 13 here about today really revolves around the question of  
 14 whether Zurich acted reasonably in tendering its policy  
 15 based on the information it received from Crawford?  
 16 A Correct.  
 17 Q Now, you said during direct examination that you were  
 18 familiar with Zurich's liability best practices?  
 19 A Yes.  
 20 Q And you said that that was pretty much an industry  
 21 standard, right?  
 22 A Correct.  
 23 Q Nothing wrong with those best practices as far as you  
 24 know them, right?

1 correct?  
 2 A Correct.  
 3 Q We know that -- and it was Mr. Chaney, John Chaney, who  
 4 was handling the case for Crawford at that time?  
 5 A Yes, sir.  
 6 Q And it was assigned to him by GAF, correct?  
 7 A Correct.  
 8 Q Do you know, sir, when Mr. McIntosh of Zurich actually  
 9 found out about the accident?  
 10 A My recollection is September of '02.  
 11 Q And so would it be fair to say that between January and  
 12 September of 2002 Crawford was not receiving any  
 13 direction directly from Zurich?  
 14 A Apparently not.  
 15 Q Okay. But they receiving direction from GAF; is that  
 16 correct?  
 17 A Yes, sir.  
 18 Q Okay. Now, during that initial analysis that Mr.  
 19 Chaney said, and maybe -- I'm going to ask you a number  
 20 of questions about the Crawford reports, so if you  
 21 could turn please to Exhibit 66. It's got several sub-  
 22 exhibits, I think A through O or something like that.  
 23 A Is it plaintiff exhibits -- which number?



1 A Okay, what number?  
 2 (By Mr. Goldman)  
 3 Q Sixty-six.  
 4 A Yes, sir.  
 5 Q Okay. I'd like you to look at Exhibit 66A, please.  
 6 A Yes, sir.  
 7 Q And I'll ask you to look at the second to last page of  
 8 that report. That's the January 30, 2002, report?  
 9 A Yes, sir.  
 10 Q Do you see there under the section where it says:  
 11 Liability?  
 12 A Yes, sir.  
 13 Q And it says there: GAF's exposure is purely  
 14 contractual, in our view?  
 15 A Yes.  
 16 Q Okay. Now, that was before any lawsuit was brought  
 17 correct?  
 18 A Correct.  
 19 Q And GAF was the one who assigned the claim, correct?  
 20 A Yes, sir.  
 21 Q Now, you testified on direct examination that the  
 22 obligation of Zurich -- I think the question was: What  
 23 should they, being Zurich, have done? And your answer  
 24 was: Tendered when it was clear that the exposure to

1 their insured, GAF, was in excess of the policy limit.  
 2 Do you recall that?  
 3 A Yes, sir.  
 4 Q Okay. Is that still your belief?  
 5 A Absolutely.  
 6 Q Okay. So when we look at this report, we need to see  
 7 what the exposure was to Zurich, right?  
 8 A The initial report?  
 9 Q Excuse me. Exposure to GAF, right?  
 10 A Correct.  
 11 Q Now, you said that in that -- I'm going to ask you in a  
 12 minute about that answer, because you testified earlier  
 13 that the exposure value was the worst-case scenario,  
 14 right?  
 15 A Certainly.  
 16 Q So is it your testimony that Zurich had an obligation  
 17 to tender its policy limits when the worst-case  
 18 scenario was in excess of policy limits?  
 19 A In this case, it would have been.  
 20 Q Now, going back to Crawford's initial assessment that  
 21 GAF's exposure is purely contractual in our view, would  
 22 it be correct to say that as of January -- the date of  
 23 the report was January 30, 2002 -- the only entity  
 24 asking for coverage under the Zurich policy was GAF?

1 A Correct.  
 2 Q In other words, the other entities that later became  
 3 defendants in the case were not --  
 4 A Say that question again.  
 5 Q Yes. As of January 30, 2002, the only entity asking  
 6 for coverage under the Zurich policy was GAF?  
 7 A No.  
 8 Q Penske already made a request at that point?  
 9 A And DLS was involved. They were aware of the driver  
 10 and the sub-contractor and all the relationship -- he  
 11 outlined all the relationship in this report.  
 12 Q I understand the relationships are outlined, but I want  
 13 to ask you, have you seen any document, sir, in the  
 14 entire review in which there was a communication from  
 15 DLS or the driver to Zurich or any representative of  
 16 Zurich asking to provide coverage for this accident  
 17 before September of 2002?  
 18 A DLS and/or Mr. Zalewski?  
 19 Q That was my question  
 20 A No.  
 21 Q So until September of 2002, neither DLS or Mr. Zalewski  
 22 were asking Zurich for coverage; is that correct?  
 23 A Correct.  
 24 Q But it's your testimony that Zurich should have

1 tendered its limits by no later than September 2002,  
 2 correct?  
 3 A Correct.  
 4 Q All right. Now, let's look at the different defendants  
 5 that ultimately were added to this case. Do you  
 6 remember when the complaint was filed?  
 7 A June of '02.  
 8 Q Okay. And you have reviewed that complaint; have you  
 9 not?  
 10 A Some time ago, sir.  
 11 Q Okay. Now, that complaint, when it was filed --  
 12 actually let me just show that to you and maybe we can  
 13 mark it if there's no objection.  
 14 MR. GOLDMAN: Do we have an exhibit number on  
 15 that?  
 16 MS. SACKETT: It had been originally marked  
 17 as AIG proposed Exhibit No. 28 -- 228, I apologize.  
 18 MR. GOLDMAN: So we can mark it as that or  
 19 mark it independently.  
 20 THE COURT: Well, if you already have it as  
 21 228, we should leave it as 228.  
 22 MS. SACKETT: I believe it was a disputed  
 23 exhibit.  
 24 MR. GOLDMAN: There was a page added to that

1 that wasn't part of it.

2 MS. SACKETT: Correct, the civil action cover

3 sheet.

4 THE COURT: Is there any objection now to it?

5 MR. GOLDMAN: This is without the cover

6 sheet. This is just the text of the complaint, so

7 that's the difference between what was pre-marked and

8 objected to and what is now --

9 THE COURT: I'm sorry. And you are seeking

10 to offer the text of the --

11 MR. GOLDMAN: Just the text of the original

12 complaint.

13 MR. PRITZKER: This is not the complaint that

14 we went to trial on, your Honor. This is the original

15 complaint.

16 MR. GOLDMAN: That's right.

17 THE COURT: Okay. Any objection to that?

18 MR. PRITZKER: No objection, your Honor.

19 THE COURT: And that had been --

20 MR. GOLDMAN: Well, in this form it has not

21 been pre-marked. It was marked with some additional

22 pages.

23 THE COURT: Okay, well we might as well

24 attach it to what -- there is no reason to have two of

1 A Yes.

2 Q And GAF Building Materials Corp., correct?

3 A Yes.

4 Q Okay. Now, let's look at the allegations against each

5 of those defendants. Let's start first with GAF, okay.

6 And if we go to Count III as to the allegations against

7 GAF, that's the only count that makes allegations

8 against GAF; is it not?

9 A Yes, sir.

10 Q And there in paragraph 30 of that complaint it alleges

11 that the defendant's conduct in exercising control over

12 the contractors with whom they entrusted operation of

13 an 18-wheel-tractor-trailer was negligent, right;

14 that's the allegation?

15 A Yes, it is, sir.

16 Q Okay. And are there any other allegations in this

17 complaint that GAF did anything wrong or any other

18 reasons stated why GAF is liable in contract or tort?

19 MR. PRITZKER: Objection, your Honor. The

20 document speaks for itself.

21 THE COURT: I'll allow his understanding.

22 A Ask the question again, Mr. Goldman, I'm sorry.

23 (By Mr. Goldman)

24 Q Yes. Are there any other allegations in this complaint

1 them. So, if it was in part admitted, let's now admit

2 it as A to that. So 228 is the initial complaint?

3 MR. GOLDMAN: Yes, the other one didn't go

4 into evidence, your Honor, because there was an

5 objection to the pages that were not included on this

6 one.

7 THE COURT: Okay, so we'll mark it as 228.

8 MR. GOLDMAN: Thank you.

9

10 (Exhibit No. 228, marked; Original

11 Complaint.)

12

13 (By Mr. Goldman)

14 Q I've handed you now what has been marked as Exhibit

15 228, is that a copy of the original complaint that was

16 filed in the underlying case?

17 A If you tell me it is, it is.

18 Q I think I can fairly make that representation to you.

19 Now, that complaint lists as defendants Carlo Zalewski,

20 he was the driver, right?

21 A Yes, sir.

22 Q And Driver Logistics, correct?

23 A Yes, sir.

24 Q And Penske Truck Leasing Corp., right?

1 that GAF did anything wrong or any other reasons

2 offered for why it is claimed that GAF was liable in

3 contract or in tort?

4 A The only allegation I've read is Count III.

5 Q Okay. Now sir, what was apparent when this complaint

6 was filed -- what was known as to what kind of control

7 GAF exercised over the contractors with whom they

8 entrusted operation of an 18-wheel-tractor-trailer?

9 MR. PRITZKER: Objection.

10 THE COURT: I'll allow it.

11 A In June of '02?

12 (By Mr. Goldman)

13 Q Right.

14 A They were aware of -- who are talking about here,

15 Zurich?

16 Q Well, let's just look at what the Crawford reports

17 show. Okay?

18 A I have to go back up to June or July.

19 Q Right. Let's look at them one at a time here, as to

20 GAF, right?

21 A Hm-mm.

22 Q And the initial report is January 30, correct?

23 A Correct.

24 Q And that indicates that, as we just looked at, that

1 GAF's exposure is purely contractual in nature, right?  
 2 A That's what it says.  
 3 Q Okay, let's look to the second report, which is Exhibit  
 4 66B.  
 5 A Yes, sir.  
 6 Q If you look at the second page of that, you see at the  
 7 top it says: Exposures?  
 8 A Yes.  
 9 Q And this is dated April 8, '02, correct?  
 10 A Yes, sir.  
 11 Q And that indicates that liability may fall to client  
 12 due to insurance contract obligations, right?  
 13 A Yes, sir.  
 14 Q And that's talking about the obligations under GAF's  
 15 contract with DLS to provide insurance for DLS?  
 16 A That one sentence refers to that, but there's more  
 17 information here.  
 18 Q And when they look at exposures and it says "percent,"  
 19 do you see the 50 percent, right above that?  
 20 A Correct.  
 21 Q Now look at the next Crawford report which is dated  
 22 June 10, 2002, pretty close to the date of the  
 23 complaint, correct?  
 24 A Yes, sir.

1 Q And here we have an indication under "exposure," it  
 2 says 25 percent, but you don't understand it?  
 3 A No. I said that's the exposure they're talking about  
 4 from the sources of DLS, et al. They're talking about  
 5 probability, a percentage of fault, is probable. They  
 6 are separate but they are together. This is one  
 7 paragraph, one caption. It all flows together. It's  
 8 not just 25 percent --  
 9 Q What is the 25 percent referring to?  
 10 A It's against GAF, I am sure, but --  
 11 Q Okay. So 25 percent of the exposure is GAF's; is that  
 12 right? Is that your understanding?  
 13 A That's my understanding.  
 14 Q Okay. So you don't know if it means there's a 25  
 15 percent chance of GAF becoming liable, do you?  
 16 A No, it says probable.  
 17 Q Okay. So it's probable -- so it's your testimony that  
 18 the word "probable" refers only to GAF, but that 25  
 19 percent also applies only to GAF?  
 20 A My interpretation would be 25 percent for each  
 21 defendant, because the word "probable" is liability.  
 22 That comes before it does percentages. It's first  
 23 probable, percentage of fault is probable. That's  
 24 first. It breaks it down beneath it.

1 Q And if we look to the second page of that, under  
 2 "exposure," it says: Liability may fall to client due  
 3 to insurance contract obligations. It says that again,  
 4 right?  
 5 A Yes, it does.  
 6 Q And that has a percentage of a liability of 25 percent,  
 7 right?  
 8 A Not exactly. It's got "percent." Two lines above it,  
 9 it says "percentage of fault, probable" on all these  
 10 reports. This is not abstract; it's together.  
 11 Q The 25 percent exposure that is -- well, doesn't that  
 12 indicate that they've got a 25 percent exposure?  
 13 A I don't know what it indicates. You would have to ask  
 14 Crawford. I'm just telling you that the percentage of  
 15 fault is probable.  
 16 Q Now wait a minute. You've reviewed everything --  
 17 Absolutely.  
 18 Q -- in order to give expert testimony?  
 19 Absolutely.  
 20 Q And you went through all the Crawford reports?  
 21 Yes, sir.  
 22 Q It was very, very important to understand them; was it  
 23 not?  
 24 A Correct.

1 Q Okay. And the basis of that probable liability is the  
 2 contract obligations, right?  
 3 A It just says percentage, 25 percent.  
 4 Q If we look right below at "Comments," it says liability  
 5 may fall to client due to insurance contract  
 6 obligations?  
 7 A That's what it reads there, yes, sir.  
 8 Q So the bases of the analysis would be the contract  
 9 obligations?  
 10 A The bases of the percentile would be the contract  
 11 obligation.  
 12 Q Okay. Now, had you looked at that contract between DLS  
 13 and GAF?  
 14 A Some time ago, yes, I did.  
 15 Q Okay. And if I could ask you to look at Exhibit 10  
 16 there.  
 17 A Exhibit 10?  
 18 Q Yes. It's a self-standing notebook, Exhibit 10.  
 19 Actually, keep your place in Exhibit 66 as we will be  
 20 going back to that, and Exhibit 10 should be a separate  
 21 notebook.  
 22 A Okay.  
 23 Q I believe that's Exhibit K to the demand package that  
 24 Mr. Pritzker sent in August of 2003; is that right?

1 MS. PINKHAM: What document are you  
2 referencing?  
3 MR. GOLDMAN: Exhibit K.  
4 MS. PINKHAM: And what document?  
5 MR. GOLDMAN: To Exhibit 10.  
6 MS. PINKHAM: And what document are you  
7 referencing?  
8 MR. GOLDMAN: It's the agreement between  
9 Driver Logistic Service, Inc. and GAF Materials  
10 Corporation, dated November 19, 1997.  
11 MS. PINKHAM: Thank you.  
12 THE COURT: And the Bates number?  
13 MS. PINKHAM: BMCA0046.  
14 MS. SACKETT: Are there perhaps two of these  
15 documents in your demand package? We're looking at a  
16 different document.  
17 MS. PINKHAM: If you could give me the Bates  
18 number.  
19 MR. PRITZKER: 001001.  
20 MS. SACKETT: Correct. That's what we're  
21 looking at now.  
22 MS. PINKHAM: Okay.  
23 MS. SACKETT: It's about twelve documents in,  
24 about a third of the way through.

1 the significant aspects of a party to a contract being  
2 an independent contractor as opposed to an agent is  
3 that they have -- that there's no liability  
4 transferred; is that correct?  
5 A Yes.  
6 Q Now, in the complaint that we just looked at, it  
7 alleges that GAF was negligent in controlling DLS,  
8 correct?  
9 A Yes.  
10 Q Now, in the Crawford reports, as opposed to the demand  
11 package that's later sent from Mr. Pritzker, they do  
12 not identify, do they, any of the controls that GAF is  
13 alleged to have exercised over DLS?  
14 A No, they do not.  
15 Q And we would need to get more information about that  
16 control, if any existed, in order to determine whether  
17 the allegations in the complaint were correct; isn't  
18 that correct?  
19 A Certainly.  
20 Q And that's information we'd need to know, things such  
21 as the extent to which GAF personnel gave Mr. Zalewski  
22 instructions on how he was suppose to drive, correct?  
23 A Certainly.  
24 Q The extent to which GAF personnel told Mr. Zalewski

1 THE COURT: I'm sorry, it's what Bates number  
2 again?  
3 MR. PRITZKER: 001001. If you count the blue  
4 slips, your Honor, and get to K.  
5 THE COURT: All right, I'll figure it out.  
6 Go ahead. Please proceed.  
7 (By Mr. Goldman)  
8 Q If I could draw your attention, sir, to the page that  
9 bears Bates No. 1003, with two zeroes preceding that.  
10 A Mine's got a different Bates number.  
11 Q Well, all right. Well, paragraph 17 of the contract is  
12 what I'm looking at.  
13 A Okay.  
14 Q Okay? That says there that DLS's relationship to  
15 customer, and the customer being identified earlier as  
16 GAF. So DLS's relationship to customer is that of an  
17 independent contractor and under no circumstances shall  
18 DLS, its agents, drivers, other employees, or any other  
19 individual or entity associated in any manner with DLS,  
20 be deemed to be the agent, employee, partner, or joint  
21 venturer with customer.  
22 Have I read that correctly?  
23 A Yes, you did, sir.  
24 Q And from your familiarity with handling claims, one of

1 where he was to drive, correct?  
2 A Yes.  
3 Q The extent to which GAF personnel gave Mr. Zalewski  
4 instructions as to what precautionary steps he ought to  
5 take in driving, right?  
6 A Yes.  
7 Q The extent to which GAF personnel made sure that Mr.  
8 Zalewski was properly licensed to drive?  
9 A Yes.  
10 Q The extent to which GAF told Mr. Zalewski how fast to  
11 drive, right?  
12 A Yes.  
13 Q All of those kinds of things. We could go on for a  
14 while, but all those kinds of things the plaintiff was  
15 trying to prove that GAF actually controlled what Mr.  
16 Zalewski did in some way, or it should have controlled  
17 what he did, right?  
18 A Correct.  
19 Q So we would need to know more than was in the GAF --  
20 excuse me -- in the Crawford reports as of that date in  
21 order to evaluate that, right?  
22 A Certainly. You need to ask for that, sure.  
23 Q Right.  
24 A You need to ask those questions.

1 Q And as far as you know, up until the date of that  
 2 complaint, that theory, that GAF had improperly  
 3 supervised Mr. Zalewski, that theory had not been  
 4 articulated by the plaintiff to Crawford; is that  
 5 correct?  
 6 A Correct.  
 7 Q So the complaint was the first time that had happened,  
 8 right?  
 9 A Correct.  
 10 Q Now, at any time during all the reporting that Crawford  
 11 did, did they ever write anything saying that in our  
 12 opinion, GAF exercised control over Mr. Zalewski?  
 13 A I don't remember reading that, sir, no.  
 14 Q I don't either. Now, at any time did the complaint --  
 15 did any of the Crawford reports report that GAF  
 16 exercised control over DLS?  
 17 A I don't remember reading that either.  
 18 Q At any time did any of the Crawford reports indicate  
 19 that GAF exercised control over Penske?  
 20 A I don't remember reading that, no.  
 21 Q Now, let me ask you for a minute about the second  
 22 defendant, Penske.  
 23 Penske was dismissed out of the case before  
 24 it went to trial, right?

1 A Correct.  
 2 Q So there was a determination, at least as a legal  
 3 matter, if not a practical one, that Penske had no  
 4 fault in causing Mrs. Rhodes' injuries, right?  
 5 A Correct.  
 6 Q All right. So there's no allegation in this case,  
 7 then, that Zurich did anything wrong by failing to pay  
 8 money on behalf of Penske; is that correct?  
 9 A I don't think I've ever said that, no, sir.  
 10 Q And that's not your opinion?  
 11 A No.  
 12 Q Now, that leaves a third and fourth defendant, which  
 13 are DLS and Zalewski, right?  
 14 A Correct.  
 15 Q But before we get to them, I want to ask you one other  
 16 thing about the contractual theory which was earlier  
 17 identified by Crawford. And I want to refer you back  
 18 to the Zurich insurance policy, okay? And if you need  
 19 to review this in order to be able to answer my  
 20 question, just say so and we'll go to the policy.  
 21 But that's a auto liability insurance policy,  
 22 correct?  
 23 A Commercial.  
 24 Q Commercial auto liability insurance policy?

1 A Yes, sir.  
 2 Q And that, in fact, has an exclusion for liabilities  
 3 that arise out of contractual obligations, correct?  
 4 A Yes, it does.  
 5 Q So if GAF's only exposure was contractual in nature,  
 6 that liability would not be covered, correct?  
 7 A If its only exposure was contractual.  
 8 Q Now, let's go to DLS. You already testified earlier  
 9 that DLS did not ask for coverage from Zurich until  
 10 September of 2002, correct?  
 11 A DLS?  
 12 Q DLS.  
 13 A Correct.  
 14 Q And that's for Mr. Zalewski also, right?  
 15 A Yes.  
 16 Q Now, do you know what kind of business DLS was in?  
 17 A Off the top of my head, no.  
 18 Q But we know that they in fact provided a driver for the  
 19 vehicle that unfortunately caused Mrs. Rhodes'  
 20 accident, right?  
 21 A Correct.  
 22 Q And we know that pursuant to the contract that we just  
 23 looked at a few minutes ago, right?  
 24 A Correct.

1 Q Now, in your experience in the claims area, does a  
 2 company that is engaged in the kind of business of  
 3 providing drivers for a fee for commercial vehicles  
 4 typically carry insurance?  
 5 A They typically do.  
 6 Q So if you were looking at this matter for the first  
 7 time when the complaint's filed, you would expect that  
 8 DLS would have some insurance of their own, right?  
 9 A I would look -- I would investigate and ensure that  
 10 they do.  
 11 Q Right. You couldn't be sure, but you would think that  
 12 they probably would, right?  
 13 A I said I would investigate it.  
 14 Q Now, you said one of your opinions was that it wouldn't  
 15 make any difference as to Zurich's obligations if there  
 16 was another insurance policy out there for DLS, because  
 17 Zurich's obligations would be the same, right?  
 18 A I said it doesn't remove their duty.  
 19 Q Okay. Now, let me ask you something to follow up on  
 20 something that Mr. Cohen asked you about, because he  
 21 asked you about certain obligations of an excess  
 22 insurance company, right?  
 23 A Certainly.  
 24 Q And an excess insurance company typically does not make

1 offers to settle until the primary limits are either  
 2 tendered or offered, correct?  
 3 A On a regular basis, correct.  
 4 Q And that is the ordinary practice in the insurance  
 5 industry, right?  
 6 A Yes, it is.  
 7 Q So when you are working on a liability claim for an  
 8 insurance company and somebody asks you for coverage  
 9 under a liability policy, one of the first things you  
 10 need to determine is whether your policy is a primary  
 11 policy or an excess policy, right?  
 12 A When you say "somebody asks," explain.  
 13 Q An insured. Somebody claiming to be an insured asks  
 14 you for coverage. The first thing you want to see is  
 15 are they insured, right?  
 16 A Correct.  
 17 Q And then you want to look at the limits, right?  
 18 A Correct.  
 19 Q And you want to look at the scope of coverage?  
 20 A Yes, sir.  
 21 Q And then another thing you need to know is whether this  
 22 policy is a primary policy or an excess policy, right?  
 23 A Correct.  
 24 Q Okay. And the answer to that question has a material

1 coverage and I may have said Penske, okay? So if I did  
 2 that, I want to just clarify a few earlier questions  
 3 and answers.  
 4 With regard to the General Star inquiry, that  
 5 was an inquiry in which General Star said they were the  
 6 excess carrier for DLS, correct?  
 7 A Correct.  
 8 Q And when we asked normally a company like DLS has  
 9 excess, that would typically mean that they would also  
 10 have primary, correct?  
 11 A You asked that, yes.  
 12 Q Yes. I just want to make sure I was talking about DLS  
 13 and not Penske.  
 14 A Yeah, you were.  
 15 Q And when you say you don't know whether there's a  
 16 primary policy, do you know currently whether there's a  
 17 primary policy for DLS or not?  
 18 A In this case there was not.  
 19 Q There was not?  
 20 A If I recall correctly, there wasn't.  
 21 Q Okay. And you know that from Mr. Chaney's note in the  
 22 November 2003 transmittal letter that he wrote?  
 23 A Yes.  
 24 Q And that's the first indication in the Crawford files

1 effect upon your obligations, correct?  
 2 A Certainly.  
 3 Q Now, do you know, as you sit here today, whether Penske  
 4 in fact had its own primary liability insurance policy?  
 5 A No, I don't, as I sit here today.  
 6 Q After all these years, you still don't know?  
 7 A It's not all these years. I looked at the file a year  
 8 ago, that portion of the file.  
 9 Q Well, we do know, sir, do we not, that there was an  
 10 approach from General Star Indemnity Company to  
 11 Zurich's coverage counsel, in which it was stated that  
 12 General Star had an excess liability insurance policy  
 13 for DLS; do we not?  
 14 A Yes.  
 15 Q And normally, if a company like DLS purchases primary  
 16 insurance, normally do they also purchase -- excuse me.  
 17 Normally a company like DLS, if they purchase excess  
 18 insurance, do they purchase primary insurance also?  
 19 A In the normal course of business, yes.  
 20 Q Now, let me go through some things with you. If we  
 21 could turn to the Zurich policy.  
 22 A Where might that be, sir?  
 23 Q I'm sorry. Mr. Varga just passed me a note indicating  
 24 I probably misspoke. I was asking about the DLS

1 or the Zurich files that DLS does not have primary  
 2 insurance, correct?  
 3 A Correct.  
 4 Q So up until then, there's nothing in the file of either  
 5 Zurich or Crawford indicating that DLS does not have  
 6 primary insurance, right?  
 7 A That I can remember.  
 8 Q So let's look for a moment then at the Zurich policy,  
 9 which is I believe Exhibit 61. And I want to first  
 10 look at the question that we need to figure out, as to  
 11 whether DLS and Mr. Zalewski were insureds under the  
 12 policy, okay?  
 13 And if I could draw your attention in Exhibit  
 14 61 to the page that bears Bates number, in the lower  
 15 right-hand corner, 0069.  
 16 A I don't think that's the same here.  
 17 Q It's page 3 of 11 in the basic form there.  
 18 A Yes, sir.  
 19 Q Now, the section in the lower right-hand section of  
 20 that page deals with the question of who is an insured  
 21 under the Zurich policy, right?  
 22 A Maybe I'm missing something.  
 23 Q It's page 2 of 11. I said 3 of 11. I'm sorry to mess  
 24 you up. I apologize.

1 A No problem. Go ahead, sir.  
 2 Q The lower right-hand corner deals with the question of  
 3 who is an insured, right?  
 4 A Yes, sir.  
 5 Q And that says "you for any covered auto," right?  
 6 A Correct.  
 7 Q And figure out what -- and "you" would mean GAF and its  
 8 employees, right?  
 9 A Correct.  
 10 Q And to figure out what a covered auto is, we have to  
 11 look to the section -- on the page before that, page 1  
 12 of 11, where it indicates that if the number one is  
 13 shown in the declarations, then that means any auto,  
 14 right?  
 15 A That's correct.  
 16 Q And, in fact, the number one is shown on the  
 17 declarations for this policy, so that would mean that  
 18 the auto that Mr. Zalewski was driving is a covered  
 19 auto but the "you" wouldn't apply because Mr. Zalewski  
 20 isn't GAF or its employees, right?  
 21 A What "you"?  
 22 Q In the "who is an insured" section.  
 23 A Right. That's just in the first line, correct.  
 24 Q Right. So now we have to go to Part B, correct? And

1 MR. PRITZKER: Objection, your Honor.  
 2 THE COURT: Overruled.  
 3 MR. PRITZKER: May I state my objection,  
 4 please?  
 5 THE COURT: You may.  
 6 MR. PRITZKER: There is an endorsement later  
 7 in this agreement which changes this term, and it's  
 8 rather disingenuous to be talking about this term  
 9 without looking at the endorsement.  
 10 MR. GOLDMAN: Well, your Honor, I don't  
 11 believe that's a proper objection in the middle of  
 12 cross-examination. I was going to get to that, and I  
 13 don't think that's proper.  
 14 THE COURT: All right. I'll let you get  
 15 there.  
 16 (By Mr. Goldman)  
 17 Q So in the absence of the endorsement, sir, would it be  
 18 correct that in order to determine whether DLS and  
 19 Zalewski are insured, we would need to know whether  
 20 this was a hired vehicle, right?  
 21 A Yeah. You'd have to look up the definition in the  
 22 policy for the word "hire."  
 23 Q In this policy, sir, what is the definition?  
 24 A I'd have to look it up, sir.

1 it says: Anyone else -- and that might include Mr.  
 2 Zalewski, right?  
 3 A Yes, it might.  
 4 Q -- while arising -- excuse me -- while using with your  
 5 permission a covered auto -- that would be any auto --  
 6 that you own -- now this was not an auto that GAF  
 7 owned, correct?  
 8 A Correct.  
 9 Q Hired. Now, I won't ask about that word "hire,"  
 10 because you talked about that earlier.  
 11 Now, "hire," you testified earlier, is  
 12 different from "lease," correct?  
 13 A No. I said it's like a rental agreement. I think it's  
 14 the word I used for lease.  
 15 Q Well, we need to -- the word "lease" is used separately  
 16 in this policy from hire; is it not?  
 17 A Yes, it is.  
 18 Q So this only applies to autos that you own, hire or  
 19 borrow, right?  
 20 A That's what it says here, yes.  
 21 Q That's what it says. So in order to determine whether  
 22 Mr. Zalewski and DLS were insureds under this policy,  
 23 we would need to determine whether the vehicle which  
 24 caused the accident was a hired vehicle, right?

1 Q It's not there, though, is it?  
 2 A No. If you're telling me it's not, it's not.  
 3 Q I'll save you some time. It's not there.  
 4 A That would be the normal course of policy review.  
 5 Q All right. Now, let's look at the endorsement which  
 6 Mr. Pritzker talked about, which is -- well, could you  
 7 identify it for us, since you --  
 8 MR. PRITZKER: 0103.  
 9 (By Mr. Goldman)  
 10 Q Now, this says --  
 11 A I've got it.  
 12 Q Okay. This says --  
 13 A I've got it.  
 14 Q This says: All vehicles leased for a term of six  
 15 months or longer, right -- and that would be any auto  
 16 described in this schedule will be considered a covered  
 17 auto you own and not a covered auto you hire, borrow or  
 18 lease under the coverage for which it is a covered  
 19 auto, right?  
 20 A Correct.  
 21 Q All right. So we need to know, then, whether the auto  
 22 was leased for more than six months, right?  
 23 A Correct.  
 24 Q And if wasn't, then we'd need to know whether a

1 hired auto was -- whether this auto that was driven fit  
 2 in the description of hired auto, right?  
 3 A Correct.  
 4 Q Okay. Well, let's assume for the moment we get beyond  
 5 all that now and we conclude that either at six months  
 6 or more or that this is a hired auto, okay?  
 7 A Okay.  
 8 Q Now, our next question is: What happens if Penske --  
 9 excuse me. What happens if Zalewski and DLS have their  
 10 own insurance, right?  
 11 A Right.  
 12 Q Then the question is: What is Zurich's obligations  
 13 then, right?  
 14 A Correct.  
 15 Q And in order to determine the answer to that question,  
 16 we have to look at another provision of the policy,  
 17 which is called the other insurance.  
 18 A Correct.  
 19 Q All right. Let's look at that then. And that's found  
 20 on page 8 of 11 of that same form. It's Bates 0075.  
 21 THE COURT: Why don't you finish that and  
 22 then we'll call it a day. Go ahead.  
 23 A Hold on one second, sir.  
 24 (By Mr. Goldman)

1 Q And that would indicate --  
 2 A I'm not there yet.  
 3 Q I'm sorry.  
 4 A That's okay. I'm trying to find it. Mine are not in  
 5 that order. Eight of eleven, I found it.  
 6 Q Okay. That would indicate that for any covered auto  
 7 you owned, this coverage form provides primary  
 8 insurance. For any covered auto you don't own the  
 9 insurance provided by this coverage form is excess over  
 10 any other collectible insurance, correct?  
 11 A Correct.  
 12 Q All right. So in other words, in order to determine  
 13 whether the Zurich policy is a primary policy for  
 14 purpose of providing coverage for DLS and Zalewski for  
 15 an excess policy, we would need to know whether there  
 16 was other insurance in place for Zalewski and DLS,  
 17 right?  
 18 A Yes, sir.  
 19 Q And if there was other primary coverage in place for  
 20 DLS, the Zurich policy would be an excess policy,  
 21 right?  
 22 A In this case, it would be.  
 23 Q Okay. And that would mean, then, that Zurich's  
 24 obligations would be those of an excess carrier, if

1 that were the case, right?  
 2 A Not necessarily. It's not structured the same way,  
 3 because there's not a contract -- an insuring agreement  
 4 between primary and excess, if there would be.  
 5 Q So in other words, the --  
 6 MR. PRITZKER: Your Honor, I'm going to have  
 7 to object, because what counsel is trying to do is to  
 8 have Mr. Kiriakos interpret this hundred-page policy  
 9 without reading every term, and we just looked at the  
 10 endorsement which defines hired autos as covered autos  
 11 you own. So even though I wouldn't expect him to know  
 12 that, it is here. Counsel can argue about it, but I'm  
 13 not sure that this is appropriate cross-examination.  
 14 MR. GOLDMAN: Well, your Honor, I think the  
 15 opinion on direct testimony was that it never should  
 16 have taken so long to figure out coverage and that it  
 17 was very simple and should have been done within, I  
 18 think he said, if I recall correctly, 30 days or so.  
 19 THE COURT: Okay. I will allow it, but it's  
 20 my understanding of the policy that the definition of  
 21 an owned vehicle under the policy is a vehicle that's  
 22 either owned or leased for more than six months, and  
 23 therefore if it's either owned or leased for more than  
 24 six months, it's a primary.

1 MR. GOLDMAN: Well, for certain parts of the  
 2 coverage. That's the question, as to whether that then  
 3 applies to the other insurance clause, which is written  
 4 differently, your Honor. Because if you look at the  
 5 other insurance clause, the words are different than --  
 6 THE COURT: Where are they different?  
 7 MR. GOLDMAN: All right. Let me just go to  
 8 that.  
 9 THE COURT: For any covered auto you own,  
 10 this coverage form provides primary insurance. The  
 11 endorsement says it's to be treated as owned if you  
 12 lease it for more than six months.  
 13 So are you telling me that it's your  
 14 understanding that there is a distinction there in  
 15 terms of -- that I'm missing?  
 16 MR. GOLDMAN: Well, I believe there is,  
 17 because that is, your Honor, not a covered auto you  
 18 hire, borrow or lease; and the distinction there is  
 19 between hire, borrow and lease, and the other  
 20 distinction is between owned and not owned.  
 21 THE COURT: Right.  
 22 MR. GOLDMAN: In other words, I think the --  
 23 and I'm not saying which is the correct coverage  
 24 position.



THE COURT: All right. You can go back and think whether this is a good use of your time, but the endorsement that was shown to me earlier says: Hired autos specified as covered autos you own. So I understand that to mean that, well, yeah, there is a distinction between own, hire and borrow. This endorsement says that if it's leased for more than six months, it's to be treated as if it were owned. If your interpretation is different, then I'll hear you tomorrow on that.

MR. GOLDMAN: It just says under the coverage for which it's a covered auto, and that's the difference. That doesn't necessarily apply to the other insurance clause, which is written for a different purpose.

THE COURT: The question is, what constitutes the meaning of "own," and the endorsement says it is owned if it is leased for a period of six months or longer. That's at least how I understand it. If you have a different interpretation that you're going to contend was one that should have generated the delay, then we can discuss that tomorrow.

Tomorrow we're going to start at nine. I teach Tuesday and Thursday mornings now from 8:00 to

9:30, so that's why we need to be delayed on those mornings.

MR. PRITZKER: Your Honor, is a week from Monday open if, in fact, we have to go that long?

THE COURT: Yes. And I do expect that we will not be sitting a week from Friday, a week from tomorrow.

MR. PRITZKER: I understood that, that's why I asked the question.

THE COURT: I'll check. I hope we don't need it, but I think it is there. So let me also --

MR. ZELLE: If we don't finish next week, I'm not available that Monday, Tuesday, or Wednesday.

THE COURT: We'll aim to finish next week. We'll cross that bridge if we need to.

With regard to the issue concerning the admissibility of the annual report stating the size and profitability of, I guess it's AIG, I do acknowledge that there is some ambiguity in the law, at least from my preliminary examination, of whether or not the question of whether double or treble damages are appropriate must be based entirely on the culpability of the defendant or may be based in part upon the size or profitability of the defendant. I do note that with

regard to punitive damages in general, focusing on a discrimination case, the SJC in LaBonte v. Hutchins & Wheeler, 424 Mass. 814, relying in part on the concurrence in the BMW of North America case, says as follows:

"We note that some other factors set forth in the concurring opinion may assist the trial judge in reconsidering a punitive damage award. In reviewing punitive damages, the judge may consider the following criteria: a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred."

Well, let me get to the one that matters. One of the factors is: "Removal of the profit of an illegal activity and be in excess of it so that the defendant recognizes a loss; factoring in the financial position of the defendant."

So to that extent, to the extent that a court may review it based on the financial position of the defendant, one would think that in general for punitive damages, the financial position of the defendant is a factor that may be considered by the fact finder.

I do acknowledge that AIG has cited the case of International Fidelity Insurance v. Wilson, 387

Mass. 841, which states that in the absence of willful or knowing conduct, it's single damages. In the presence of them there is an obligation to impose multiple damages. And there is the sentence: Based on the egregiousness of each defendant's conduct, the trial judge may assess between double and treble damages, which may arguably say that that is the only factor that may be considered.

It then goes on to say the multiple damage provisions of 93A are designed to impose a penalty that varies with the culpability of the defendant. It then cites Lithocom v. Archinbeau, 379 Mass. 381, 388, which, frankly, doesn't support that particular proposition. So it's not as if Lithocom said that the only factor that may be considered is culpability. In fact, I think in Lithocom the court ruled that it was not a willful, intentional or deliberate violation, so there was no need to consider double or treble because there was no finding of willfulness.

So I don't quite know -- because we have the SJC making a statement seeking support from a case that does not support it and the SJC has not expressly said -- it's not clear if the SJC means that -- well, certainly the SJC means, because the statute says so,

1 that you don't get to double or treble in the absence  
 2 of egregious conduct. I don't know that the SJC has  
 3 expressly said that, in determining whether or not  
 4 double or treble is appropriate, one may consider the  
 5 financial position of the defendant. I think  
 6 essentially that issue is still out there. In any  
 7 event, since it's still out there, I will admit the  
 8 document. If we reach that issue, we can consider  
 9 whether or not -- in determining whether it's double or  
 10 treble, whether or not the financial position of the  
 11 defendant is a factor that I may consider. But since  
 12 the law, I think, is still based on my at least  
 13 preliminary research, relying in part upon what you've  
 14 given me, a bit uncertain, the better part of wisdom is  
 15 to accept it as an exhibit and see whether or not it  
 16 matters ultimately. As I said, I don't expect that if  
 17 I do get to the issue of double or treble, that that  
 18 will be something that will be material.

19 I do understand that AIG is a big company,  
 20 even though I've not looked at the annual report, so I  
 21 don't know that that is going to, as I say, matter.  
 22 But in event, it will be admitted, and we'll get there  
 23 if we need to.

24 All right. We'll see you back at nine

1 tomorrow.  
 2 (Hearing adjourned at 1:15 p.m.)  
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1 C E R T I F I C A T E  
 2

3 I, Paula Pietrella and Faye LeRoux, Court  
 4 Reporters, do hereby certify that the foregoing  
 5 transcript, Pages 1 through 150, is a  
 6 complete, true and accurate transcription of the  
 7 above-referenced case.  
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 Paula Pietrella

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 Faye LeRoux

Pages: 164

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT  
SUCV2005-1360 OF THE TRIAL COURT

\*\*\*\*\*  
 MARCIA RHODES, HAROLD RHODES, INDIVIDUALLY, \*  
 HAROLD RHODES, ON BEHALF OF HIS MINOR CHILD \*  
 AND NEXT FRIEND, REBECCA RHODES, \*  
 \*  
 Plaintiffs, \*  
 VS. \*  
 AIG DOMESTIC CLAIMS, INC. f/k/a AIG TECHNICAL \*  
 SERVICES, INC., NATIONAL UNION FIRE INSURANCE \*  
 COMPANY OF PITTSBURGH, PA., and ZURICH \*  
 AMERICAN INSURANCE COMPANY, \*  
 \*  
 Defendants, \*  
 \*\*\*\*\*

JURY-WAIVED TRIAL - DAY 12

BEFORE: GANTS, J.  
 BOSTON, MASSACHUSETTS  
 MARCH 9, 2007

PAULA PIETRELLA  
 FAYE LEROUX

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APPEARANCES

BROWN RUDNICK  
 M. Frederick Pritzker  
 Daniel J. Brown  
 Margaret M. Pinkham  
 Attorneys At Law  
 One Financial Center  
 Boston, MA 02111

FOR: The Plaintiffs Marcia Rhodes, et al.

ROBINSON & COLE, LLP  
 Gregory P. Varga  
 Elizabeth C. Sackett  
 Stephen Goldman  
 Attorneys At Law  
 1 Boston Place  
 Boston, MA 02108

FOR: The Defendant Zurich American Insurance  
 Company

ZELLE McDONOUGH, LLP  
 Anthony Zelle  
 Brian McDonough  
 Attorneys At Law  
 4 Longfellow Place, 35th Floor  
 Boston, MA 02114

FOR: The Defendants AIG Domestic Claims and  
 National Union Fire Insurance Company

THE McCORMACK FIRM, LLC  
 Mark E. Cohen  
 Robert Maselek  
 Attorneys At Law  
 1 International Place  
 Boston, MA 02110

FOR: The Defendants AIG Domestic Claims and  
 National Union Fire Insurance Company

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Arthur Kiriakos (Resumed)				
(By Mr. Pritzker)			25, 49	
(By Mr. Goldman)		4		48, 51
(By Mr. Cohen)				36, 50
Janet Kelley				
(By Mr. Brown)	53		93	
(By Mr. Cohen)		75		
(By Mr. Varga)		89		
William Cormack				
(By Mr. Zelle)	97			

E X H I B I T S

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1 yesterday in the last line of questioning, we went  
2 through the process of reviewing the different  
3 defendants in the lawsuit that was brought in June of  
4 2002, went through the liability of GAF and Penske, and  
5 we were focused on the question of how to determine  
6 whether there was coverage for DLS and whether that  
7 coverage was primary or excess. Do you recall that?  
8 A I recall that conversation, yes.  
9 Q And we looked at that endorsement that required six  
10 months of leasing in order to make it -- to bring the  
11 coverage within the endorsement. Do you recall that?  
12 A Yes, I do.  
13 Q And the endorsement says that it's an owned auto under  
14 the coverage for which it's a covered auto; is that  
15 correct?  
16 A I don't have it. Page what, sir?  
17 Q Okay. Do you want to take a minute and find that?  
18 A Which Bates number?  
19 Q Well, it's -- I don't know if my Bates number is  
20 different. Which Bates number is that?  
21 THE COURT: Endorsement is 0103.  
22 MR. GOLDMAN: Okay, we've got the same  
23 numbers.  
24 A Hired autos?

P R O C E E D I N G S

1  
2  
3 (In court at 9:10 a.m.)  
4 THE COURT OFFICER: This Honorable Court is  
5 in session. You may be seated.  
6 THE COURT: Good morning. Why don't we get  
7 started.  
8 Mr. Kiriakos, why don't you return to the  
9 stand.  
10 As we approach day three, you remain under  
11 oath, as you did in days one and two.  
12 So, Mr. Goldman?  
13 MR. GOLDMAN: Thank you, your Honor.  
14 ARTHUR KIRIAKOS, Resumed  
15 CROSS-EXAMINATION BY MR. GOLDMAN (Continued):  
16 Q Mr. Kiriakos, could you turn back to the insurance  
17 policy. I believe that was Exhibit 61, if I recall  
18 correctly.  
19 A Sir, what book is it in?  
20 MR. PRITZKER: Volume 2. I can come up.  
21 THE WITNESS: They were put out of order,  
22 that's why.  
23 (By Mr. Goldman)  
24 Q Okay. Just to recap for a minute where we were

1 (By Mr. Goldman)  
2 Q That's it. Again, in subparagraph A, below the  
3 schedule, it says: An auto described in the schedule  
4 be considered a covered auto you own and not a covered  
5 auto you hire, borrow, or lease under the coverage for  
6 which it is a covered auto.  
7 Did I read that correctly?  
8 A Yes, you did, sir.  
9 Q So the question, when we apply that to the other  
10 insurance clause, is whether that qualification under  
11 the coverage for which it's a covered auto means that  
12 it's a -- does that or does that not mean it's an owned  
13 auto for purposes of the other insurance clause? Would  
14 that be correct?  
15 MR. PRITZKER: Objection.  
16 THE COURT: Overruled. I'll hear him.  
17 A Say that again, sir.  
18 (By Mr. Goldman)  
19 Q The question is whether the -- when we look at the  
20 endorsement, we need to know first whether we have a  
21 leased vehicle for more than six months, right?  
22 A Correct.  
23 Q And if we do, then at least in analyzing another  
24 insurance clause, we have to determine whether the

1 words under the coverage for which it is a covered auto  
2 make it an owed auto for purposes of applying the other  
3 insurance clause; is that correct?

4 MR. PRITZKER: Objection.

5 THE COURT: I'll hear his answer.

6 A That's my interpretation based upon what it says here.

7 Q Okay. So we would need to interpret that language,  
8 right?

9 A Yes.

10 Q And that would be in part a legal question, right?

11 A Yes, it is.

12 Q Now, let's go back to the other insurance clause, which  
13 is found at pages 75 and 76.

14 THE COURT: Exhibit or page? I'm sorry, I  
15 lost you.

16 MR. GOLDMAN: It's page 0075.

17 THE COURT: Oh, 0075. Okay.

18 (By Mr. Goldman)

19 Q Now, we looked yesterday at the provision that says if  
20 it's not an owned auto within -- and, again, putting  
21 aside a legal question we just discussed. But if it's  
22 not an owned auto, then it's -- this policy would be  
23 excess if there's other insurance available, right?

24 A That's what it says here.

1 Q Then we would go -- then our share is the proportion  
2 that the limit of insurance in our coverage form -- and  
3 here that would be \$2 million, right?

4 A Yes.

5 Q -- bears to the total of the limits of all the coverage  
6 forms and policies covered on the same basis. So in  
7 other words, what that would mean, Mr. Kiriakos, is  
8 that if the Zurich policy was in excess to a DLS  
9 policy, you would determine that there was a DLS  
10 policy, you would determine how much Zurich owes by  
11 looking at the ratio of the \$2 million Zurich limit to  
12 the dollar limit in the other policy, whatever that  
13 was, right?

14 A That's my interpretation. That's "if."

15 Q Right. If there's a DLS policy in place, right?

16 A If there is one in place.

17 Q So in order to determine how much is owed under this  
18 clause, you would need to know, number one, whether a  
19 DLS policy is in place, correct?

20 A Yes.

21 Q And, number two, what the limits of that policy are.

22 A Yes.

23 Q Okay. And you said yesterday that we knew at the time,  
24 or at least believed at the time, based on the letters

1 Q Okay. And let's assume now that we get over the  
2 hurdle, the endorsement applies, it's interpreted to  
3 mean it's an owned auto for purposes of the other  
4 insurance clause, then if DLS and Zalewski have their  
5 own primary insurance, what happens here?

6 A We become -- GAF becomes excess. GAF's policy becomes  
7 excess. Zurich's policy is excess.

8 Q Now, if the Zurich policy is the primary policy and the  
9 DLS policy is also -- DLS also has it's insurance in  
10 place and the Zurich policy is determined to be  
11 primary, then we go to the pro rata clause, right? Pro  
12 rate provision?

13 A Continuing down, yes.

14 Q And that would take us to subparagraph D, which appears  
15 on the next page, page 0076, right?

16 A Yes, sir.

17 Q And that says that when this coverage form and any  
18 other coverage form or policy covers on the same basis  
19 -- and the same basis would mean primary and primary,  
20 right?

21 A Yes.

22 Q -- either excess or primary -- in other words, whether  
23 they're both primary or both excess, right?

24 A Yes.

1 from coverage counsel that were in the file, that there  
2 was a General Star excess policy in place for DLS,  
3 right?

4 A Yes.

5 Q And we don't know, though, what the limits of that are,  
6 do we?

7 A I don't remember reading that, no.

8 Q And at least at that time, we didn't know whether DLS  
9 had a policy in place, a primary policy in place,  
10 correct?

11 A From that letter, no, you do not.

12 Q Now, I'm just going to ask you. The way this clause  
13 would read, assuming that the Zurich policy would apply  
14 as a primary policy when you apply the other insurance  
15 on this pro rata arrangement, let's assume  
16 hypothetically that DLS had a \$10 million primary  
17 policy in place, okay?

18 A Hm-hmm.

19 Q Now, if we were to try to make an offer to settle this  
20 underlying case for \$8 million, the number that Mr.  
21 Rhodes testified at one point along the way he would  
22 have taken, then we look at a ten to two, divide up of  
23 the \$8 million. Would that be correct?

24 MR. PRITZKER: Objection.

1 THE COURT: I'll hear his answer.

2 A That proportionate share question would require some

3 additional investigating from a legal perspective,

4 because, first, it didn't happen in this case. You're

5 asking me to leap forward. Those aren't the

6 circumstances, period.

7 (By Mr. Goldman)

8 Q My question is, is your answer, sir, that if there was

9 a \$10 million DLS primary policy in place, that you

10 could not tell us what percentage of the \$8 million

11 offer Zurich would need to make? Is that your answer?

12 You're not able to tell us?

13 A That's not my answer. My answer said it's a question I

14 would seek legal advice for. That's why I have

15 coverage counsel.

16 Q I understand. So you couldn't answer the question

17 without legal advice?

18 A I would seek coverage opinion. It's common practice.

19 Q Is it your testimony that you would not feel

20 comfortable testifying to that without seeking legal

21 advice first?

22 A On the issue you just raised, given the size of the

23 case, given the size of the other policy you're

24 raising, it's not a simple answer.

1 Q But you do agree with me that you would want to find

2 out whether DLS and Zalewski had primary coverage,

3 right?

4 A Absolutely.

5 Q And you would absolutely also want to find out, if

6 there was primary coverage, what the limits were,

7 right?

8 A Yes, you do.

9 Q Now, in fact, Zurich did try to find that out; did they

10 not?

11 A They did.

12 Q And, in fact, there are six different places in the

13 claim file where there are six different communications

14 that are documented where Zurich is communicating with

15 people trying to find that out; isn't that right?

16 MR. PRITZKER: Objection.

17 THE COURT: Overruled. If he knows.

18 A I do not recall reading six different places where

19 Zurich was trying to find that, sir.

20 (By Mr. Goldman)

21 Q Okay. Well, let's go through them then. First, if

22 you'd turn to Exhibit 102.

23 A And that book is. I have an empty one, 102, 103,

24 104.

1 Q Okay. Well, let me show you this and see if this

2 refreshes your recollection as to whether on January

3 16, 2003, coverage counsel for Zurich wrote to the

4 lawyer representing --

5 THE COURT: I'm sorry, my book for 102 is

6 blank.

7 THE WITNESS: Same here.

8 MR. PRITZKER: Your Honor, the reason for it,

9 it's objected to. And the reason it was objected to is

10 this is not one that the defendants produced claiming

11 attorney-client work product and privilege. I don't

12 even know which one this particular one is, but there

13 was a whole series of them.

14 THE COURT: Were they produced in discovery?

15 MR. VARGA: Yes, your Honor, they were

16 produced in discovery. This was introduced through

17 Kathleen Fuell.

18 THE COURT: I'm sorry?

19 [Long Pause]

20 THE COURT: Okay, so what's going on?

21 (By Mr. Goldman)

22 Q If I could just show you this to refresh your

23 recollection, sir, does that refresh your recollection

24 as to whether coverage counsel for Zurich wrote to

1 counsel for Penske asking what information they had

2 about DLS on September 23, 2002?

3 A I've seen this before?

4 Q You have?

5 A Yes, I have.

6 Q Okay, and that was part of what your reviewed?

7 A As far as I remember, yes.

8 Q Okay. So does that refresh your recollection as to

9 whether coverage counsel for Zurich wrote to coverage

10 counsel for Penske on September 23, asking for

11 information about DLS?

12 MR. PRITZKER: Objection.

13 THE COURT: Well, are you seeking to offer

14 it? What's going on?

15 MR. GOLDMAN: Just to ask -- the witness has

16 testified about what efforts were made to ascertain the

17 coverage and I'm seeking to ask him whether, in fact,

18 when he reviewed the file, there was correspondence

19 September 23, '02 asking for information about DLS.

20 THE COURT: And your objection?

21 MR. PRITZKER: It's hearsay.

22 THE COURT: Well, right now since it's not

23 being admitted, it's being only offered as to whether

24 or not his opinion is credible, so I will not take it

1 as evidence yet until it's admitted, but it does go to  
2 his opinion since he had reviewed it and he has made  
3 certain opinions as to when Zurich was obligated to  
4 make an offer. So I will allow the question to be  
5 answered for that purpose.

6 A Ask your question again, sir.

7 (By Mr. Goldman)

8 Q Okay. Does that document refresh your recollection as  
9 to whether, when you reviewed the file, there was  
10 correspondence in there from coverage counsel to Zurich  
11 to counsel for Penske asking what information counsel  
12 for Penske had about DLS on September 23, 2002?

13 A Yes.

14 Q And your recollection having been refreshed, was there  
15 such correspondence in the file?

16 A As far as I can recall. I reviewed this some time ago.

17 Q Okay. Now, do you recall correspondence in the file  
18 when you reviewed it on January 16, 2003, from coverage  
19 counsel for Zurich to the lawyer representing DLS,  
20 Stephen Leary, asking for policy information?

21 A No, I don't.

22 Q If I might show you this document, sir, and ask does  
23 that refresh your recollection as to whether on January  
24 16, 2003, coverage counsel for Zurich wrote to counsel

1 for DLS asking for copies of the insurance policy for  
2 DLS?

3 A If that's what this says. I don't recall reading this.

4 Q Do you know whether that was among the materials that  
5 you reviewed?

6 A I don't recall seeing that. The next letter I recall  
7 seeing is dated March 7, '03.

8 Q Well sir, do you recall in the Crawford notes seeing  
9 entries that coverage counsel for Zurich had made  
10 contact with the lawyer hired by DLS?

11 A I recall reading that in the notes, yes.

12 Q Right. And if I could refer you to Exhibit 67, please.  
13 Keep a marker on the policy because we'll be going back  
14 to that in a minute.

15 A What Bates number, sir?

16 Q What is Bates numbered 0583.

17 A I'm sorry, what --

18 Q We're in Exhibit 67. Are you there?

19 A I'm here.

20 Q And I'd like to draw your attention to the last entry  
21 on that page on the bottom. It reads, does it not,  
22 that: Defense Taylor Dunne -- that's coverage counsel  
23 for Zurich; is that right? Taylor Duane, excuse me.

24 A What's the number at the bottom?

1 Q 0583.

2 MR. PRITZKER: They go back.

3 MS. PINKHAM: They go in reverse order.

4 THE WITNESS: Thank you. Go ahead.

5 (By Mr. Goldman)

6 Q Are you there?

7 A Yes.

8 Q Now this reads, does it not: Taylor Duane -- Taylor  
9 Duane is the coverage counsel for Zurich, right?

10 A Yes, they are.

11 Q Okay: Call Steve Leary, attorney for DLS and Zalewski.  
12 Party demanding coverage. He has sent letter demanding  
13 further info on coverage. States he will not give this  
14 info. Taylor Duane will send letter to indicate that  
15 there will be a defense provided. Okay. And then it  
16 goes on.

17 Do you recall reading that note when you  
18 reviewed the file?

19 A Crawford notes, yes.

20 Q Okay. Now, just to get the cast of characters correct,  
21 Stephen Leary actually appeared for DLS and Zalewski in  
22 the lawsuit brought by the Rhodeses shortly after the  
23 lawsuit was brought, correct?

24 A Yes.

1 Q And Zurich didn't hire him, right?

2 A Correct.

3 Q Zurich had nothing to do with him as far as paying him  
4 or anything like that, right?

5 A Correct.

6 Q Do you know, sir, whether an insurance company hired  
7 Stephen Leary?

8 A No, I do not.

9 Q Okay. Now, this note indicates that Stephen Leary  
10 would not give this information to coverage counsel for  
11 Zurich, right?

12 A That's what it reads here, correct.

13 Q So where we were as of February of 2003, was Zurich was  
14 doing what you just testified they should be doing as  
15 far as trying to find other policies. They were  
16 reaching to the lawyer for the entity and person that  
17 were seeking coverage, right?

18 A Crawford is doing that, yes.

19 Q Right. Well, Crawford is doing it or coverage counsel?

20 A Coverage counsel is doing it.

21 Q Okay. And basically as they reach out, they're getting  
22 their hand slapped away and they're saying we're not  
23 going to tell you, right?

24 A That's what it reads here, yes.

1 Q So would Zurich at that point been within its rights to  
2 deny coverage for lack of cooperation?  
3 A From who, GAF?  
4 Q From DLS.  
5 A They haven't picked up coverage for them yet.  
6 Q Okay. How was Zurich to deal with this situation where  
7 they are trying seek the coverage to find out what  
8 policies are out there and how much, what the limits  
9 are, what coverages they provide, and they are being  
10 told by the lawyer representing that insured we're not  
11 going to tell you. What are they supposed to do with  
12 that?  
13 A From an investigative standpoint they could deny  
14 representing them.  
15 Q They could have simply denied representing them at all,  
16 right?  
17 A They could have.  
18 Q Right. But they didn't do that, did they?  
19 A No, they did not.  
20 Q What they did was step up and provide a defense anyway,  
21 right?  
22 A Once coverage counsel rendered a formal opinion.  
23 Q And hat was -- I don't know about the formal opinion,  
24 but we know what they did was they provided a defense

1 under a reservation of rights, correct?  
2 A Right.  
3 Q And that was the March 7, 2003, letter, which is  
4 Exhibit 105, correct?  
5 A Correct.  
6 Q But even after that letter of March 7, 2003, Exhibit  
7 105, Zurich through its coverage counsel continued to  
8 seek information about additional policies; did they  
9 not?  
10 A Yes, they did.  
11 Q They sent additional correspondence to their coverage  
12 counsel seeking the policies, right?  
13 A Yes, they did.  
14 Q But they never received a response, did they?  
15 A No, they did not.  
16 Q And despite that, at the end of the day, Zurich then  
17 paid their \$2 million policy limits, plus interest,  
18 right?  
19 A So you're leaping from April of '03 to a year later; is  
20 that that what you're asking me?  
21 Q Right.  
22 A So at the end of the day, the next 11 months, they just  
23 handed over their money instead of doing it then.  
24 Okay. The answer is, yes.

1 Q Now, let's go to the issue regarding the tender of the  
2 policy. And you had testified on direct examination  
3 that Zurich and AIG should not have gotten into a  
4 dispute about the defense, right?  
5 A Correct.  
6 Q And I think, if I understood you correctly when you  
7 testified on direct, you said what they should have  
8 done was just agree to disagree and continue to provide  
9 the defense, right?  
10 A That's what I said, correct.  
11 Q Now, have you looked at the Zurich policy with regard  
12 to the obligation to provide a defense?  
13 A Some time ago, yes, I did, sir.  
14 Q Okay. Can you turn back to that policy for a minute,  
15 which again I think is Exhibit 61, and I'm trying to  
16 find a page for you here.  
17 If you could turn to the Massachusetts  
18 endorsement, mandatory Massachusetts endorsement to the  
19 policy.  
20 A Sir, what page is that?  
21 Q It starts on page 0079. And if you could particularly  
22 turn to page 0084.  
23 And if we look at that, where it says  
24 "liability coverage" there?

1 A Yes, sir.  
2 Q Now, what this is doing, what this endorsement is doing  
3 is changing the terms of the policy so that the  
4 provisions set forth in this endorsement supersede  
5 those in the basic form; is that right?  
6 A That's what an endorsement does, yes.  
7 Q So if we look about two-thirds down the paragraph  
8 that's titled A, Coverage, do you see where it says:  
9 Our duty to defend ends?  
10 A Yes, I do.  
11 Q And let me just read that aloud and you can tell me if  
12 I'm reading it correctly.  
13 (Reading): Our duty to defend ends when we  
14 tender or pay to any claimant or to a court of  
15 competent jurisdiction, with the court's permission,  
16 the maximum amount of the liability coverage limit of  
17 insurance. We may end our duty to defend at any time  
18 during the course of the suit by tendering or paying  
19 the maximum amount of the liability coverage limit of  
20 insurance without the need for a judgment or settlement  
21 of the suit or a release by the claimant.  
22 Did I read that correctly?  
23 A Yes, you did.  
24 Q So according to this language, Zurich, once it



1 tendered, had the right to stop paying for and  
 2 controlling the defense; is that correct?  
 3 A That was not my answer under direct, sir. My answer  
 4 was the two insurers should have kept the fighting off  
 5 to the side, continue to do the right thing.  
 6 Q Sir, I'd ask that the --  
 7 A I can read -- to answer your question, yes, but that's  
 8 not what I responded to under direct.  
 9 Q Well, I'd like to just focus on --  
 10 A I just want to make it clear.  
 11 Q -- what I'm asking you now, okay? What I'm asking you  
 12 is, according to this language, Zurich had the right to  
 13 stop defending when it tendered, right?  
 14 A According to this language, correct.  
 15 Q And we looked earlier, when Mr. Cohen was going  
 16 through, according to the language in the AIG policy,  
 17 AIG had no obligation to take on the defense until the  
 18 primary actually was exhausted through payment,  
 19 correct?  
 20 A Correct.  
 21 Q So there was, in fact, a gap in the coverage, as it  
 22 related to defense, right?  
 23 A No. There was a gap in the language.  
 24 Q A gap in the language. Okay. And when the coverage is

1 originally placed, one of the things the broker is  
 2 supposed to do is to look at both the primary and  
 3 excess and make sure there is no gap in the language,  
 4 right?  
 5 A I'm not a broker. You're asking me to make an  
 6 assumption.  
 7 Q So you don't know?  
 8 A I've never been a broker. You'd have to ask a broker.  
 9 Q So you do not know whether that's a broker's  
 10 responsibility.  
 11 A I understand it's a broker's task, but you'd have to  
 12 ask a broker what they do.  
 13 Q Okay. So you think that what should have happened here  
 14 is that the parties should have agreed to disagree and  
 15 move forward, right?  
 16 A Absolutely.  
 17 Q Now, in fact, sir, four days after the March 29 letter,  
 18 I believe it was April 3 -- I might be off by a day or  
 19 two -- Zurich did exactly that, didn't it? It said  
 20 we're going to pay the defense, continue to pay the  
 21 defense, and we'll just reserve our rights to go seek  
 22 reimbursement from AIG later, at the end of the day,  
 23 right?  
 24 A They did that, yes.

1 Q So they did exactly what you said they should do,  
 2 right?  
 3 A Yes.  
 4 MR. GOLDMAN: No further questions.  
 5 THE COURT: Mr. Pritzker?  
 6 REDIRECT EXAMINATION BY MR. PRITZKER:  
 7 Q Mr. Kiriakos, you just answered to Mr. Goldman what  
 8 Zurich could have done and what they did do in order to  
 9 resolve the dispute on coverage in April of '04. Could  
 10 they have done the same thing concerning the inability  
 11 to obtain the DLS primary insurance, if there were any,  
 12 back in '02?  
 13 A Absolutely.  
 14 Q Jumping back a little bit, I believe you testified on  
 15 direct examination that over the course of your 25  
 16 years of adjusting activity, out of the 27, you handled  
 17 approximately 125,000 claims?  
 18 A Yes, sir.  
 19 Q Of those, what proportion of that was personal injury  
 20 claims?  
 21 A Directed, handled, or controlled, 50,000.  
 22 Q And of the 125,000, what number were commercial auto  
 23 claims?  
 24 A A conservative number would be approximately 3,500.

1 Q And of the 125, how many were catastrophic personal  
 2 injury claims?  
 3 A Twelve to 1,500, approximately.  
 4 Q And of those 12 to 1,500, how many were spinal cord  
 5 injuries?  
 6 A In total, 60 -- 55, 60.  
 7 Q And of the 60, how many resulted in paralysis?  
 8 A All of them.  
 9 Q All of them?  
 10 A All of them.  
 11 Q And of all of them that resulted in paralysis, how many  
 12 were paraplegics?  
 13 A My memory is two or three, sir. Less than five.  
 14 Q Was it reasonable, in your opinion, for AIG or Zurich  
 15 to wait until June of '04 to resolve any issues of  
 16 primary policies for Zalewski, DLS or Penske?  
 17 MR. GOLDMAN: Objection. Leading, your  
 18 Honor.  
 19 THE COURT: Overruled.  
 20 A Say that one more time, Mr. Pritzker.  
 21 (By Mr. Pritzker)  
 22 Q Is it your opinion that it was reasonable for either  
 23 AIG or Zurich to wait until June of '04 to resolve any  
 24 primary policy questions --

1 A Thirty months --  
 2 Q -- relating to Zalewski, DLS or Penske?  
 3 A Thirty months is unreasonable.  
 4 Q Why?  
 5 A Because everyone was being reported to within 30 days.  
 6 Everyone was aware of this loss. So at that point in  
 7 time, your investigation from a coverage perspective  
 8 continues forward.  
 9 Do I think a coverage opinion is reasonable?  
 10 Yes, I do. Do I think six months to gather it is  
 11 unreasonable? It's long. It's longer than it should  
 12 have been. But even if we take that into consideration  
 13 -- if you'll indulge me for a moment -- that's July of  
 14 '02 and the issue is resolved, so it's two years  
 15 earlier.  
 16 Q What could the insurers have done to resolve it, other  
 17 than asking counsel for the particular defendant for  
 18 his policy?  
 19 A If you want the -- we're just saying -- we'll bring  
 20 with just the policy. Go to your underwriting  
 21 department, see if there is all that language and  
 22 endorsements, because that's a certified copy from the  
 23 company. That's Zurich I'm talking about now.  
 24 Q Let's talk for a minute about the policies, other

1 primary policies of the other defendants.  
 2 A Go to GAF. Go simply to your policyholder. They're  
 3 going to have had proof of coverage presented to them  
 4 when they engaged in some sort of agreement at arm's  
 5 length. It's that simple.  
 6 Q Did you see anywhere in the records that you reviewed  
 7 where any of the insurers did that?  
 8 A No, I did not, sir.  
 9 Q Is defense counsel considered part of the defense team  
 10 for investigation and evaluation purposes?  
 11 A In my opinion, no. They're part of the discovery --  
 12 litigation process.  
 13 Q Is there any reason why the investigation and  
 14 evaluation team can't utilize directly information that  
 15 they obtain from defense counsel?  
 16 A No, absolutely not.  
 17 Q Did you see anything in the file which indicated -- or  
 18 do you know of any information defense counsel was  
 19 communicating to Crawford, Zurich or AIG?  
 20 A No, I do not.  
 21 Q Why not?  
 22 A Most of it was redacted, from what I saw.  
 23 Q Were you aware that defense counsel had approximately  
 24 2,000 pages of medical documents and bills which

1 plaintiff produced, as well as extensive answers to  
 2 interrogatories, in April of '03?  
 3 A I was aware because you had informed me of that, Mr.  
 4 Pritzker.  
 5 Q And, in fact, they're here as an exhibit today.  
 6 A We're running out of room.  
 7 Q I'm going to put it right beside you here.  
 8 A Thank you.  
 9 Q I'm going to show you Exhibit 80A and ask whether or  
 10 not you've seen those documents in bulk before.  
 11 A Not that I can recall, sir.  
 12 Q But were you aware of the fact that discovery had been  
 13 produced?  
 14 A Yes.  
 15 Q Do you know any reason why either Zurich or AIG could  
 16 not have obtained that information had they asked for  
 17 it?  
 18 A I don't know of any reason, absolutely not.  
 19 Q Do you know whether or not they asked directly of  
 20 defense counsel for that information?  
 21 A No, I do not.  
 22 Q Do you know that Zurich and AIG had access to  
 23 plaintiffs' demand in August of '03?  
 24 A Yes.

1 Q And do you know that that demand had more medical  
 2 information, doctors' summaries, quantification to  
 3 special costs, life-care plan, et cetera?  
 4 MR. GOLDMAN: Objection. Leading.  
 5 MR. VARGA: Objection.  
 6 THE COURT: I'll let it go.  
 7 A Mr. Pritzker, it was a 17- or 18-page letter. It was  
 8 quite impressive, and there were supports to it. Yes,  
 9 I'm aware of it.  
 10 (By Mr. Pritzker)  
 11 Q Do you know of any reason why the defendant's life-care  
 12 planner had to wait until they reviewed the plaintiff's  
 13 life-care planner before rendering it in a report?  
 14 A No, I do not.  
 15 Q What, in your opinion, would have been reasonable  
 16 timing wise in this case?  
 17 A From a perspective of what, sir?  
 18 Q Retaining a life-care planner in order to evaluate the  
 19 future prospects and future prognosis for Mrs. Rhodes.  
 20 A As early on as your demand letter, because at least I  
 21 had a discharge summary, I know the extent of the  
 22 damages. So we're talking July of '03. There's no  
 23 reason to wait.  
 24 Q Do you know that in fact the life-care planner and

1 defense counsel interviewed Marcia and Harold Rhodes at  
2 their home in September of '03?

3 MR. GOLDMAN: Objection. Leading.

4 THE COURT: Overruled.

5 A I know that the letter was October of '03, sir.  
6 October 9 it was dated. And, yes, it references that  
7 interview and meeting Mr. Rhodes and meeting with you  
8 and meeting with Mrs. Rhodes, et cetera.

9 (By Mr. Pritzker)

10 Q Do you know that the medical experts were deposed in  
11 this case?

12 A Yes.

13 Q Do you know who deposed them?

14 A You did, if I'm not mistaken, the plaintiff.

15 Q Do you know why?

16 A Preserve their testimony.

17 Q Do you know whether or not the defendants ever noticed  
18 the depositions of the plaintiff's expert medical  
19 doctor?

20 A I never saw that they did, sir.

21 Q You testified on cross-examination that there are times  
22 when an independent medical examination is not  
23 necessary. Do you remember that?

24 A Yes, I do, sir.

1 A Yes, it does.

2 Q In your opinion, is mediation fruitful when party  
3 refuses to offer any settlement to a demand which is  
4 seven months old?

5 A No. It takes two to tango.

6 Q You testified on cross-examination that structured  
7 settlements have the advantage of a tax-free income  
8 over the period of years for the structured portion of  
9 the settlement. Are there any disadvantages?

10 A Oh, certainly. I mean, first of all, the plaintiff  
11 herself can't control the money. It's not in her power  
12 to do that. Secondly, if it's not guaranteed, she  
13 passes away, there is no passing of the baton on a  
14 beneficiary. Mainly because, in my mind, on the  
15 plaintiff's side, it's out of their control. Whatever  
16 you lock into, you're locked into forever.

17 Q What about the timing of the receipt of funds? Is that  
18 an issue?

19 A Certainly, because it's set in stone.

20 Q So if I understand what you're saying, the plaintiff  
21 doesn't get the money up front, even though it's  
22 valued?

23 A It depends. They could get some of it up front, but  
24 they don't get --

1 Q What are such circumstances, when, in your opinion, an  
2 independent medical exam is not necessary?

3 A If I can expand a little bit and if you can indulge me  
4 for a moment.

5 An IME is just that, it's an independent exam  
6 retained by an insurer. I've done them many times.  
7 All too often they become boilerplate. I order it  
8 every time there's a personal injury. In this case,  
9 it's superfluous, especially in the eleventh hour,  
10 given all the medical, given two life-care planners,  
11 given all the other documents that have been produced,  
12 including her own doctors, who are independent of one  
13 another, who are very credible in and of themselves.  
14 There's no need for it. No need to put the plaintiff  
15 in this case through that all over again.

16 Q If there were, in the opinion of the insurers, a need  
17 for an IME, when should that have occurred, in your  
18 opinion?

19 A Her condition was just going -- it's not going -- it  
20 could have been early on, sir. There was no need to  
21 wait till right before trial.

22 Q You testified that mediation is a good thing when  
23 parties are unable to settle a case on their own. Does  
24 that imply that the parties are talking?

1 Q I'm talking about the structured portion.

2 A They do not get it up front, sir.

3 Q Do you consider that an advantage or a disadvantage?

4 A It's an advantage on one side; it's a disadvantage on  
5 the other. It's a disadvantage to the plaintiff.

6 Q You testified to a question on cross-examination that  
7 Mr. Chaney had requested medical information of  
8 plaintiff's counsel. Do you remember that?

9 A Yes, I do, sir.

10 Q Would you take a look in Volume 2 at Exhibit 67?

11 A Yes, sir.

12 Q And would you look at page ZA0595?

13 A Yes, sir.

14 Q Do you remember Mr. Chaney testifying in his deposition  
15 that he only had one conversation with me and that was  
16 on January 25 of '02?

17 A Yes, I do.

18 Q Would you take a look at the bottom of page 0595, the  
19 last three lines of that page, and then spilling over  
20 to page 0594, where Mr. Chaney in his claim notes is  
21 describing his conversation with me?

22 A Yes, he is.

23 Q Do you see any reference there to a request for medical  
24 information?

1 A No, I do not.

2 Q Do you see that there is a reference there to

3 plaintiff's counsel promising to send a copy of the

4 police report?

5 A Yes, I do.

6 Q Do you see any reference in there to plaintiff's

7 counsel promising to send medical information?

8 A No.

9 Q Did you ever hear, Mr. Kiriakos, of a lawyer

10 named John Haliby?

11 A Yes, I have, sir.

12 Q Who is John Haliby?

13 A He is an attorney with the McCormack Group.

14 Q How do you know that name?

15 A He has retained me recently in '06 to conduct an

16 investigation on behalf of whoever he is

17 representing. It was a personal injury claim

18 involving a construction company.

19 Q And that's the same McCormack Firm that Mr.

20 Cohen and Mr. Maselek are attorneys in?

21 A Yes, it is, sir.

22 MR. PRITZKER: I have no other

23 questions, your Honor.

24 THE COURT: Any further questions of

1 counsel?

2 RECROSS-EXAMINATION BY MR. COHEN:

3 Q Sir, Mr. Haliby retained you to go out and take

4 a witness statement, correct?

5 A Several, yes.

6 Q He didn't retain you as an expert witness,

7 right?

8 A No, he did not, sir.

9 Q He didn't retain you to evaluate settlement of

10 any case?

11 A No, he did not, sir.

12 Q Okay. You went out and took a statement of a

13 witness in a slip and fall, or witnesses in a

14 slip and fall accident, right?

15 A There was more than one assignment from Mr.

16 Haliby. The most recent was a construction

17 loss.

18 Q And that went to the Central Bureau of

19 Investigation and you happened to do it, right?

20 A Yes, I did, but I was specifically requested in

21 the assignment.

22 Q Now, you said that the insurance companies could

23 have just gone to GAF to get information about

24 other insurance policies, right?

1 A Yes, I did, sir.

2 Q Is there any document that you've seen that

3 would suggest that GAF had copies of any

4 policies for Penske or for DLS?

5 A No, I did not, sir.

6 Q Okay. So if they had gone to GAF and said get

7 me the Penske and DLS policies, as far as you

8 know the answer would have been we don't have

9 any, right?

10 A You've got to ask to get that answer, sir. They

11 didn't ask.

12 Q Well, let me refer you to Exhibit 5. Do you

13 have that in front of you?

14 A Volume 2, I take it, sir?

15 Q Volume 1.

16 A I apologize.

17 Q That's a letter from Tracy Kelly who was a claim

18 director at AIG at the time, correct?

19 A Yes, it is.

20 Q And she wrote to Mr. Chaney at Crawford, right?

21 A Yes, she did.

22 Q And it's dated April 9, 2002, right?

23 A Yes, it is.

24 Q And in the letter she asked to be provided all

1 pleadings, right?

2 A Yes, she did.

3 Q She asked to be provided all investigative

4 materials, right?

5 A Yes.

6 Q She asked to be provided with information

7 regarding all claim damages, right?

8 A Yes.

9 Q She asked to be provided with a synopsis of

10 medical records, right?

11 A I'm just reading, pardon me. Yes.

12 Q She asked to be provided with deposition

13 summaries?

14 A Yes.

15 Q She wanted an analysis of liability and/or

16 damages prepared by defense counsel, right?

17 A Yes.

18 Q And she asked for the contract between the

19 various parties as well as the policies for

20 Penske and Driver Logistics Services, right?

21 A Yes.

22 Q So that was the correct thing to do by Ms.

23 Kelley; she asked for the policies and you said

24 that's what she should do, right?

1 A She didn't ask GAF, she asked Crawford. When  
 2 you don't get a response, you keep going, you  
 3 don't stop.  
 4 Q Crawford was the third-party administrator for  
 5 GAF, right?  
 6 A Yes.  
 7 Q Can you turn to the next page of Exhibit 5. In  
 8 fact, that letter was cc'd to Robert Manning who  
 9 was the risk manager for GAF, right?  
 10 A Yes, it was.  
 11 Q He's the right person to ask, right?  
 12 A Yes, he is.  
 13 Q And in fact Ms. Kelly, you are aware, followed-  
 14 up that request several times in 2002 and early  
 15 2003, both by phone and letter, right?  
 16 A Yes, I do.  
 17 Q So that was perfectly appropriate for AIG to do,  
 18 correct?  
 19 A Follow up? Yes, it is.  
 20 Q You mentioned that defense counsel had the  
 21 medical records in April of 2003, right?  
 22 A Yes.  
 23 Q Okay. Do you have any indication that those  
 24 were sent to AIG around that time period?

1 planner or other expert itself. Is that your  
 2 testimony?  
 3 A Once the exposure is tendered to them, it's  
 4 their job to handle the claim.  
 5 Q And you base that expertise on what again?  
 6 A Just good claims practice, good claims handling  
 7 practice, sir.  
 8 Q But again, you've never worked at an excess  
 9 claims department yourself, right?  
 10 A I don't think you have to, to have that opinion,  
 11 sir.  
 12 Q And as far as you're concerned, an excess  
 13 insurer has the same obligations regarding  
 14 investigating a claim as a primary insurer. Is  
 15 that your opinion?  
 16 A It's their policyholder? Yes, it is.  
 17 Q Now, you also said in this case the IME was  
 18 superfluous, right?  
 19 A That's the word I used, yes.  
 20 Q And no need to put Mrs. Rhodes through that  
 21 because you had her own doctor's reports, right?  
 22 A Correct.  
 23 Q Wouldn't that same rationale apply in any case  
 24 where you have doctors' reports provided by the

1 A No, I do not.  
 2 Q And you also said that the demand package was  
 3 received in August of 2003, correct?  
 4 A Yes.  
 5 Q Okay. And that was sent to defense counsel only  
 6 and not directly to the insurers, right?  
 7 A Yes.  
 8 Q And do you have any indication whatsoever that  
 9 AIG actually received any medical records or the  
 10 demand package until late November of 2003?  
 11 A I have no idea.  
 12 Q Now, you said that a life-care plan doesn't have  
 13 to wait, that the insurers or the defendants  
 14 could have don't that earlier, right?  
 15 A Certainly.  
 16 Q Okay. And we talked yesterday about how the  
 17 responsibility for investigating this claim or  
 18 any claim rests on the primary insurer, right?  
 19 A Did I say just rests on their shoulders? Is  
 20 that what I said?  
 21 Q That's what I thought.  
 22 A It's every insurer's obligation.  
 23 Q Okay. So your testimony is that an excess  
 24 insurer should go out and hire a life-care

1 plaintiff's own physicians?  
 2 A No, it does not.  
 3 Q Why not?  
 4 A Because every case you take on its on merits, on  
 5 its own face.  
 6 Q Well, what about this case is special that an  
 7 insurance company can rely on the plaintiff's  
 8 own doctors to tell them what the damages are?  
 9 A You tell me -- and I have to turn this back to  
 10 you, sir -- what part of paralysis do I need  
 11 further analysis of? What part of paraplegic do  
 12 I need further analysis of? An IME is an  
 13 investigative tool.  
 14 Q I don't know if I have to be sworn in to answer  
 15 your question, but let me ask you this. We  
 16 talked yesterday about the level of Mrs. Rhodes'  
 17 rehabilitation being important to determining  
 18 what her damages are, correct?  
 19 A Certainly.  
 20 Q And whether she was going to be able to transfer  
 21 herself, right? You said that was important.  
 22 Whether she was going to be able to go shopping  
 23 by herself, you said that was important,  
 24 correct?

1 A Yes, I did, sir.  
 2 Q You said whether she could learn to drive was  
 3 important, correct?  
 4 A Yes, I did, sir.  
 5 Q You said that whether she could learn to cook  
 6 was important, right?  
 7 A Yes, I did.  
 8 Q You said that whether she was engaging in  
 9 physical therapy and aquatic therapy to  
 10 strengthen herself, that was important?  
 11 A Yes.  
 12 Q And those things were important to both enable  
 13 her to get back into as much of the activities  
 14 of daily living as possible, but also to prevent  
 15 complications, right?  
 16 MR. PRITZKER: Objection.  
 17 THE COURT: Overruled.  
 18 A As a lay person, yes, I'll answer your question.  
 19 (By Mr. Cohen)  
 20 Q So have I now answered your question as to why  
 21 an IME was important in this case?  
 22 A But I come back to my same response, sir. It's  
 23 not -- we're not talking a soft-tissue injury  
 24 where there's a lot of question of fact from a

1 annuity payments, right?  
 2 A Correct.  
 3 Q Now, when you do a structured settlement, you  
 4 can structure the structured part of the  
 5 settlement any way you want. In other words,  
 6 you can have X amount paid per month, you can  
 7 have X amount paid per year, you can have spin-  
 8 off lump sums to pay for college education for  
 9 kids when they get to college age. Those are  
 10 all things that you can arrange up front in a  
 11 structured settlement, right?  
 12 A It can be as creative as you wish, yes, sir.  
 13 Q And the drawback to a structured settlement of  
 14 not being able to control the money once you  
 15 bought the annuity is outweighed, is it not, by  
 16 the fact that you're not paying any taxes  
 17 whatsoever on those payments for however long  
 18 they are, right?  
 19 A I don't know if it's outweighed. You'd have to  
 20 ask the person receiving the stream of benefits  
 21 if it outweighs it.  
 22 Q Okay. That certainly is up to a plaintiff to  
 23 determine whether the benefits of the structure  
 24 outweigh whatever detriments there might be,

1 damages standpoint and there's a lot of built-  
 2 up treatment course. We're talking about  
 3 paraplegia. And we're talking about that at the  
 4 time of the IME, we're talking about already  
 5 going through a life-care planner, already  
 6 having the deposition transcripts of her  
 7 treating physicians. I do not see a need or  
 8 value from an investigative standpoint. It's an  
 9 investigative tool.  
 10 O Well, whether there was a need for it or there  
 11 wasn't a need for it, I guess the judge can draw  
 12 his own conclusions as to that, you testified  
 13 yesterday that it certainly wasn't bad faith for  
 14 AIG to request the IME, right?  
 15 A The timing of it? If I testified to it, the  
 16 answer is going to be yes again, that it's not  
 17 in bad faith just to request it.  
 18 Q Now, I have a couple of questions about the  
 19 structured settlement, and you talked about  
 20 there are benefits and there are drawbacks to a  
 21 structured settlement, right?  
 22 A Yes.  
 23 Q And the drawback that you've identified was that  
 24 the plaintiff doesn't have control over the

1 right?  
 2 A Yes.  
 3 Q And nobody certainly was forcing Mrs. Rhodes to  
 4 enter into a structure if she didn't want to?  
 5 A Of course not.  
 6 Q And have you seen any of the structured  
 7 settlement proposals that were provided to Mrs.  
 8 Rhodes in this case?  
 9 A If I did, it was some time ago. I don't recall  
 10 them off the top of my head.  
 11 Q Are you aware that they were all guaranteed for  
 12 the remainder of Mrs. Rhodes' life?  
 13 A No, I'm not.  
 14 Q Are you aware that even if Mrs. Rhodes were to  
 15 pass away, that they were guaranteed to pay her  
 16 family, her heirs, for 20 years?  
 17 A That's what a guarantee will do. It's a life  
 18 insurance policy.  
 19 Q And that's a typical structured settlement,  
 20 right?  
 21 A Yes.  
 22 MR. COHEN: I'd just like to offer the  
 23 chronology, your Honor.  
 24 (By Mr. Cohen)

1 Q Mr. Kiriakos, you said that you were given a  
2 chronology by plaintiffs' counsel?  
3 A Yes, I was.  
4 Q And you relied on that as part of your testimony  
5 over the last three days?  
6 A Yes.  
7 Q Okay.  
8 MR. COHEN: And that's Exhibit 229, so  
9 I'd just like to mark that for evidence.  
10 MR. PRITZKER: Your Honor, the only  
11 reason that I object to it is the timing of it.  
12 This is now recross and the time to introduce it  
13 I think is gone. I have no objection, however,  
14 to the court seeing the chronology.  
15 MR. COHEN: I don't have any questions  
16 on it; I just want to mark it as part of the  
17 record.  
18 THE COURT: Well, is it actually an  
19 exhibit or is it to be for I.D.? I mean, it's  
20 not evidence, I assume.  
21 MR. COHEN: I.D.  
22 THE COURT: So let's mark it for I.D.  
23  
24 (Exhibit K for I.D., marked;

1 Chronology.)  
2 MR. COHEN: That's all I have.  
3 THE COURT: Okay. Mr. Goldman, any  
4 further questions?  
5 MR. GOLDMAN: Just a couple, your  
6 Honor.  
7 RECROSS EXAMINATION BY MR. GOLDMAN:  
8 Q Mr. Kiriakos, you testified that you believed  
9 that GAF may have had copies of the insurance  
10 policies for DLS, Zalewski, and Penske. Have  
11 you ever seen document that that suggested to  
12 you they did have those policies?  
13 A No, I didn't.  
14 Q And there's no testimony from anyone saying they  
15 had the policies, right?  
16 A No, there is not.  
17 Q And in fact, GAF responded to a very  
18 comprehensive document production in connection  
19 with the underlying case, right?  
20 A Correct.  
21 Q And no place in those documents is there any  
22 information about insurance policies for Penske  
23 or DLS or Zalewski, is there?  
24 A No, there is not.

1 Q So it's true, is it not, then, sir, that you had  
2 no idea whatsoever whether GAF had insurance  
3 policies for Penske, DLS, or Zalewski; isn't  
4 that correct? You don't know one way or the  
5 other?  
6 A I don't know.  
7 MR. GOLDMAN: No further questions.  
8 THE COURT: Any further questions  
9 within the scope of the recross?  
10 MR. PRITZKER: Yes, your Honor.  
11 THE COURT: Very briefly.  
12  
13 FURTHER REDIRECT EXAMINATION BY MR. PRITZKER:  
14 Q I'm going to show you a page, Mr. Kiriakos, from  
15 Exhibit M of Exhibit 10, which is the evidence,  
16 that is, the demand package, and I will  
17 represent to you that that is part of the DLS-  
18 GAF agreement.  
19 A Okay.  
20 MR. GOLDMAN: Could I see what that is?  
21 MS. PINKHAM: BMCA0047 has been shown  
22 to the witness  
23 THE COURT: I'm sorry?  
24 MS. PINKHAM: BMCA0047. That's the

1 second page of the agreement between DLS and GAF  
2 Materials.  
3 (By Mr. Pritzker)  
4 Q And directing your attention to Paragraph 8,  
5 would you just read that to yourself and tell me  
6 if that refreshes your recollection as to  
7 whether or not there is an agreement that DLS,  
8 number one, obtained insurance, which includes a  
9 waiver of subrogation; and number two, that DLS  
10 present evidence of that to GAF?  
11 A Yes.  
12 Q Thank you, sir. Do you know, Mr. Kiriakos,  
13 whether or not AIG made any reference to the  
14 independent medical examination in any of its  
15 executive claims summaries where it valued this  
16 case?  
17 A No.  
18 MR. PRITZKER: I have no other  
19 questions, your Honor.  
20 MR. COHEN: I have just one other  
21 question.  
22 FURTHER RECROSS EXAMINATION BY MR. COHEN:  
23 Q Mr. Kiriakos, the report of the IME, do you know  
24 whether that was received before or after the

1 executive claims summary before the trial was  
2 written.  
3 A My memory is after.  
4 Q So it couldn't have been referred to in the  
5 executive claims summary if they didn't get it  
6 until after the executive claims summary was  
7 written, right?  
8 A Correct. So it's just as meaningless as I said  
9 early on. It's just as superfluous.  
10 MR. GOLDMAN: Sir, could we see the  
11 page that Mr. Pritzker showed you?  
12 MS. PINKAHM: I'm sorry. I put it back  
13 and I didn't mark it.  
14 (Pause.)  
15 MR. GOLDMAN: If I can just mark --  
16 well, I don't need to mark this. I think it's  
17 already in evidence, or part of it's in  
18 evidence.  
19 FURTHER RECROSS-EXAMINATION BY MR. GOLDMAN:  
20 Q Now, that refers, sir, to the customer providing  
21 evidence of the insurance and the like, right?  
22 A Correct.  
23 Q And you responded to Mr. Pritzker's questions by  
24 saying that that meant that DLS would have to

1 provide GAF with copies of its policies, right?  
2 A Customer will provide.  
3 Q Right. The customer has to provide it. Based  
4 on that, you concluded that DLS should have  
5 provided its policies to GAF, right?  
6 A The customer will provide DLS with satisfactory  
7 proof of waiver, it says. It didn't say  
8 "policy."  
9 Q Okay, let's read --  
10 A That's what we read a few minutes ago.  
11 Q Okay. So the customer, under this contract, is  
12 GAF, right?  
13 A And the customer shall maintain in full force --  
14 yes, it is.  
15 Q Right. So this has nothing to do with DLS being  
16 required to provide GAF with evidence of DLS'  
17 insurance, does it?  
18 A No, it does not, not from that one sentence.  
19 Q Well, nothing in this paragraph requires DLS to  
20 provide GAF with any information whatsoever  
21 about insurance coverage for DLS, does it?  
22 A It's referring to the customer, GAF.  
23 Q So the answer is, no, it does not?  
24 A That's my answer.

1 MR. GOLDMAN: I have no further  
2 questions.  
3 MR. PRITZKER: I have no other  
4 questions, your Honor.  
5 THE COURT: All right, thank you. You  
6 may step down. Next witness.  
7 MR. BROWN: The plaintiffs call Janet  
8 Kelley, your Honor.  
9 THE CLERK: Stop right there, ma'am, and  
10 raise your right hand, please.  
11 JANET KELLEY, Sworn.  
12 DIRECT EXAMINATION BY MR. BROWN:  
13 THE COURT: You may proceed.  
14 Q Ms. Kelley, since there are two different spellings of  
15 Kelley in this case, would you mind just spelling your  
16 name, just to make it clear for the record?  
17 A K-e-l-l-e-y.  
18 THE COURT REPORTER: The witness's first  
19 name, please?  
20 THE WITNESS: Janet.  
21 (By Mr. Brown)  
22 Q And Ms. Kelley, where do you work?  
23 A I work at Brown Rudnick.  
24 Q And how long have you worked there?

1 A Twenty-two years.  
2 Q What is your position at Brown Rudnick?  
3 A Billing coordinator.  
4 Q And as a billing coordinator, what are your  
5 responsibilities?  
6 A I distribute pro formas to attorneys which are  
7 summaries of unbilled time and costs. I edit and do  
8 corrections per attorneys' instructions. I follow  
9 billing guidelines set by the client, and just try and  
10 get the bills out in a timely manner per the attorneys'  
11 instructions.  
12 Q Before editing any bills, do you review them with the  
13 attorneys?  
14 A Sometimes.  
15 Q Do you periodically review bills with attorneys?  
16 A Periodically.  
17 Q And did you do so with Mr. Pritzker?  
18 A Mr. Pritzker would review them monthly.  
19 Q And he did so with the Rhodes case as well?  
20 A Yes.  
21 Q And, I'm sorry, let me just step back. You are the  
22 billing coordinator for the Rhodes case, or were the  
23 billing coordinator for the Rhodes case?  
24 A Yes.



1 Q And what is the process at Brown Rudnick for recording  
2 costs that occurred?

3 A Costs are done manually through receipts of bills, and  
4 they're done internally. Each matter is provided a  
5 client case number, and if you're going to do a  
6 photocopy, you to first put in the client case number  
7 to each matter.

8 Q And as far as the costs that are posted manually, what  
9 types of costs were those?

10 A Those would be checks, things with receipts, outside  
11 counsel bills, outside costs that need a receipt.

12 Q And how are those verified, or how are they approved  
13 before posting to the client matter?

14 A They would be approved by a partner.

15 Q Ms. Kelley, I'm going to show you a set of documents.  
16 Actually, if I could have these marked for  
17 identification.

18 THE COURT: Okay. They may be marked for  
19 I.D.

20

21 (Exhibit L; marked for I.D., Detailed  
22 Summaries of Unbilled Time and Costs.)  
23

24 (By Mr. Brown)

1 Q I'm showing you the set of documents that have been  
2 marked L for identification. And just so the record is  
3 clear, those are Bates numbers R93A, numbers 3638  
4 through 3661, and R93A, 3436 through 3637.

5 Ms. Kelley, do you recognize those documents  
6 in front of you?

7 A Yes.

8 Q And what do you recognize those to be?

9 A These are the detail summaries to the Rhodes case for  
10 disbursements.

11 Q And how many pages do those -- or, how many pages are  
12 in front of you?

13 A 271.

14 Q And do you know about how many line items are there?

15 A There are about 6,353 entries here.

16 Q That's a pretty good estimate. What do those entries  
17 reflect?

18 A These entries are the disbursements that were posted  
19 and paid in the Rhodes case.

20 Q Ms. Kelley, are there two different client matter  
21 numbers there as well?

22 A There are.

23 Q And why are there two different matter numbers?

24 A When a matter begins at Brown Rudnick and it's a

1 contingency matter, the client is always responsible  
2 for all of the disbursements, but they are not  
3 responsible for the fees until the case is settled. So  
4 it begins in a nonbillable number; and then once a case  
5 is settled, it is transferred to a billable number, so  
6 the first portion of these disbursements are under a  
7 nonbillable number.

8 Q And when you say "nonbillable number," does that mean  
9 that the client is not billed for those costs?

10 A No. The client is always billed for all of the  
11 disbursements. The fees are nonbillable at that point.

12 Q So to determine what costs were billed to the Rhodes  
13 family, you would add the totals from the two sets of  
14 documents; is that right?

15 A Yes.

16 Q And are those documents part of the original books and  
17 records of Brown Rudnick?

18 A Yes, they are.

19 Q And are those records kept in the ordinary course of  
20 business?

21 A Yes.

22 Q Are the entries of costs made in good faith at Brown  
23 Rudnick?

24 A Yes.

1 Q And is it the regular course of business to enter those  
2 costs at or about the time that they are incurred?

3 A Yes.

4 Q And were the entries in the documents in front of you  
5 entered before the current case began?

6 A Yes.

7 Q And are those the entries that you relied upon in  
8 invoicing the -- oh, I'm sorry -- for sending bills to  
9 the Rhodes family?

10 A Yes.

11 Q Can you generate other types of reports from those  
12 records?

13 A Yes.

14 Q I'm going to hand you another set of documents. I'm  
15 going to ask you if you recognize those documents as  
16 well.

17 A Yes.

18 Q If you could just turn to the two pages attached as Tab  
19 A. And could you tell me what those documents are?  
20 What those two pages are?

21 A There's a summary of disbursements for the Rhodes case,  
22 broken down by month.

23 Q And were these taken from the original records that  
24 were marked for identification as L?

1 A Yes.

2 Q And are these both client matter numbers for the Rhodes case?

3 A Yes.

4 Q And if you could look at the total, what is the total on the first page?

5 MR. VARGA: Objection, your Honor. The document's not in evidence at this point. He's asking the witness to read the substance of it.

6 THE COURT: I think that's probably right.

7 (By Mr. Brown)

8 Q Could you turn to Tab B as well? And what are these two pages?

9 A These are the same costs, just broken down by cost code.

10 Q And what is a cost code? Would that be a type of cost?

11 A It is.

12 Q A category?

13 A Mm-hum.

14 Q For example, a filing fee or a travel expense?

15 A Yes.

16 Q And if you could look at Tab C. There's a few more pages, but there's a few more pages, but would you mind telling me what these are as well?

1 THE COURT: Okay. Any objection?

2 MR. VARGA: Yes, your Honor. Again, for clarification, is the only document or series of documents being offered the summary? I'm just asking for clarification on that because --

3 THE COURT: Basically what he said is he's going to mark for I.D. the others, but only offer into evidence the summaries.

4 MR. BROWN: Well, if there is an objection just on summaries, then we would offer both. L would be the backup in the original records, as was testified, and then these are just simply summaries of the voluminous entries contained in item L.

5 THE COURT: Okay. I'll hear from --

6 MR. VARGA: Your Honor, if I may be heard just for a moment. I believe what counsel is describing and the witness is talking about as being original documents from the Brown Rudnick system, in a very real sense they are also all summaries, because the defendants have not been given the benefit of any of the original underlying documents that would allow us to examine and evaluate, for example, video production costs that are allegedly charged, cellular telephone expenses, travel expenses in the amount of --

1 A This is a summary of the disbursements broken down by cost code, by month.

2 Q And the documents behind Tab B and Tab C, were those taken from the original records that are in front of you and marked for identification as item L?

3 A Yes.

4 Q And if you could also look at Tab D, could you tell me what that document is?

5 A That is a CTF, Client Trust Fund summary.

6 Q And what does that show?

7 A That shows deposits and wires from --

8 Q Deposits and wires from --

9 A To Brown Rudnick on behalf of the Rhodeses.

10 Q And is this also taken from the original records as they're maintained on the accounting system?

11 A Yes.

12 MR. BROWN: Your Honor, I would offer the entire collection of documents into evidence.

13 THE COURT: I'm sorry, by the "entire collection," you mean Exhibit L as well or just these?

14 MR. BROWN: A through D, to keep the collection of exhibits down, and they do contain --

15 it's summaries of the information that's contained in the large collection of L.

1 well, I won't get into the amounts, but travel expenses, and all these other items that they are making claim for in this case, these documents purport to summarize them, as does the document or the series of documents that Mr. Brown is calling the summaries.

2 We have requested the originals. In particular, counsel for AIG has requested them, but via e-mails. I'm not aware that they've ever been provided, and I think it's inappropriate to admit summaries of summaries when the underlying documents have not been produced in the case. We should at least have been afforded an opportunity to review them; we weren't.

3 THE COURT: Okay. Mr. Brown?

4 MR. BROWN: Your Honor, those entries, the document L, are the original records as was testified. Those are basically the accounting records of Brown Rudnick, and they are relied upon. And under the Real Bank case, any documents or any entries that are relied upon can be admitted as business records. And if there is an objection --

5 THE COURT: Mr. Varga's point, as I understand it, is that he said, for instance, with regard to disbursements for airplane flights, he sought

1 the original records with regard to those bills.

2 MR. BROWN: I don't believe there was ever  
3 actually a request for receipts and checks paid and  
4 that sort of information, no, your Honor. I don't  
5 recall any such request.

6 MR. VARGA: Your Honor, as I mentioned, I was  
7 not the one that requested them, but Mr. Cohen -- I'm  
8 sorry, Mr. McDonough actually requested them in an e-  
9 mail dated February 5, 2007, to Ms. Pinkham and copied  
10 Mr. Pritzker and Mr. Brown, Rachel Lipton, Rebecca  
11 McDowell, and Susan Oldham of AIG. That was February  
12 5th of this year.

13 MR. BROWN: My memory was faulty.

14 MR. VARGA: But if --

15 THE CLERK: Counsel.

16 MR. BROWN: Either way, your Honor, I believe  
17 that goes to the weight of the evidence, not the  
18 authenticity, and admissibility of the accounting  
19 records of Brown Rudnick. The fact that they are costs  
20 that were paid, and if I'm allowed to continue -- or,  
21 I'm sorry, were charged to the Rhodes family, and Ms.  
22 Kelley will testify to that they were in fact paid by  
23 the Rhodes family, Harold Rhodes testified that he did  
24 pay them, those are costs incurred in the litigation.

1 THE COURT: Well, let me ask Ms. Kelley, if I  
2 may.

3 When you incorporate certain expenses as  
4 disbursements, do you require receipts?

5 THE WITNESS: For large disbursements? Mm-  
6 hum.

7 THE COURT: And how large?

8 THE WITNESS: Probably anything over 500.

9 THE COURT: And if it's below 500?

10 THE WITNESS: Usually you have a backup, you  
11 have a receipt and it is paid.

12 THE COURT: And do you keep those receipts  
13 after you make the disbursement?

14 THE WITNESS: Yes.

15 THE COURT: So there is a file somewhere  
16 containing all of these receipts?

17 THE WITNESS: Yes.

18 THE COURT: But you may not have receipts for  
19 all expenses below 500 because they're not required.

20 THE WITNESS: A partner has to sign off on  
21 anything over 500. Under 500, we have receipts. We do  
22 have receipts for everything.

23 THE COURT: Okay. But let me make sure I  
24 understand. And let's focus on the Rhodes case. Did

1 Mr. Pritzker provide you with receipts for all -- or  
2 Mr. Pritzker or his colleagues provide you with  
3 receipts with regard to every disbursement?

4 THE WITNESS: Some disbursements are  
5 internal. Those are automatically, so I don't have a  
6 receipt for those. But outside receipts, yes, there  
7 will be.

8 THE COURT: There will be?

9 THE WITNESS: Mm-hmm.

10 THE COURT: All right. And you keep those?

11 THE WITNESS: We keep them in storage.

12 THE COURT: All right. Okay. Well, I mean,  
13 an e-mail request on February 7 is not a request for  
14 production of documents, so I think what I will do is I  
15 will overrule the objection. I think it does go to  
16 weight as opposed to admissibility, but I will ask Ms.  
17 Kelley to go to your storage facility and retrieve  
18 those receipts and make them available for defense  
19 counsel, as soon as that can be done.

20 How long does it take to get things from  
21 storage?

22 THE WITNESS: You want a receipt for every  
23 disbursement here?

24 THE COURT: Well, let me ask you this. Is it

1 part of the same file?

2 THE WITNESS: They're all in different files  
3 regarding what the receipt pertains to, so.

4 THE COURT: Oh. So they're not kept by the  
5 client number?

6 THE WITNESS: No.

7 THE COURT: So you would have all the taxi  
8 receipts in a taxi?

9 THE WITNESS: Yes.

10 THE COURT: And they're not done by clients.  
11 You'd have to pull all the taxi receipts and determine  
12 which of them relate to this case?

13 THE WITNESS: Yes.

14 THE COURT: Do you have any which are  
15 organized by client number?

16 THE WITNESS: No.

17 THE COURT: All right. So, pragmatically, if  
18 you were to do this, you would have to go by the  
19 category of -- well, strike that. It's done by cost  
20 code?

21 THE WITNESS: Yes.

22 THE COURT: So you would go to the cost code,  
23 and you'd be gathering up every receipt for every case  
24 that Brown Rudnick did for, say, cab fares?

1 THE WITNESS: Yes.

2 THE COURT: All right. Well, if that's the  
3 case, I will retract my request to have that done, and  
4 I will overrule the objection. I do think it goes more  
5 to weight than to admissibility. If it was relatively  
6 simple, like retrieving from the storage facility the  
7 box of client receipts for this particular client  
8 number, well, plainly I would have asked you, because I  
9 did. But in view of the means by which they are kept,  
10 I think it would be unduly burdensome and the burden  
11 would exceed the benefits, so I will overrule.

12 MR. VARGA: Your Honor, if I may. And I  
13 understand the court's ruling, but just for the record,  
14 to the extent that it may be relevant to the court's  
15 analysis of the issue, my belief, although I don't have  
16 the document in front of me, is that document requests  
17 that were propounded to the plaintiffs, either by AIG,  
18 National Union, or Zurich, or both, requested  
19 documentation relative to damages, which certainly  
20 would -- this would come within the scope with -- I'm  
21 sorry, this would come within that scope. And I would  
22 also note that the summary set of documents that are  
23 dated -- the spreadsheet's dated June 22, 2006 -- were  
24 in fact produced by plaintiffs at, I believe, or around

1 that you're allowed to provide a summary as long  
2 as the underlying documents are available or for  
3 essentially review in cross-examination. You've  
4 made them available; they're marked for I.D. If  
5 you wish to admit them, you may. If they wish to  
6 admit them, they may. But I'm not requiring you  
7 to admit them in order to get the summary in.  
8 That's really your call.

9 MR. BROWN: Thank you, your Honor. So  
10 we'll move the packet of summaries into evidence  
11 as the next exhibit.

12 THE COURT: And having noted the  
13 objection -- I'm sorry, I did not hear Mr. Cohen.  
14 Do you join in Mr. Varga's objection?

15 MR. COHEN: Yes, your Honor.

16 THE COURT: Anything else beyond --

17 MR. COHEN: Another problem with that,  
18 but I think we'll get that out on cross, I don't  
19 believe that these documents reflect the date that  
20 the costs were actually incurred, but I believe --  
21 I'm going to show this on cross -- that they  
22 reflect the date that they were paid by Brown  
23 Rudnick. So I'm not sure how you can determine  
24 what the damages for costs would be without

1 that time, June of 2006.

2 THE COURT: I'm sorry. The what? I'm sorry,  
3 I lost you.

4 MR. VARGA: The spreadsheet that -- I don't  
5 recall what it's been marked, if it's L or something  
6 else, but the thicker package of backup documents was  
7 produced in response to a document request; the backup  
8 for it was not. So to the extent that that factors  
9 into the court's analysis, I would just renew the  
10 objection.

11 THE COURT: Okay. Well, having renewed, it's  
12 denied, because the fact of the matter is, if you had  
13 moved to compel and I heard what I just heard, I would  
14 have come to the same view. So you may proceed.

15 MR. BROWN: Thank you, your Honor. Does that  
16 go for L and the summaries as well, or --

17 THE COURT: Well, I'm not requiring you --  
18 you are permitted to offer a summary, as long as you've  
19 made available the underlying documents. Are you  
20 seeking to admit the underlying documents? You can  
21 do that, too, but you're not required --

22 MR. BROWN: The underlying documents were  
23 there documents that were marked as L.

24 THE COURT: Right. I think the law is

1 knowing what date they were actually incurred.

2 THE COURT: That I think will go to  
3 weight, but it is a proper subject for cross-  
4 examination. So they may come in as the next  
5 exhibit, 90.

7 (Exhibit No. 90, marked; Disbursements.)

8 (By Mr. Brown)

9 Q Ms. Kelley, do those documents reflect the date  
10 that they were incurred or the date that the  
11 charges were incurred?

12 A Yes.

13 Q Actually, Ms. Kelley, if you wouldn't mind if -- I  
14 kept it, I apologize.

15 THE COURT: I'm sorry. When you  
16 "incurred," what do you mean by "incurred"?

17 THE WITNESS: Well, photocopies and  
18 internal costs are posted immediately to a matter.  
19 The receipts, as long as they are -- they are  
20 paid as soon as we receive the receipt.

21 THE COURT: I'm sorry. They're paid or  
22 they are reflected here?

23 THE WITNESS: Reflected here.

1 THE COURT: Let me make sure I  
2 understand. If I were an attorney at Brown  
3 Rudnick back at the time of the Rhodes case and I  
4 had copies made, I would have that done, I gather,  
5 internally through the Brown Rudnick copy service,  
6 correct?

7 THE WITNESS: Correct.

8 THE COURT: And that would be posted  
9 immediately?

10 THE WITNESS: Yes.

11 THE COURT: And so you would have a  
12 record of the date in which those copies were  
13 made.

14 THE WITNESS: Yes.

15 THE COURT: If I flew to California for a  
16 week to do depositions in that case, came back and  
17 a week later provided you with the receipts, so  
18 let's say I left on June 1st and gave you the  
19 receipts on June 15th, when you say -- I mean,  
20 there would be a credit card that would be used to  
21 pay it, correct?

22 THE WITNESS: Hm-hmm.

23 THE COURT: Would you repay me for my  
24 credit card expense?

1 THE WITNESS: The disbursements are paid  
2 as you submit them. So the day you submit them,  
3 if you submitted them on the 15th, that's the date  
4 that they would follow. But in the description it  
5 usually details the date that the work was done or  
6 the receipt covers. So as a posting date, it's  
7 the day that the check was cut, and the  
8 description, it usually tells the time period  
9 covered.

10 THE COURT: The date the check was cut by  
11 --

12 THE WITNESS: Brown Rudnick.

13 THE COURT: Brown Rudnick to me, to  
14 reimburse me.

15 THE WITNESS: Yes.

16 THE COURT: Okay. So basically the date  
17 here reflects the date of reimbursement.

18 THE WITNESS: Yes.

19 THE COURT: And with regard, say, to an  
20 airplane flight, just by way of example, what's  
21 the usual lag time between your receipt of the  
22 request for reimbursement and the actual  
23 reimbursement?

24 THE WITNESS: That's up to an attorney to

1 present. We don't have a deadline. It's up to  
2 the attorney to present it.

3 THE COURT: In terms of how quickly they  
4 present them to you.

5 THE WITNESS: Yes.

6 THE COURT: Right. But once it's  
7 presented to you, what's the time lag between your  
8 repaying, say, me?

9 THE WITNESS: Usually the same day.

10 THE COURT: All right. Being part of the  
11 court system, I'm not used to such prompt  
12 reimbursement for expenses, but --

13 MS. PINKHAM: Let the record reflect the  
14 receipt has to be walked into accounting the same  
15 day.

16 THE COURT: All right. You may proceed.  
17 (By Mr. Brown)

18 Q Ms. Kelley, if you would turn to Tab A of Exhibit  
19 90, please. And on the first page there, could  
20 you tell me what the total amount of expenses on  
21 that page are?

22 A \$33,998.80.

23 Q I think you read that wrong. Do it one more time.

24 I believe it's \$898.80. I just think you

1 misspoke.

2 A Under A?

3 THE COURT: I'm sorry, which page are you  
4 on?

5 Q I think you just misspoke.

6 A I'm sorry.

7 THE COURT: There are two documents.

8 MR. BROWN: Yes, it's page 1, under A.

9 THE COURT: Page 1, okay. You want her,  
10 what, to read the total?

11 MR. BROWN: Yes.

12 THE COURT: Of billed amount or worked  
13 amount? They're the same.

14 MR. BROWN: Yes. Either total.

15 THE COURT: We can save time. It's  
16 before me. It's 33,898.80, so having done that,  
17 now you can ask what that means.

18 (By Mr. Brown)

19 Q And then on the second page, the total is 108,633?

20 A Yes.

21 Q And to get the total amount of expenses incurred  
22 by the Rhodes family, you add those two numbers  
23 together; is that right?

24 A Correct.

1 Q And are you aware of whether or not the Rhodes  
2 family paid all of those costs?  
3 A Yes, they did.  
4 Q And do you know how they paid them, how Brown  
5 Rudnick was paid for them?  
6 A Brown Rudnick took the money from their settlement  
7 and paid the disbursements in full.  
8 Q And the document that's under Tab D, does this  
9 reflect all the settlement payments received by  
10 Brown Rudnick on behalf of the Rhodes family in  
11 the underlying case?  
12 A Yes.  
13 MR. BROWN: Thank you. I have no further  
14 questions.  
15 THE COURT: Okay. Mr. Cohen, now you can  
16 get to that cross-examination you promised me.  
17 MR. COHEN: I'm sorry?  
18 THE COURT: Now you can get to that  
19 cross-examination you promised me.  
20 MR. COHEN: I will get to that.  
21 CROSS-EXAMINATION BY MR. COHEN:  
22 Q First, Ms. Kelley, are you the only billing  
23 coordinator at Brown Rudnick or are there a bunch  
24 of them?

1 A There are four.  
2 Q Four. Okay.  
3 But you're knowledgeable about how the  
4 billing system works at the firm, I take it.  
5 A Billing system.  
6 Q You've been there a long time.  
7 A I have.  
8 Q Now, if you look at the big, thick package that we  
9 have marked here, it has a column on the far left,  
10 right?  
11 A Yes.  
12 Q And that column has two dates for every entry,  
13 correct?  
14 A Correct.  
15 Q And for all of the entries in the whole package, I  
16 believe, I haven't checked every page, but the  
17 second entry seems to be 9/16/2005. So I take it  
18 that's the date that this document was run off the  
19 computer system, right?  
20 A No.  
21 Q No? What does that date refer to?  
22 A That is the date the disbursements were paid out  
23 of the settlement. That's an invoice number.  
24 Q That's the date that you billed the Rhodeses for

1 the disbursements?  
2 A In the second part of it. In the first part, the  
3 date is December 29, 2004.  
4 Q Okay. Now, the first date, the upper date, is the  
5 date that, for external costs, Brown Rudnick  
6 actually cut the check to pay whatever the outside  
7 costs were, right?  
8 A Correct.  
9 Q So if there was a deposition of an expert, say, or  
10 an expert of anybody, and you had a charge for a  
11 deposition transcript, the date that is referred  
12 to in that left-hand column would be not the date  
13 that the deposition took place, right?  
14 A I don't post disbursements, so I believe that is  
15 correct.  
16 Q Okay. And I think we can tell that for certain by  
17 looking at some of the entries. For example, if  
18 you turn to page 178, and I'm referring to the  
19 page numbers in the upper right-hand corner of the  
20 big package, do you see that there's a mediation  
21 fee there dated --  
22 MR. BROWN: What page number?  
23 MR. COHEN: 178. I don't know what the  
24 Bates stamp number is. I can find it for you if

1 you want.  
2 MR. BROWN: No, that's fine.  
3 MR. COHEN: 3613.  
4 (By Mr. Cohen)  
5 Q There is a charge there for a mediation fee that  
6 was paid to a gentleman Tom Corder [phonetic],  
7 right?  
8 A Yes.  
9 Q And can you tell us what the date on that is?  
10 A September 28, 2004.  
11 Q And if I told you that the mediation in the case  
12 actually took place on August 11, 2004, that was  
13 more than a month and a half after the mediation  
14 took place, right?  
15 A Yes.  
16 Q And if you look at the same page, you see that  
17 there is a charge for expert fees as well, right?  
18 A Yes.  
19 Q And by that time the trial was over, so I presume  
20 that whatever the expert did, he did before the  
21 trial was over, right?  
22 A I would think so.  
23 Q So that would have been the date that you actually  
24 paid the expert and not the date that he performed

1 whatever services he performed, whether he was  
2 testifying at an audiovisual deposition or a trial  
3 or whatever, right?

4 A Correct.

5 Q So there's no way to tell from the two documents  
6 that you've marked here today, with respect to at  
7 least outside fees outside the firm, exactly when  
8 those dates, those costs were incurred, right?

9 A Correct.

10 MR. COHEN: Your Honor, I move to strike  
11 both exhibits based on that, because there's no  
12 way from that you can determine whether the costs  
13 were incurred before or after you make any finding  
14 against any of the defendants, if you do, that  
15 they violated the statute, because obviously it's  
16 going to be from a particular date.

17 THE COURT: I'll hear from Mr. Brown as  
18 to that.

19 MR. BROWN: Your Honor, again, that only  
20 goes to the weight of costs. Ms. Kelley did  
21 testify that they are placed in here when they are  
22 submitted by attorneys. They'll be based on when  
23 -- many of these costs are, in fact, of the  
24 automatically entered variety. As far as expert

1 testimony is that the date she marks is the date  
2 she pays; and while she is prompt, sometimes  
3 attorneys don't get the bill and sometimes  
4 attorneys don't deliver the bill to her  
5 immediately. But I think that does go to weight  
6 as opposed to admissibility. So I will overrule  
7 it, but I will have the additional data that's  
8 provided from what was Exhibit L and now is  
9 Exhibit 91.

10  
11 (Exhibit No. 91, marked; Previously L for  
12 I.D.)

13  
14 (By Mr. Cohen)

15 Q Are you aware, Ms. Kelley, that the Rhodeses  
16 signed a contingent fee agreement or Mr. Rhodes  
17 signed a contingent fee agreement in this case?

18 A Yes.

19 Q And the contingent fee agreement stated that the  
20 clients are liable to the attorneys for all  
21 reasonable expenses and disbursements associated  
22 with the services described, right?

23 A Yes.

24 Q That's the standard contingent fee agreement, I

1 fees and those sorts of things, for example, Dr.  
2 Biesaw testified at trial and would have been paid  
3 within 30 days of his testimony, according to  
4 these records. We know when the mediation  
5 occurred, so the fact that Mr. Porter was paid 45  
6 days later doesn't change the fact that the Rhodes  
7 family actually incurred that cost. It goes to  
8 weight, not to admissibility, and therefore  
9 there's no reason to strike.

10 As well, also, defense counsel has been  
11 told several times that Mr. Pritzker, since they  
12 are calling him anyway, will be able to testify as  
13 to when costs were -- when several of the costs  
14 were incurred, as he was the billing attorney  
15 ultimately responsible for the costs being posted  
16 to the account.

17 THE COURT: In view of the that, do you  
18 wish to offer Exhibit L as an exhibit?

19 MR. BROWN: Sure.

20 THE COURT: I will overrule the  
21 objection. I will have Exhibit L be offered as  
22 Exhibit 91 because it provides me with additional  
23 information as to the precise dates of  
24 disbursements. I do recognize that Ms. Kelley's

1 take it, the firm uses?

2 A (Witness nodded.)

3 Q You have to answer verbally so she can take it  
4 down.

5 A Yes.

6 Q And did you do anything to determine whether the  
7 six thousand or so entries that are in the exhibit  
8 are, in fact, reasonable expenses and  
9 disbursements?

10 A No, I didn't.

11 Q And it says that in Paragraph 5 of the contingent  
12 fee agreement -- and I guess I'll show that to you  
13 and see if you recognize that. Sorry I don't have  
14 an extra copy but I know everybody has one.

15 Is that the Rhodes' contingent fee  
16 agreement?

17 A I've never seen this.

18 Q Well, in looking at it, can you identify it as a  
19 contingent fee agreement entered into by the  
20 Rhodeses?

21 A Yes.

22 MR. COHEN: Can we mark it, your Honor?

23 THE COURT: Mark it as an exhibit or mark  
24 it for I.D.?

1 MR. COHEN: Let's mark it as an exhibit.  
 2 THE COURT: Any objection?  
 3 MR. BROWN: No, your Honor.  
 4 THE COURT: It may come in as Exhibit 92.  
 5  
 6  
 7 (Exhibit No. 92, marked; Contingent Fee  
 8 Agreement.)  
 9  
 10 (By Mr. Cohen)  
 11 Q And it says that the expenses to be paid by the  
 12 Rhodes include, but are not limited to, sheriff  
 13 and constable fees, filing fees, expert fees,  
 14 travel expenses, long-distance telephone, copying  
 15 and other costs. Right?  
 16 A Correct.  
 17 Q Is it generally the practice at Brown Rudnick to  
 18 charge for local telephone calls?  
 19 A I don't know.  
 20 Q Why does the contingent fee agreement only refer  
 21 to only long-distance calls if you charge for  
 22 local calls?  
 23 MR. BROWN: Objection, your Honor.  
 24 A I don't know.

1 MR. BROWN: She said she didn't know if  
 2 we even charge for local phone calls.  
 3 THE COURT: I will sustain the objection.  
 4 It's rhetorical, I think.  
 5 (By Mr. Cohen)  
 6 Q Well, there are local phone calls included in your  
 7 six thousand or so disbursement entries, right?  
 8 A I don't know if there are.  
 9 Q Well, when it says "telephone in-house," is that a  
 10 local phone call?  
 11 A Not necessarily.  
 12 Q So it could be local, it could be long distance?  
 13 A Yes.  
 14 Q We have no way of knowing which, right?  
 15 Now, among other things, there were  
 16 charges for secretarial overtime in here. Isn't  
 17 that part of firm overhead?  
 18 A No.  
 19 Q No? And meals, this covers meals in here?  
 20 A Yes.  
 21 Q Is that something that Brown Rudnick customarily  
 22 charges clients for?  
 23 A I don't know.  
 24 Q Well, you're one of the four billing coordinators,

1 right?  
 2 A I do the billing. I don't approve of what is in  
 3 here. Mr. Pritzker edits these monthly; and if  
 4 there is an error, he makes me aware of it. But  
 5 it is not my job to approve what is in this.  
 6 Q Okay. Are you aware of how the rates for, say,  
 7 copying is determined?  
 8 A No.  
 9 Q You're aware that the rates charged are twenty  
 10 cents a page for every page copied, correct?  
 11 A Yes.  
 12 Q You have no idea of how that figure was arrived  
 13 at?  
 14 A No, I don't.  
 15 Q And you don't know what the actual copying costs  
 16 are that are incurred per page by Brown Rudnick,  
 17 right?  
 18 A No, I don't.  
 19 Q Same thing for in-house binding. You have no idea  
 20 how that's figured out?  
 21 A No, I don't.  
 22 Q How about for the in-house telephone charges. It  
 23 looks like you're billing forty-eight cents a  
 24 minute for that. Are you aware of that?

1 A No, I'm not.  
 2 Q But you have no idea how that's calculated?  
 3 A When an attorney makes a long-distance call, he  
 4 has a client matter number that he puts in and  
 5 that's how it gets generated onto --  
 6 Q Well, do you know whether in terms of local calls  
 7 how that's generated?  
 8 A I don't.  
 9 Q How about, there are a bunch of cell phone bills  
 10 for Mr. Pritzker, do you know how that was  
 11 calculated?  
 12 A He would provide a receipt for that.  
 13 Q And would the receipt indicate how much of that  
 14 was due to the Rhodes case as opposed to some  
 15 other personal or business matter?  
 16 A I don't know.  
 17 Q Now, about Westlaw and LEXIS charges, they're in  
 18 here too, right?  
 19 A Yes.  
 20 Q How are the charges for that calculated?  
 21 A I don't know.  
 22 Q In the column, I guess it's in Exhibit A, there's  
 23 an entry for consulting. Do you know what's  
 24 encompassed within t category of consulting?



1 A No, I don't.  
 2 Q And there's also charges for airfare. Do you have  
 3 any idea what airfare was required to be paid in  
 4 this particular case?  
 5 A I don't.  
 6 Q And how about petty cash. There are charges for  
 7 general petty cash. Do you know what that refers  
 8 to?  
 9 A No, I don't.  
 10 Q How about miscellaneous expenses, any idea what  
 11 that means?  
 12 A Those are checks.  
 13 Q Those are checks?  
 14 A Yes, they are.  
 15 Q I'm not sure I understand.  
 16 A Miscellaneous expense is a check that is cut from  
 17 Brown Rudnick, but they don't necessarily fall  
 18 into a category, or we don't have a cost code set  
 19 up so it's put under a miscellaneous charge.  
 20 Q And what might miscellaneous include?  
 21 A Whatever doesn't have a cost code.  
 22 Q Now, I believe the affidavit that you submitted  
 23 indicated that on September 10th, the Rhodeses  
 24 received a \$275,000 payment from One Beacon

1 Insurance. Do you recall that?  
 2 A Yes.  
 3 Q And on September 24, 2004, they received a payment  
 4 of \$175,000 from Network Adjustors. Do you  
 5 understand that that's the representative of the  
 6 other insurance company, one of the other  
 7 insurance companies?  
 8 A I didn't know that.  
 9 Q Okay. The \$550,000 that was received in September  
 10 2004, were the costs incurred up to that time  
 11 deducted from the payments made to the Rhodeses?  
 12 A They were deducted in December of 2004.  
 13 Q Okay. That was when a check for \$2,322,995.75 was  
 14 received, right?  
 15 A No, just after that.  
 16 Q What was just after that? A check was received  
 17 after that or the costs were deducted just after  
 18 that?  
 19 A The costs were deducted on December 28th -- I  
 20 mean, were paid, I'm sorry. Excuse me.  
 21 Q Now, are you aware that Brown Rudnick, on behalf  
 22 of the Rhodeses, filed a motion to seek recovery  
 23 of costs in the underlying accident case?  
 24 A No, I wasn't.

1 MR. COHEN: Your Honor, I'd like to offer  
 2 Exhibit what we marked as D229, which I guess is  
 3 disputed, and it's the Opposition of GAF to the  
 4 Plaintiffs' Motion for Post-Judgment Costs.  
 5 MR. BROWN: Objection, your Honor.  
 6 THE COURT: I'm sorry, it's the  
 7 opposition of GAF? Why would that be --  
 8 MR. COHEN: I don't have their motion,  
 9 but we have the opposition which indicates how  
 10 much costs they were seeking from the court.  
 11 MR. PRITZKER: Your Honor, if I may.  
 12 THE COURT: You may.  
 13 MR. PRITZKER: There was a motion for  
 14 costs. There was an opposition. The case then  
 15 went -- there was a notice of appeal that was  
 16 never heard. The case was settled. It was never  
 17 resolved.  
 18 THE COURT: And were costs part of the  
 19 judgment?  
 20 MR. PRITZKER: No, they were never part  
 21 of the judgment because there was never a final  
 22 judgment after the motion was heard. The judgment  
 23 that entered was the judgment on the jury verdict  
 24 and then the notice of appeal and then the

1 settlement.  
 2 THE COURT: So costs had not been  
 3 ascertained at the time of the judgment?  
 4 MR. PRITZKER: Correct.  
 5 THE COURT: All right. Well, I don't  
 6 quite understand why the opposition, if it was  
 7 their motion in support of it, then it would be  
 8 their assertion as to what their cost would be,  
 9 but it's not going to come into evidence.  
 10 MR. COHEN: We'll mark it for I.D.  
 11  
 12 (Exhibit M for I.D., marked: GAF's  
 13 Opposition to Plaintiffs' Request for Post-  
 14 Judgment Costs.)  
 15  
 16 MR. COHEN: That's all I have for you,  
 17 Ms. Kelley. Thank you very much.  
 18 THE COURT: Okay. Mr. Varga.  
 19 CROSS-EXAMINATION BY MR. VARGA:  
 20 Q Ms. Kelley, could you turn to Exhibit 90, please,  
 21 Tab D, the last tab. I'd ask you to identify for  
 22 the court all of the deductions of costs that were  
 23 taken from settlement monies that were paid to the  
 24 Rhodes family, or payable to the Rhodes family.

1 If you could identify for those on the page.  
 2 A I'm sorry, for --  
 3 Q Yes. My question is, can you show the court where  
 4 on the first page, or the only page, of Tab D of  
 5 Exhibit 90 there are references to the actual  
 6 deductions of costs from amounts that had been  
 7 sent by the insurance companies in settlement of  
 8 the case, the underlying case.  
 9 A Costs meaning disbursements?  
 10 Q Yes.  
 11 A December 28, 2004, is the first one.  
 12 Q Index No. 48971?  
 13 A Yes. And then --  
 14 Q Your answer is yes?  
 15 A Yes.  
 16 Q And the next one?  
 17 A And then the costs were paid July 15, 2005.  
 18 Q And that's Index No. 52585?  
 19 A Yes.  
 20 Q Part of the description in Index No. 52585, it  
 21 says "Fees and Costs (Settlement). Payee: Brown,  
 22 Rudnick, Berlack, Israels, LLP." How much costs  
 23 were deducted from that payment?  
 24 A All of the outstanding costs were paid.

1 Q So the balance of the \$150,000 and change the  
 2 plaintiffs claim in this case is costs?  
 3 A I believe it was 108, because I think the 33 was  
 4 already paid.  
 5 Q I see. And the 33 is paid above, when the  
 6 settlement check came in from Zurich, correct?  
 7 A Correct.  
 8 Q You testified earlier there were two file numbers  
 9 opened for the Rhodes case, correct?  
 10 A Correct.  
 11 Q One was a contingency fee case file and the other  
 12 was a file that was created after the point in  
 13 time when the case settled. Yes?  
 14 A It's not actually a file. It's an internal  
 15 billing number that is just used to receipt the  
 16 settlement.  
 17 Q The second one you're referring to.  
 18 A Yes.  
 19 Q I see.  
 20 So your firm did not maintain separate  
 21 case file numbers for Marcia Rhodes, Rebecca  
 22 Rhodes and Harold Rhodes, correct?  
 23 A Correct.  
 24 Q So it was just the one file number during the

1 course of the contingency case.  
 2 A I believe so.  
 3 Q And the costs that we've been talking about today  
 4 were all charged against that one number, correct?  
 5 A I believe so.  
 6 Q How much of the costs that Brown Rudnick deducted  
 7 from payments meant to be given to the Rhodes were  
 8 actually paid by Harold Rhodes as opposed to  
 9 Rebecca Rhodes or Marcia Rhodes?  
 10 A I don't know.  
 11 Q What percentage of the costs that were charged for  
 12 disbursements and deducted from the Rhodes'  
 13 payments, or the payments intended for them, were  
 14 paid by Harold Rhodes?  
 15 A I don't know.  
 16 Q If I asked you the same questions for Marcia  
 17 Rhodes and Rebecca Rhodes, would you be able to  
 18 answer those questions?  
 19 A No.  
 20 Q So you had no idea how much money, if any, in  
 21 terms of costs were charged or incurred by Rebecca  
 22 Rhodes, correct?  
 23 A Correct.  
 24 Q And you have no idea as you sit here today how

1 much, in terms of chart costs, were charged to  
 2 Marcia Rhodes?  
 3 A Correct.  
 4 Q And you don't know how much, in terms of costs,  
 5 were actually charged and paid by Harold Rhodes?  
 6 A Correct.  
 7 Q And you can't tell us that based on any of the  
 8 documents that plaintiff counsel have introduced  
 9 into evidence today, correct?  
 10 A Correct.  
 11 Q And you've never spoken to Mr. Rhodes or Mrs.  
 12 Rhodes or Rebecca Rhodes on the subject of how, if  
 13 at all, they allocated any of the costs that were  
 14 charged or deducted from payments that were meant  
 15 to be given to them?  
 16 A No, I haven't.  
 17 MR. VARGA: I have no further questions.  
 18 THE COURT: Any redirect?  
 19 MR. BROWN: Just a couple of questions,  
 20 your Honor.  
 21 REDIRECT EXAMINATION BY MR. BROWN:  
 22 Q Ms. Kelley, do you know if there were any  
 23 additional disbursements made on the client trust  
 24 account after September 6, 2005?

1 A I don't.  
 2 Q Do you know if there were any -- I'll withdraw  
 3 that.  
 4 When you were acting as billing  
 5 coordinator on the Rhodes case, you were basically  
 6 following attorney's instructions as to the bills;  
 7 is that correct?  
 8 A Yes.  
 9 Q And Ms. Kelley, do you have to enter a client  
 10 matter number into the telephones at Brown Rudnick  
 11 when you make a local phone call?  
 12 A No.  
 13 Q So no client is charged for those?  
 14 A No.  
 15 MR. BROWN: Thank you.  
 16 THE COURT: Any further questions?  
 17 MR. VARGA: No, your Honor.  
 18 THE COURT: If you would just turn to  
 19 Bates 3638. Do you have it in front of you?  
 20 MR. BROWN: It's the first page of  
 21 Exhibit 91, the big packet, the first page.  
 22 THE COURT: Look to the various telephone  
 23 in-house rates. Do you understand why there would  
 24 be different rates per minute for each of those or

1 for most of those telephone calls?  
 2 THE WITNESS: I don't. I don't input  
 3 costs.  
 4 THE COURT: Okay. But your understanding  
 5 as to how this is generated is that it's generated  
 6 automatically by your telephone system.  
 7 THE WITNESS: Yes.  
 8 THE COURT: And you know of this bill  
 9 only because somebody inputs the billing number  
 10 before the call is made.  
 11 THE WITNESS: Yes.  
 12 THE COURT: And I think Mr. Brown asked  
 13 you, let me make sure it's clear, do you know  
 14 whether or not an attorney can input a client  
 15 number before a local call?  
 16 THE WITNESS: It isn't necessary to input  
 17 a client number for a local call.  
 18 THE COURT: So you don't have to.  
 19 THE WITNESS: No.  
 20 THE COURT: Do you know what happens if  
 21 you were to do it?  
 22 THE WITNESS: No.  
 23 THE COURT: And can an attorney make a  
 24 long-distance call without putting in a client

1 number of some other personal code?  
 2 THE WITNESS: No.  
 3 THE COURT: So no long-distance call can  
 4 be made unless the attorney either puts his or her  
 5 own personal code in or a client billing number.  
 6 THE WITNESS: Yes.  
 7 THE COURT: Okay. I have no further  
 8 questions. Any questions of counsel?  
 9 MR. BROWN: One quick one.  
 10 (By Mr. Brown)  
 11 Q Ms. Kelley, do you know if the telephone in-house  
 12 charges listed on here varied because of the  
 13 length of time of the telephone call rather than  
 14 different rates per minute?  
 15 A I don't know that, but probably.  
 16 MR. BROW: Thank you.  
 17 THE COURT: Okay. Thank you. You may  
 18 step down and we'll take our morning break.  
 19 Anything you have before you rest, by the way?  
 20 MR. PRITZKER: No.  
 21 THE COURT: Okay.  
 22 MR. PRITZER: Having said that, your  
 23 Honor, I probably should have checked with my  
 24 bosses.

1 THE COURT: Well, this is probably a  
 2 better chance. Why don't you confer, then, with  
 3 your colleagues and then after the break we'll  
 4 address the issue of resting. All right? So we  
 5 are adjourned.  
 6 (A recess was taken.)  
 7 THE COURT OFFICER: This Honorable Court  
 8 is back in session, please be seated.  
 9 THE COURT: Mr. Pritzker.  
 10 MR. PRITZKER: Your Honor, the plaintiff is  
 11 not resting, because, as the court remembers, there was  
 12 the dialogue about me testifying to the reasonableness  
 13 of the costs as part of me being called later. And  
 14 also, we had designated Tracy Kelly as a witness of  
 15 ours but agreed that AIG could go forward with Ms.  
 16 Kelley and then we would do the cross-examination in  
 17 sequence. So except for those, we are resting.  
 18 THE COURT: Okay. So we will then proceed  
 19 with the defense case prior to the resting, and I think  
 20 I already said that there was no meaningful chance that  
 21 I would decide this case on a directed verdict standard  
 22 in view of the various issues that are both factual and  
 23 legal that will need to be resolved by me and perhaps  
 24 by an appellate court.

1 So I think that the better part of wisdom is  
2 to have the case reach its conclusion, have everything  
3 made a matter of the record, and I will decide it. And  
4 then after I decide it, I'm sure at least one, perhaps  
5 two appellate courts will take their shot at it.

6 MR. PRITZKER: But with that proviso, your  
7 Honor, the plaintiffs are done.

8 THE COURT: Okay.

9 MR. ZELLE: Your Honor, just as a formality,  
10 we will, once plaintiffs do rest, move for directed  
11 verdict.

12 THE COURT: Right. And you're certainly  
13 entitled to.

14 MR. VARGA: We will as well, your Honor.

15 THE COURT: Right. So your rights are  
16 reserved in that regard.

17 MR. ZELLE: Then National Union and AIG are  
18 calling William Cormack.

19 WILLIAM CORMACK. Affirmed.

20 DIRECT EXAMINATION BY MR. ZELLE:

21 THE COURT: All right. Please tell us your  
22 full name and state your -- and spell your last name,  
23 sir.

24 THE WITNESS: Yes. William T. Cormack, C-o-

1 r-m-a-c-k.

2 (By Mr. Zelle)

3 Q Where do you live?

4 THE COURT: Okay. Just for the record, Mr.  
5 Cormack, I did ask the clerk if he could affirm, which  
6 is fine. I think the clerk added "so help me God" at  
7 the end just out of reflex, but for all practical  
8 purposes, I view you as having affirmed, and we'll  
9 disregard that last phrase for your purposes, okay?

10 THE WITNESS: Thank you, Judge.

11 THE COURT: So with that, you may proceed.

12 MR. ZELLE: Thank you, your Honor.

13 (By Mr. Zelle)

14 Q Where do you live, Mr. Cormack?

15 A 6 Macintosh, Clarendon Hills, Illinois.

16 Q That's a Chicago suburb?

17 A It is.

18 Q How long have you been a Chicago area native?

19 A My whole life.

20 Q Cubs or White Sox?

21 A Definitely White Sox.

22 Q All right.

23 THE COURT: That will not go to my view of  
24 his credibility.

1 (By Mr. Zelle)

2 Q Mr. Cormack, let's start with your experience in the  
3 insurance industry. Did you take the bar in Illinois?

4 A Yes, I did.

5 Q And what was your first job?

6 A I worked at a law firm in Chicago.

7 Q What was the practice area?

8 A Insurance defense.

9 Q How long did you remain in private practice?

10 A Nine years.

11 Q Did you handle personal injury cases?

12 A I did.

13 Q Can you give the court a sense of the more serious  
14 types of personal injury cases you handled as an  
15 attorney?

16 A Yes. During those nine years, I went to verdict with  
17 juries 13 times, and I had a bench trial also. Those  
18 cases -- some of those cases were very serious personal  
19 injury cases. One of the trials was a 5-year-old child  
20 who was injured in an automobile accident, a passenger,  
21 and suffered severe brain damage resulting in two  
22 craniotomies, and the child was retarded at the time of  
23 trial.

24 Q More significant to this case than trial experience is

1 your claim handling experience. Tell us as an attorney  
2 what you did to develop serious personal injury cases  
3 for your insurance clients.

4 A During those nine years, I prepared many cases for  
5 disposition for the insurance clients, including a  
6 paraplegic case that was one that I handled. I was  
7 entirely responsible for the investigation and -- not  
8 the investigation, the preparation from the legal  
9 standpoint.

10 Q And do you view the defense attorney and the claims  
11 person at the insurance company to be partners in  
12 developing a case for investigation and evaluation  
13 purposes?

14 A I do.

15 Q Did you handle wrongful death claims as an attorney?

16 A Yes. I had dozens of wrongful death claims.

17 Q How long were you in private practice?

18 A Nine years.

19 Q And what did you do after leaving private practice?

20 A I went to work for one of my clients, Wausau Insurance  
21 Company, as a senior liability claims specialist.

22 Q When was that?

23 A 1974.

24 Q And since 1974, have you been involved in the insurance

1 claims handling business?  
 2 A I have.  
 3 Q All right. Most recently as a consultant or expert  
 4 witness, correct?  
 5 A That's correct.  
 6 Q Tell us what the responsibilities were at Wausau for a  
 7 liability claims specialist.  
 8 A I was charged with the responsibility of handling --  
 9 for claim handling for the major exposure cases in the  
 10 Illinois region for Wausau Insurance Companies.  
 11 Q If you could describe your responsibilities as a claim  
 12 handler in three words, what would those words be?  
 13 A Investigation, evaluation, and disposition.  
 14 Q How long were you a liability claims specialist?  
 15 A Ten years.  
 16 Q And what position did you take after that?  
 17 A Well, during those ten years I had a lot of experience  
 18 with major injury cases.  
 19 Q Let me go back to that then. Why don't you tell the  
 20 court the types of major injury cases that you handled  
 21 as a liability claims specialist.  
 22 A I had a number of cases which involved spinal cord  
 23 injury for which I did the investigation and handled  
 24 all the way through. I had a number of amputees; a

1 number of death cases. The amputees usually came from  
 2 -- Wausau insured 90 percent of the crane  
 3 manufacturers, and as a result, when a crane contacted  
 4 electric wires, there very often were serious injuries  
 5 to the people in the vicinity and usually resulted in  
 6 loss of limbs, and so I had cases where a man lost one  
 7 arm plus two legs. I had a case where a young man lost  
 8 two arms. They're very, very serious type injuries  
 9 that were the result of those accidents.  
 10 The largest case I had was the Consumers  
 11 Powers case -- Consumers Power, a western Michigan  
 12 case. It was a case for \$1 billion, which was a lot of  
 13 money back in the 70s, at the Consumers Power plant --  
 14 nuclear power plant in Palisades, Michigan.  
 15 Q Did you handle, as a liability claims specialist, motor  
 16 vehicle claims?  
 17 A I did.  
 18 Q Did you handle claims where liability was, or at least  
 19 the fault of the insured was virtually undeniable?  
 20 A I did.  
 21 Q Did you handle trucking claims?  
 22 A I handled trucking claims also.  
 23 Q Products liability work?  
 24 A Products liability also.

1 Q And that was during what time period?  
 2 A 1974 to 1984.  
 3 Q And in 1984, what job did you take?  
 4 A At that time, a number of environmental claims were  
 5 coming into Wausau. The first ones I saw was 1982.  
 6 And in 1984, I was assigned all of the environmental  
 7 claims for Wausau Insurance Company.  
 8 Q And did those include mass tort -- excuse me -- toxic  
 9 tort type claims?  
 10 A They did.  
 11 Q And bodily injury type claims?  
 12 A Yes.  
 13 Q All right. As the environmental claim manager at  
 14 Wausau, did you manage claims other than claims under  
 15 Wausau Insurance Company paper?  
 16 A Yes. Under contract, I handled all of the  
 17 environmental claims for Nationwide Insurance out of  
 18 Columbus, Ohio, and Scottsdale Insurance out of  
 19 Scottsdale, Arizona.  
 20 Q Can you describe some of the more serious bodily injury  
 21 type claims that you dealt with?  
 22 A One of the worst was -- there were 14 neural tube  
 23 defect babies in Bryan, Texas around the Pennwalt  
 24 Chemical Plant, which resulted in massive litigation,

1 30,000 plaintiffs, plus these 14 seriously injured  
 2 children.  
 3 I had cases involving people who ingested  
 4 alleged contaminated water and those kind of  
 5 situations.  
 6 I had the excess policy for the case in  
 7 Woburn, Massachusetts, which resulted in a movie, and  
 8 followed the trial with reports from the attorney for  
 9 the primary carrier.  
 10 Q That's the W. R. Grace case?  
 11 A W. R. Grace, yeah.  
 12 Q And was Wausau an excess insurer there?  
 13 A Yes.  
 14 Q And in connection with your responsibilities on that  
 15 case, did you deal with defense counsel?  
 16 A I did.  
 17 Q Who was that?  
 18 A Mr. Cheesman.  
 19 THE COURT: And who played you in the movie?  
 20 THE WITNESS: It didn't get to our level.  
 21 THE COURT: Is that right? Okay. That's  
 22 probably the part they cut. Okay.  
 23 (By Mr. Zelle)  
 24 Q How many cases did you handle where the paper issued by

1 Wausau or one the other companies was primary paper?  
 2 A I think of the environmental cases about 6,000 were  
 3 primary, and I also was in charge of approximately  
 4 4,000 excess claims.  
 5 Q In your work as a liability claims specialist, did you  
 6 deal primarily with primary policies?  
 7 A I did.  
 8 Q In those claims where you were the claim manager or a  
 9 claim specialist and the insurance company you were  
 10 working for wrote the primary policies, were there  
 11 instances where you interfaced with excess carriers?  
 12 A There were.  
 13 Q How about when you managing claims and there were  
 14 excess policies at issue for your company, did you deal  
 15 with primary carriers?  
 16 A Yes.  
 17 Q And did you deal with, in that context, situations  
 18 where the claim presented exposure in excess of the  
 19 primary limits?  
 20 A I did. I handled those kind of cases.  
 21 Q Bear with me for a minute.  
 22 In terms of cases that you've handled  
 23 personally as a claims manager or claims specialist  
 24 that involved interaction between primary and excess

1 carriers, can you identify some of the issues that you  
 2 were facing?  
 3 A Often there were issues of notice, whether proper  
 4 notice had been given to the excess carrier, and I've  
 5 handled that from both sides. Issues of exhaustion;  
 6 issues related to allocation of losses between various  
 7 policies and then within each policy year. Generally  
 8 those kind of issues.  
 9 Q Have you dealt with cases where there were disputes as  
 10 to the duty to defend, whether it would be passed to an  
 11 excess carrier from a primary carrier?  
 12 A I don't recall. I recall that sometimes carriers would  
 13 say that there was no real exhaustion and therefore  
 14 that they would not step down, but that was mostly as  
 15 an expert.  
 16 Q Are you familiar, through your experience, with the  
 17 respective custom and practices for primary and excess  
 18 insurers in connection with the investigation in  
 19 defense of claims?  
 20 A Yes. I became familiar with the custom and practice by  
 21 actually handling the primary and excess claims;  
 22 conversations with excess claim managers;  
 23 correspondence with brokers, with claim agents, with  
 24 claim handlers, that kind of a situation. In a typical

1 case, you might have many other insurance companies  
 2 involved in the same claim, and as a result, I became  
 3 familiar with how carriers handled the claims.  
 4 Q Can you explain for the court how you developed an  
 5 understanding of practices for excess carriers and  
 6 primary carriers other than Wausau and the other  
 7 companies that you worked for?  
 8 A I had conversations with other companies. I had seen  
 9 how other companies acted in my litigation and in  
 10 similar litigation on what they did and how they  
 11 handled their claims; and I had correspondence with  
 12 brokers who presented the claims to the primary and  
 13 also to the excess, and with Lloyds of London brokers  
 14 and with Lloyds itself, how the excess market handled  
 15 various claims.  
 16 Q Have you read legal opinions that discuss the duties of  
 17 primaries and excess carriers in connection with the  
 18 investigation and settlement of claims?  
 19 A I have.  
 20 Q Have you read memos from attorneys that address those  
 21 types of issues?  
 22 A I'm sure I have.  
 23 Q How long did you work as the environmental claim  
 24 manager at Wausau?

1 A From 1985 to 1995.  
 2 Q And what have you been doing since?  
 3 A I've been acting as a consultant.  
 4 Q Have you worked for excess insurance companies?  
 5 A I have.  
 6 Q Have you ever worked for AIG before?  
 7 A I had a case against AIG before.  
 8 Q Have you ever worked for Zurich?  
 9 A I worked -- I was hired as an expert by a Zurich  
 10 Company, Steadfast Insurance Company, their excess  
 11 carrier.  
 12 Q How many different excess insurance companies have you  
 13 worked with as a consultant?  
 14 A Boy, I never counted them. I've had cases both for and  
 15 against. I'm currently involved in a case of GM v.  
 16 Excel Insurance, an excess carrier in Bermuda, and that  
 17 case involved a claim for 53 million. Large claims.  
 18 Q Okay. Based on your experience, Mr. Cormack, do you  
 19 feel you have an understanding of industrywide practice  
 20 of primary and excess carriers in terms of the  
 21 investigation, evaluation, and disposition of claims?  
 22 A I do.  
 23 Q What, Mr. Cormack, is the single most important factor  
 24 in determining the respective rights and obligations of

1 insurance companies in connection with the  
 2 investigation and defense of claims?  
 3 A The single most important factor is the factor that you  
 4 start with, the policy of insurance.  
 5 Q If you could look at Exhibit 69, the plaintiffs'  
 6 exhibit, and that's the National Union policy that was  
 7 issued to GAF Corporation. And, specifically, I'd like  
 8 you to direct your attention to the -- it's Bates No.  
 9 1972, the section entitled "Defense." Do you see that,  
 10 Mr. Cormack?  
 11 A I do.  
 12 Q And is that the section of the policy that spells out  
 13 the contractual rights and responsibilities of National  
 14 Union in connection with the Rhodes claim?  
 15 A It is.  
 16 MR. PRITZKER: What page, please?  
 17 MR. ZELLE: This is 1972. This is under the  
 18 section "Defense."  
 19 Q We've been over this before but, Mr. Cormack, if you  
 20 could just direct the court to the specific terms that  
 21 set forth the contractual rights and obligations of  
 22 National Union.  
 23 A Yes. If you turn to 1973, still under section 2,  
 24 paragraph C, it states:

1 In all other instances, that is, under other  
 2 than exhaustion, we, National Union, will not be  
 3 obligated to assume charge of the investigation  
 4 settlement or defense of any claim made, suit brought,  
 5 or proceeding instituted against the insured. We will,  
 6 however, have the right and shall be given the  
 7 opportunity to participate in the defense and trial of  
 8 the claims, suits or proceedings relative to any  
 9 occurrence which, in our opinion, may create liability  
 10 on our part under the terms of this policy.  
 11 Q I think we'll come back to this, Mr. Cormack. But if I  
 12 can focus your attention for the moment on the language  
 13 "shall be given the opportunity to participate," can  
 14 you explain that language?  
 15 MR. PRITZKER: Objection.  
 16 A Yes.  
 17 MR. PRITZKER: Objection, your Honor.  
 18 THE COURT: I'll allow it. You may answer.  
 19 A "Shall be given the opportunity" is an obligation on  
 20 the part of the policyholder, that they give National  
 21 Union the opportunity to associate counsel.  
 22 (By Mr. Zelle)  
 23 Q In the connection with developing the opinions that you  
 24 formed in connection with this case, I just want to

1 briefly identify what you've reviewed. Did you review  
 2 the trial transcripts from this case, that is, Rhodes  
 3 versus National Union and Zurich that were prepared and  
 4 have been prepared?  
 5 A Some of them, yes.  
 6 Q Did you review trial transcripts from the underlying  
 7 case, the Rhodes v. GAF case?  
 8 A Yes. I made a partial examination of those.  
 9 Q Did you review some of the deposition transcripts in  
 10 the underlying case, Rhodes v. GAF?  
 11 A I did.  
 12 Q Did you review depositions in this case, Rhodes v.  
 13 National Union?  
 14 A I did.  
 15 Q Did you review the claim file materials that were  
 16 produced by AIG in this case?  
 17 A I did.  
 18 Q Did you review the claim file materials produced by  
 19 Zurich?  
 20 A I did.  
 21 Q Did you review claim notes that were prepared by  
 22 Zurich, AIG and Crawford?  
 23 A I did.  
 24 Q Have you reviewed the trial exhibits that have been

1 marked in this case?  
 2 A Some of them.  
 3 Q Did you review any of the trial exhibits from the  
 4 underlying case?  
 5 A I did.  
 6 Q Have you reviewed pleadings and orders issued by the  
 7 court in this case?  
 8 A I have.  
 9 Q And pleadings and orders issued in connection with the  
 10 underlying case?  
 11 A I did.  
 12 Q In the context of the relationships between GAF and  
 13 Zurich and National Union, did National Union have any  
 14 contractual obligations to Zurich?  
 15 A No.  
 16 Q Did Zurich have any contractual obligations to AIG?  
 17 MR. PRITZKER: Objection.  
 18 THE COURT: Overruled. I'll hear it.  
 19 A No.  
 20 (By Mr. Zelle)  
 21 Q Do primary carriers, as an industrywide practice,  
 22 fulfill responsibilities to excess carriers?  
 23 A They do.  
 24 Q What's the source of a primary carrier's

1 responsibilities to an excess carrier?

2 A The custom and practice in the industry and some case

3 law.

4 Q Is there any relationship between the responsibilities

5 that a primary carrier fulfills for an excess carrier

6 that derive from the primary insurance policy?

7 A Not from the policy itself; however, by custom and

8 practice, the excess stands in the shoes of the

9 insured, vis-à-vis the primary carrier.

10 Q Can you explain that?

11 A Yes. Just as a primary carrier protects an insured

12 from an excess judgment when there is no excess cover,

13 the primary has that same responsibility to the excess

14 carrier.

15 Q As a claims professionals, did you handle cases in

16 Massachusetts?

17 A I did.

18 Q Are you familiar with the regulations of Chapter 176D?

19 A I am.

20 Q What do you know that as, colloquially.

21 A That's the uniform Unfair Claim Practices Act.

22 Q In terms of your experience as an expert witness, Mr.

23 Cormack, you indicated that you testify or provide

24 opinions both on behalf of insurers defending claims

1 allegedly breached in violation of an Unfair Claims

2 Handling Act?

3 A Could you repeat that?

4 Q Yes. Have you handled cases where there were claims

5 against excess carriers based on the excess carrier's

6 failure to follow a statutory obligation or the custom

7 and practice for fair claims handling?

8 A Yes.

9 Q You mentioned -- can you mention some of those cases?

10 A One that comes right to mind is Steadfast Insurance v.

11 Sophamor Danick, which involved a class action suit in

12 Philadelphia, for pedicle screws that were used in

13 spines, spinal surgeries. It was a product liability

14 case and it got to the excess level and the issue was

15 how the excess -- whether the excess carriers properly

16 handled those claims.

17 Q In forming the opinions that you've reached in

18 connection with this case, Mr. Cormack, did you

19 consider the guiding principles for insurers of primary

20 and excess coverages?

21 A Yes, I did.

22 Q I'd like to focus your attention on the relationship

23 between the insured and the insurers in this case. Are

24 the relationships between GAF, Zurich, and the excess

1 and policyholders bringing claims against insurers, so

2 roughly what is the split?

3 A The last time I looked at it, it was roughly 50 percent

4 where I was hired by the insurance company and 50

5 percent by policyholders.

6 Q Have you ever turned down work because the opinions

7 that you formed after reviewing materials did not

8 support your perspective client's opinion?

9 MR. PRITZKER: Objection.

10 THE COURT: Yes or no.

11 A Yes.

12 (By Mr. Zelle)

13 Q How many times have you been retained as a consultant

14 for an expert witness in connection with lawsuits

15 involving claims of unfair claim handling practices?

16 A Principally where I've testified with respect to

17 whether there was the custom and practice in the

18 industry with respect to claim handling in cases

19 involving allegations of bad faith.

20 Q How many cases have you handled that involved

21 allegations of failure to settle a claim?

22 A Five, six, something in that area.

23 Q How many cases have you been involved in which involve

24 an excess carrier's responsibilities that were

1 carrier, National Union, typical of insured

2 primary/excess relationships?

3 A No, they're atypical.

4 Q Can you explain why?

5 A Yes. Typically, insureds do not maintain the kind of

6 control that they had in this situation. And although

7 you will find carriers unbundling claim handling,

8 usually that unbundling only is with respect to an SIR

9 and not their own claim handling. In this case, you

10 had double unbundling.

11 Q Okay. I'll come back to that in a minute. I want to

12 ask you first, though, is this -- you said it was

13 atypical. Is this atypical of a relationship between a

14 primary and excess -- or a primary insurer and

15 policyholder when the policyholder is one that faces a

16 lot of litigation and wants to maintain control over

17 that litigation?

18 A It is more typical of that situation.

19 Q Can you give an example of other companies that --

20 other than GAF that, in your experience, have

21 arrangements where they keep a tighter control, or they

22 want to keep tighter control over litigation and

23 litigation costs?

24 A Yes. There's a number of companies that have a high



1 litigation rate, where they get sued often, and the  
 2 insurance costs can be astronomical.  
 3 Q Trucking companies fall into that category?  
 4 A Yes, they do.  
 5 Q Fast food restaurants?  
 6 MR. PRITZKER: Excuse me, your Honor. I  
 7 object to this line of questioning. This was not  
 8 disclosed as an area of expertise of Mr. Cormack, nor  
 9 an area that he intended to opine upon.  
 10 THE COURT: I will overrule it. I don't  
 11 think it's -- I think it's background with regard to  
 12 the opinion, so I will allow you to proceed.  
 13 MR. ZELLE: Thank you.  
 14 (By Mr. Zelle)  
 15 Q You use the term "bundling" and "unbundled." Can you  
 16 explain that?  
 17 A Yes. Unbundled means that the company that is insuring  
 18 doesn't do the initial claim work. It's done by a TPA.  
 19 It's called "unbundled" if the TPA isn't owned by that  
 20 insurance company and "bundled" if it is.  
 21 Q Can you explain the GAF insurance program?  
 22 A Yes. GAF hired a TPA, Crawford, under contract to  
 23 handle their claims when they first came in, and they  
 24 had a \$250,000 deductible, which was really treated as

1 (By Mr. Zelle)  
 2 Q I'd like to go through this document and I'd like  
 3 you to identify, Mr. Cormack, those provisions  
 4 which reflect the control that GAF maintained over  
 5 the defense and settlement of claims -- defense  
 6 and investigation in settlement of claims.  
 7 Let me first direct your attention on the  
 8 first page. It's Bates No. 91. If you look down  
 9 at Paragraph 4, do you see that?  
 10 A Yes, I do.  
 11 Q Can you explain how that reflects the control of  
 12 GAF over the defense and investigation of claims?  
 13 A Yes. They are saying they have the right in  
 14 making all assignments from their locations to  
 15 Crawford.  
 16 Q Okay. And if there is no TPA involved or it's not  
 17 a unbundled situation, how typically are claims  
 18 reported?  
 19 A They're reported to the insurance company, who  
 20 then itself assigns the claim handler.  
 21 Q Let me direct your attention to the second page --  
 22 well, actually, it's still on the first page. It  
 23 carries over, though, the paragraph that's  
 24 entitled "Coverage." Do you see that?

1 an SIR.  
 2 Q Self-insured Retention?  
 3 A Self-insured Retention.  
 4 Q What does that mean?  
 5 A That means that the first \$250,000 is paid by the  
 6 policyholder, and the policyholder maintains control  
 7 over claims in that area.  
 8 Q Who paid Crawford?  
 9 A Crawford was funded for its activities and for  
 10 settlement of claims by GAF.  
 11 Q So the funding, was that for both claims expenses  
 12 and settlement of claims?  
 13 A It was.  
 14 Q And what was Crawford's authority?  
 15 A They had \$100,000 authority.  
 16 Q And is there a document that you reviewed that  
 17 reflected how GAF maintained control over those  
 18 funds?  
 19 A There is.  
 20 Q Directing your attention to Exhibit 126, is that  
 21 it?  
 22 A Yes. Defendant's Exhibit 126.  
 23 MR. ZELLE: I'm going to give the folks a  
 24 chance to grab that.

1 A I do.  
 2 Q And does that reflect that analysis of coverage is  
 3 being retained by GAF?  
 4 A As of the end of paragraph 5, there's a  
 5 requirement that any claim that raises any  
 6 coverage question must be immediately referred to  
 7 Mr. Robert Manning, who was risk manager at that  
 8 time for GAF.  
 9 Q If you look now, Mr. Cormack, at page 4, there's a  
 10 heading -- it's paragraph number 7 -- it says  
 11 "Cost Containment." Do you see that?  
 12 A I do.  
 13 Q And how does an insured use cost containment --  
 14 let's do it this way. If you can look at  
 15 paragraph -- it's over on page 6, paragraph 8, and  
 16 it's still under the heading "Cost Containment."  
 17 Can you explain what that provision does to enable  
 18 the containment of costs?  
 19 A Yes. It's a requirement with respect to defense  
 20 counsel billing. So they have a requirement as to  
 21 how the defense counsel is supposed to bill.  
 22 It has also in paragraph 10 --  
 23 Q Well, before we go there, do insurance companies,  
 24 primary insurance companies, generally have

1 billing guidelines for defense counsel?  
 2 A They do. They do.  
 3 Q In this case, under this agreement, was Crawford &  
 4 Company responsible for seeing to it that defense  
 5 counsel complied with billing guidelines?  
 6 A It would appear that they would be.  
 7 Q Now, you mentioned paragraph 10. How does that  
 8 cost containment measure reflect the control of  
 9 GAF over the defense and investigation in  
 10 settlement of claims?  
 11 A A claim handler can't hire, cannot hire an expert  
 12 without the approval of Mr. Robert Manning, GAF.  
 13 Q Okay. Does the same go for IMEs, which is  
 14 addressed in paragraph 12?  
 15 A Yes.  
 16 Q If you can look on paragraph 7 -- I'm sorry, page  
 17 7, paragraph 8, there's a paragraph entitled  
 18 "Authority Limits." How does that preserve to GAF  
 19 control over the defense in settlement of claims?  
 20 A Mr. Robert Manning needed to authorize authority  
 21 limits over the \$100,000 that had been granted to  
 22 Crawford.  
 23 Q The next paragraph number 9 is entitled  
 24 "Supervision and Reporting." My question, Mr.

1 Cormack is: Do primary insurance companies, when  
 2 they are controlling the defense and investigation  
 3 of claims, generally provide supervision and  
 4 reporting requirements to defense counsel?  
 5 A They do.  
 6 Q What is the primary purpose of an insurance  
 7 agreement in which the policyholder retains a high  
 8 level of control?  
 9 A It's generally done to reduce insurance costs.  
 10 Q In this case, were there other aspects of GAF's  
 11 insurance's relationship with Zurich that afforded  
 12 GAF some control over the insurance costs?  
 13 A There were.  
 14 Q What was that?  
 15 A Zurich had a loss responsive premium plan for  
 16 anything over and above the \$250,000 SIR.  
 17 Q What's a loss responsive premium plan?  
 18 A A policyholder is charged a premium based on  
 19 expenses and losses incurred. They also had the  
 20 right to hire counsel. GAF maintained the right  
 21 to hire counsel, and that was another way that you  
 22 could control costs.  
 23 Q I'm going to show you a page from the trial  
 24 testimony of Mr. Deschenes. If you're following

1 along, it's page 7 -- it's page 18.  
 2 And Mr. Deschenes was asked, beginning on  
 3 line 6: Did you make any statements in connection  
 4 with the discovery or pursuing mediation efforts?  
 5 And the response: Yes, I did.  
 6 The question was: What did you say?  
 7 Mr. Deschenes said: My proposal at the  
 8 time -- and this at time was the wishes of my  
 9 client who I represented, GAF -- was to try to  
 10 stay the litigation, not to go through the usual  
 11 course of discovery depositions and so forth, and  
 12 to focus on efforts on mediation.  
 13 My question, Mr. Cormack, does that  
 14 reflect intention on the part of GAF to control  
 15 litigation costs in the Rhodes case?  
 16 MR. PRITZKER: Objection.  
 17 THE COURT: Sustained in that form.  
 18 (By Mr. Zelle)  
 19 Q Let me ask you, are you aware of any efforts by  
 20 GAF to control litigation costs in this case?  
 21 A I am.  
 22 Q And will you describe them?  
 23 A The limited discovery that was done on this very,  
 24 very serious case by the defense counsel, he

1 avoided depositions, IMEs, other matters, and you  
 2 would expect, or at least I would expect as a  
 3 claim handler, that those particular discovery  
 4 tools would certainly be utilized in serious case  
 5 of this nature.  
 6 Q Can you explain how a primary insurance company  
 7 direct a defense and controls a defense where it's  
 8 first dollar out or a nominal deductible?  
 9 A Yes. They would make sure that they had, in this  
 10 kind of case, that they had crossed all the T's  
 11 and dotted all the I's and done all the intensive  
 12 discovery warranted by the case.  
 13 Q Let's start before that. In the typical case, who  
 14 selects defense counsel?  
 15 A The primary carrier.  
 16 Q In that situation, where the primary carrier is  
 17 dollar one or a small deductible, to whom does  
 18 defense counsel report?  
 19 A Defense counsel reports to the primary carrier.  
 20 Q And to whom was defense counsel reporting in this  
 21 case?  
 22 A GAF.  
 23 Q Through Crawford?  
 24 A Through Crawford.

1 Q In your experience, explain what a primary  
2 carrier, or, for that matter, an excess carrier  
3 relies upon defense counsel to do in the way of  
4 undertaking a diligent investigation.

5 MR. PRITZKER: Objection.

6 THE COURT: Overruled.

7 A The primary carrier would expect that defense  
8 counsel litigate the case such that the  
9 investigation would proceed promptly and  
10 diligently, marshalling all the facts that were  
11 available for the defense of the claim.

12 (By Mr. Zelle)

13 Q Is the defense counsel's responsibilities -- let  
14 me put it this way. Are the expectations or the  
15 industry's generally accepted expectations, that  
16 is, for primary carriers -- it's a bad question.  
17 I want to make a good one.

18 Let me ask you this way. Is there any  
19 different expectation for defense counsel on the  
20 part of a primary carrier when there's excess  
21 insurance?

22 MR. PRITZKER: Objection.

23 THE COURT: Overruled.

24 A No.

1 (By Mr. Zelle)

2 Q Why not?

3 A Because the custom and practice in the industry is  
4 that whether or not there's excess, the attorney  
5 has a duty to its policyholder to marshal a good  
6 defense to the claim.

7 Q You reviewed the Zurich policy in this case; is  
8 that right?

9 A I have.

10 Q Does it require cooperation on the part of GAF in  
11 connection with the investigation in defense of  
12 claims?

13 A Yeah, I'd have to look at it, but I believe that  
14 that was --

15 Q We'll come back to that.

16 A -- part of the standard conditions.

17 Q Are you familiar with any generally accepted rule  
18 of practice relating to excess and primary  
19 carriers?

20 A Yes.

21 Q What are they?

22 A They're known as the guiding principles for  
23 insurers of primary and excess coverages.

24 MR. ZELLES: Why don't we mark this as

1 exhibit for identification, L, M, N?

2 THE COURT: I think we're beyond that.

3 Where are we?

4 THE COURT REPORTER: M.

5

6 (Exhibit M for I.D., marked; Guiding  
7 Principles for Insurers.)

8

9 (By Mr. Zelle)

10 Q Are these guiding principles binding on insurance  
11 companies?

12 A No.

13 Q Are you aware of legal decisions that have  
14 referred to or adopted the guiding principles as  
15 accepted custom and practice?

16 A Yes.

17 Q What is custom and practice?

18 A Custom and practice in the insurance industry is  
19 the proper -- let me back up. It's what the  
20 insurers have determined over many years to be the  
21 proper way to handle claims.

22 Q All right. Let me direct your attention to  
23 Guiding Principle No. 1.

24 Is it standard industry custom and

1 practice that a primary insurer must discharge its  
2 duty of investigating promptly and diligently even  
3 though those cases in which is it apparent that  
4 its policy limit may be consumed?

5 A That is the custom and practice in the industry  
6 today.

7 Q Can you explain how that applies to the claims  
8 brought by the Rhodeses against AIG in this case.

9 A Yes. The primary insurer was required to  
10 investigate promptly and diligently even when they  
11 believed that the case would exceed their primary  
12 limit.

13 Q Does it make any difference when the claim is  
14 one that presents exposure, and I used that term  
15 as it was used by Mr. Kiriakos, possible or  
16 worst-case scenario, is it any different if  
17 there is exposure from the outset of the case in  
18 excess of the primary limit?

19 A No, there is no difference as a matter of custom  
20 and practice.

21 Q Just while I'm referring to Mr. Kiriakos, he  
22 testified, and for anyone interested in  
23 following along, it was on page 115 -- I'm  
24 sorry, 114, of Day 10 -- he testified that you

1 can evaluate a claim in the abstract.  
 2 Is it your understanding that custom  
 3 and practice requires claims to be evaluated  
 4 based on concrete facts?  
 5 MR. PRITZKER: Objection.  
 6 MR. ZELLE: I'll withdraw it. I will  
 7 withdraw it.  
 8 THE COURT: I will allow the question  
 9 but not in the context of the testimony of Mr.  
 10 Kiriakos.  
 11 MR. ZELLE: Right.  
 12 (By Mr. Zelle)  
 13 Q Let me put it this way, is it your view that  
 14 it's possible to evaluate claims in the  
 15 abstract?  
 16 A That is not custom and practice.  
 17 Q What do you need?  
 18 A You need facts.  
 19 Q All right. We'll get to specifics, Mr. Cormack,  
 20 I know you're chomping at the bit, but I'd like  
 21 to direct you to guiding principle number two.  
 22 Is it standard industry custom and  
 23 practice that liability must be assessed on the  
 24 basis of all relevant facts which a diligent

1 investigation can develop and in light of  
 2 applicable legal principles?  
 3 A That is the custom and practice in the industry  
 4 today.  
 5 Q And is it the custom and practice in the  
 6 industry that the assessment of liability must  
 7 be reviewed periodically throughout the life of  
 8 a claim?  
 9 A It is.  
 10 Q Does a diligent investigation require obtaining  
 11 and reviewing medical records?  
 12 A Where there is medical issues, yes.  
 13 Q Does a diligent investigation of a personal  
 14 injury claim require an IME?  
 15 A Yes.  
 16 Q Does a diligent investigation require seeking  
 17 pre-accident medical records where there is a  
 18 claim of exacerbation?  
 19 A It would be, yes.  
 20 Q Does a diligent investigation require  
 21 depositions of the plaintiffs?  
 22 A It would, yes.  
 23 Q Does it require depositions of plaintiff's  
 24 doctors?

1 A Yes.  
 2 Q I think you heard testimony this morning that  
 3 Mr. Pritzker took the depositions of the  
 4 plaintiff's doctors in the Rhodes case. Do you  
 5 recall that?  
 6 A Yes.  
 7 Q Do you recall, based on any documents that you  
 8 reviewed, when those depositions were taken?  
 9 A I believe in the summer of 2004.  
 10 Q Was this after the discovery deadline?  
 11 A It was. That's my best memory.  
 12 Q Does a diligent investigation of a personal  
 13 injury claim, a serious personal injury claim,  
 14 require an analysis of claims against other  
 15 potential defendants?  
 16 A Yes.  
 17 Q Do you know when the tree service, McMillan Tree  
 18 Service, was added to this case?  
 19 A I believe they filed they answer in December of  
 20 2003.  
 21 Q That was also after the discovery deadline?  
 22 A It was.  
 23 Q Does a diligent investigation require an  
 24 analysis of other sources of funds that may be

1 available to satisfy a judgment or to settle the  
 2 case?  
 3 A It does.  
 4 Q That would include insurance policies of other  
 5 defendants that might provide a benefit to the  
 6 policyholder?  
 7 A That is correct.  
 8 Q You indicated you had some experience handling  
 9 claims involving trucking companies or trucking  
 10 losses. Is it typical, in your experience, that  
 11 where there are shipping companies and leased  
 12 vehicles and leased drivers, that there would be  
 13 insurance -- that those companies -- other  
 14 companies involved -- that all of the companies  
 15 involved, would have insurance policies?  
 16 MR. PRITZKER: Objection.  
 17 THE COURT: Overruled.  
 18 A I would expect just looking at this Rhodes claim  
 19 that there would be other policies of insurance  
 20 which would cover the driver, Zalewski. And I  
 21 would expect that those would be of substantial  
 22 limits.  
 23 Q Did AIG undertake an evaluation of the other  
 24 insurance policies that were issued in this case

1 to Penske?

2 A They did.

3 Q And the policies that were issued to the tree

4 service?

5 Excuse me, I withdraw the question.

6 Did they consider the insurance

7 available to the tree service?

8 A Yes, they did.

9 Q Okay. Let me ask you, is it custom and practice

10 in the insurance industry that a diligent

11 investigation is completed and that all relevant

12 facts are available when there is a request for

13 money from an excess insurer?

14 MR. PRITZKER: Objection.

15 THE COURT: Sustained unless we get to

16 this particular case.

17 MR. ZELLE: Okay.

18 MR. PRITZKER: Also I was objecting to

19 form, your Honor.

20 MR. ZELLE: Let me back up.

21 (By Mr. Zelle)

22 Q In the Rhodes case, should a diligent

23 investigation have been completed before

24 November of 2003 when defense counsel asked AIG

1 to make its funds available?

2 A Yes.

3 Q I'm going to direct your attention, Mr. Cormack,

4 to Exhibit 5, Plaintiffs' Exhibit 5. Do you

5 have that in front of you?

6 A I do.

7 Q What is that?

8 A That's a letter of Tracey Kelly to John Chaney,

9 dated April 9, 2002, referred to this morning.

10 Q And that was before this Rhodes underlying claim

11 was put into suit?

12 A It was.

13 Q What did Ms. Kelly ask Mr. Chaney to provide

14 even before the Rhodes case was put into suit?

15 MR. PRITZKER: Objection.

16 THE COURT: I'm sorry. You're asking

17 him to read what's already in evidence?

18 MR. ZELLE: Well, let me just ask you

19 through this letter -- no, I'll try to expedite

20 it, your Honor.

21 THE COURT: Which letter is it?

22 MR. ZELLE: This is Exhibit 5. It's an

23 April 9, 2002, letter.

24 THE COURT: All right, but be mindful

1 of the time. His time is better spent offering

2 opinions than reading.

3 MR. ZELLE: And I will move on, your

4 Honor.

5 (By Mr. Zelle)

6 Q My question is, by this letter did AIG request

7 Crawford to provide it with materials developed

8 through an investigation?

9 A It did.

10 Q Why was this request sent to Crawford?

11 A Because they were the claim handler.

12 Q Did Mr. Chaney or anyone at Crawford, provide

13 the material to Ms. Kelly?

14 A No.

15 Q Does this, in the custom and practice of the

16 industry, this type of information, is it

17 typically provided to an excess insurer?

18 A It is.

19 Q And is it typically provided when it is

20 developed?

21 A It is, on a continuing basis.

22 Q Did Ms. Kelly follow up with Mr. Chaney?

23 A She did.

24 Q Is that follow-up reflected in Exhibit 210?

1 A It is.

2 Q I'd like to direct your attention, Mr. Cormack,

3 back to the guiding principles. Specifically

4 I'd like to direct your attention to guiding

5 principle number three.

6 Is it the standard custom and practice

7 in the insurance industry that an evaluation be

8 realistic and without regard to a policy limit?

9 A That is the custom and practice in the industry.

10 Q And was AIG ever provided with a realistic

11 evaluation of the claim without regard to the

12 policy limit?

13 A I didn't see that they were.

14 Q During the -- did you review documentation and

15 testimony and depositions referring to the

16 November 19th conference call between Mr.

17 Deschenes and Mr. Satriano and Ms. Fuell, I

18 believe Mr. Hohn -- I know Mr. Hohn was on the

19 call, and maybe Mr. Manning --

20 A Yes.

21 Q -- did you review that? During that conference

22 call was there any explanation provided or any

23 evaluation to justify the request to Mr.

24 Satriano that AIG make a settlement offer or

1 contribute funds to a settlement offer?  
 2 A No.  
 3 Q What investigation had been done prior to  
 4 November, 2003?  
 5 A In what regard?  
 6 Q Well, here's what I would like you to opine on.  
 7 Did AIG receive at any time all of the  
 8 information relevant to a realistic  
 9 determination of the exposure without regard to  
 10 the policy limit?  
 11 A No, they did not. There was no information  
 12 presented to AIG with respect to the  
 13 applicability of other policies of insurance.  
 14 There was no medical presented other than the  
 15 plaintiffs' attorney's package. There was no  
 16 evaluation at that time presented to AIG. And  
 17 there was no independent medical examination by  
 18 anyone presented, and there was no medical  
 19 records of prior mental health. There was very  
 20 little presented for that meeting.  
 21 Q And between November and June -- November 2003  
 22 and June of 2004, was any further information  
 23 developed through investigation and passed along  
 24 to AIG?

1 A No.  
 2 Q I'd like to direct your attention to guiding  
 3 principle number five, Mr. Cormack. I'd like to  
 4 know whether it's standard and custom and  
 5 practice in the insurance industry that if at  
 6 any time it should reasonably appear that the  
 7 insured may be exposed beyond the primary limit,  
 8 the primary insurer shall invite the excess  
 9 insurer to participate in a common effort to  
 10 dispose of the claim. Is that standard  
 11 practice?  
 12 A It is.  
 13 Q And is this invitation typically extended after  
 14 all discovery is completed?  
 15 A Yes.  
 16 Q In November, 2003, was AIG invited to make a  
 17 contribution to a settlement offer??  
 18 A Let me go back to that last question. In this  
 19 case, in the Rhodes case, the call upon the  
 20 excess carrier took place after the discovery  
 21 cut off.  
 22 Q My question though was, was it after discovery  
 23 -- well, let me put it this way. Was it after a  
 24 diligent investigation had been completed?

1 A There hadn't been a diligent investigation.  
 2 Q At that time, in November of 2003, did AIG  
 3 retain counsel to participate in the case?  
 4 A I believe in that telephone conversation, there  
 5 was mention that they would associate in counsel  
 6 to participate in the defense of the case.  
 7 Q Did GAF give National Union or AIG the  
 8 opportunity to participate in the defense?  
 9 A No.  
 10 Q Is this a breach of the policy provision?  
 11 A It is.  
 12 Q Did AIG or National Union ever claim that there  
 13 was a breach of the policy?  
 14 A I believe that at one time they wrote a letter,  
 15 but they did not claim a breach.  
 16 Q Did they ever raise any defense or reservation  
 17 of rights in connection with coverage for GAF?  
 18 A No.  
 19 Q Is it custom and practice in the industry that  
 20 an insurer, if there is any coverage issue or  
 21 reservation of rights, that it is provided  
 22 promptly after notice?  
 23 A Yes. An insurer who is going to raise a  
 24 coverage issue is required to serve notification

1 upon the policyholder of that coverage issue and  
 2 reserve its rights.  
 3 Q And the notice in this case was prior to April  
 4 2002, right?  
 5 A It was.  
 6 Q And there was no -- is there any indication in  
 7 anything you've reviewed that there was any  
 8 disclaimer or reservation of rights?  
 9 A There was none.  
 10 Q I'd like to direct your attention to Exhibit  
 11 215, Mr. Cormack. And in that letter it's dated  
 12 February 13, 2003, it says: AIG expressly  
 13 informed GAF that there is no coverage dispute,  
 14 no reservation of rights.  
 15 A They do.  
 16 Q Prior to that time, had there been a suggestion  
 17 by GAF that was an effort on the part of  
 18 National Union to disclaim coverage?  
 19 A That was the suggestion that they made.  
 20 Q And based on that suggestion, did GAF oppose  
 21 National Union's efforts to participate in the  
 22 disposition of the claim?  
 23 A They did.  
 24 Q Let me direct your attention, Mr. Cormack, to

1 Exhibit 23. And in this letter -- do you  
 2 understand who Mr. Bartell was?  
 3 A I do.  
 4 Q Who was he?  
 5 A He was an attorney with the law firm of McCarter  
 6 English representing GAF.  
 7 Q And in this letter does Mr. Bartell express  
 8 GAF's opposition to the admission of Mr. Conroy  
 9 to the defense team?  
 10 A They do.  
 11 Q And who is Mr. Conroy?  
 12 MR. PRITZKER: Objection.  
 13 THE COURT: Grounds?  
 14 MR. PRITZKER: The document speaks for  
 15 itself and it doesn't objection --  
 16 THE COURT: Yes, unfortunately the  
 17 document is not in my book. I think it was  
 18 admitted, but perhaps my book has not been  
 19 updated.  
 20 MR. PRITZKER: Exhibit 23.  
 21 THE COURT: Exhibit 23 is not in my  
 22 book.  
 23 MR. PRITZKER: We will make sure you  
 24 have one.

1 Okay. What's marked in the original is  
 2 a series of letters, your Honor, and there is 28  
 3 in this tab as well. So I'll do some  
 4 housekeeping real quick. And 32. All right I'm  
 5 not going to do the housekeeping.  
 6 MR. PRITZKER: Your Honor, our copies  
 7 are only highlighted. I'll make sure that you  
 8 get it.  
 9 MR. ZELLE: All right. Let me point  
 10 out for all who are interested, that there are  
 11 five exhibits, 23, 28, 32 and 25, behind Tab 23,  
 12 so you might want to work that out. Do you have  
 13 23, your Honor?  
 14 THE COURT: Yes, now I do.  
 15 MR. ZELLE: Okay.  
 16 (By Mr. Zelle)  
 17 Q I'd like to direct your attention first, Mr.  
 18 Cormack, there is, as part of Exhibit 23, a  
 19 letter -- it's the last page of the document.  
 20 THE COURT: I'm sorry, the letter is  
 21 dated when, January 14th?  
 22 MR. ZELLE: Actually, it's the second  
 23 page as well. I apologize.  
 24 (By Mr. Zelle)

1 MR. ZELLE: It was a plaintiffs'  
 2 exhibit. Certainly we have no objection.  
 3 THE COURT: I think it came in, I mean  
 4 I remember it coming in, but I think it had not  
 5 been -- so you'll have to, over the weekend,  
 6 update my books with exhibits that have been  
 7 admitted but not incorporated. But I do recall  
 8 the letter, so you may proceed.  
 9 (By Mr. Zelle)  
 10 Q Next, Mr. Cormack, I'd like to direct your  
 11 attention to Exhibit 213.  
 12 THE COURT: I'm sorry, the letter you  
 13 gave me is from -- the letter that was given to  
 14 me by Mr. Pritzker was Martin Maderines' letter.  
 15 I thought you were referring to the letter --  
 16 MR. ZELLE: Let me make sure we have  
 17 the right 23.  
 18 THE COURT: You are referring to the  
 19 letter that Mr. Bartell wrote.  
 20 MS. PINKHAM: My mistake, your Honor.  
 21 I took it from the wrong folder.  
 22 MR. ZELLE: What I have marked as 23 is  
 23 this series of letters, so let me look at the  
 24 original, if I could.

1 Q Let's start with the second page of the exhibit.  
 2 It's a letter dated December 19?  
 3 A Yes.  
 4 Q Do you see that? And in this letter, does Mr.  
 5 Bartell suggest that a coverage confirmation  
 6 must be received before Mr. Conroy's admission  
 7 to the defense team can be evaluated?  
 8 A Yes, he does.  
 9 Q And later we looked at a letter that confirmed  
 10 coverage; is that right?  
 11 A That's correct.  
 12 Q Now the second letter I'd like you to look at  
 13 that's part of Exhibit 23 is the first page.  
 14 It's January 14. Do you see that?  
 15 A Yes.  
 16 Q And does that also reflect the opposition of GAF  
 17 to the participation of AIG in the defense of  
 18 the claim?  
 19 A Yes.  
 20 MR. PRITZKER: Your Honor, the document  
 21 speaks for itself.  
 22 THE COURT: I'm going to sustain that  
 23 objection. I don't see the word "oppose" or  
 24 "opposition."

1 Is it not fair to say that Mr. Bartell  
2 said that he wanted AIG to confirm that it is  
3 covering the claim in order for him to evaluate  
4 whether Mr. Conroy should join the defense team?

5 MR. PRITZKER: That's what he's saying.

6 THE COURT: Okay. So he didn't say, if  
7 you confirm coverage, I don't want Mr. Conroy on  
8 board; he just said I want to make sure that you  
9 confirm coverage before I evaluate whether or  
10 not we should let Conroy join the team, doesn't  
11 he?

12 MR. PRITZKER: That's what he's saying  
13 in the letter.

14 THE COURT: Okay, let's proceed.

15 (By Mr. Zelle)

16 Q Directing your attention to Exhibit 213, do you  
17 have that, Mr. Cormack?

18 A Yes, I do.

19 Q All right. And is that a response to Mr.  
20 Bartell's letter?

21 A It is.

22 Q And does that assert that AIG has an absolute  
23 right to associate in counsel of its choice?

24 A Yes.

1 Q And that they have exercised that right?

2 A Yes. They say they have exercised that right.

3 Q And Mr. Bartell responds, does he not?

4 A You are going to have to give me the Exhibit  
5 number.

6 Q I direct your attention to Exhibit 28. Before  
7 we go there, Mr. Cormack, in order to get  
8 information to participate in the defense of the  
9 case, where is AIG going to get that?

10 A Repeat that question.

11 Q Who controls the information by which AIG could  
12 investigate and evaluate the claim?

13 A The defense counsel.

14 Q And who is controlling the defense counsel?

15 A GAF.

16 Q All right. Now in this Exhibit 28, this letter  
17 from Mr. Bartell, does he raise a different  
18 objection now to the participation of AIG in the  
19 defense?

20 MR. PRITZKER: Objection.

21 THE COURT: Again, I don't have 28  
22 before me. So is the objection that it speaks  
23 for itself?

24 MR. PRITZKER: Yes.

1 THE COURT: All right. Why don't I  
2 read it and you can proceed to ask about it, but  
3 we don't need him to characterize it.

4 MR. ZELLE: That's fine. I'll direct  
5 your attention, your Honor, to the last sentence  
6 in the second paragraph of the first page.

7 (By Mr. Zelle)

8 Q My question, Mr. Cormack, is, is GAF fulfilling  
9 its responsibility to cooperate with AIG where  
10 it is suggesting that AIG's defense counsel is  
11 seeking to advance AIG's coverage position?

12 MR. PRITZKER: Objection.

13 THE COURT: Overruled. I'll allow the  
14 answer. You may answer.

15 A No, they're not. If you look at the second  
16 paragraph they are stating that Mr. Conroy  
17 therefore owes his allegiance to GAF and cannot  
18 formulate, advocate or communicate AIG's  
19 coverage positions.

20 So their objection is that by  
21 associating in counsel, that he would not be  
22 properly representing GAF. That's a different  
23 objection from the objection that had been made.

24 (By Mr. Zelle)

1 Q I'm going to direct your attention to Exhibit 41  
2 now, Mr. Cormack. At that point in time had GAF  
3 permitted some involvement by Mr. Conroy?

4 A Apparently not.

5 Q Okay. What is the basis of that statement?

6 A Well, I've got to find it in the letter.

7 Q Let me direct your attention to the end of the  
8 first paragraph.

9 A There was an objection to a motion to enlarge.

10 Q All right. Let's back up. Who filed or who  
11 served -- in Massachusetts you're familiar that  
12 we serve motions before they're filed?

13 A Yes.

14 Q And was there a motion served to enlarge the  
15 time to take discovery, to complete discovery in  
16 the Rhodes case?

17 A There was.

18 Q And which attorney served that motion?

19 A Mr. Conroy.

20 Q Was there subsequently an opposition to that  
21 expressed by GAF?

22 A There was.

23 Q And what did Mr. Conroy do?

24 A National Union instructed Conroy to withdraw the



1 motion pending resolution of coverage issues.  
2 Q And this was the same drum that Mr. Bartell was  
3 beating way back in December; is that right?

4 MR. PRITZKER: Objection. Your Honor,  
5 we're dealing with an expert here. First of  
6 all, again, this is not part of his expert  
7 disclosure --

8 MR. ZELLE: I'll withdraw the question.

9 MR. PRITZKER: -- and we're trying to  
10 prove the case through Mr. Cormack, which is  
11 inappropriate.

12 MR. ZELLE: I'll withdraw the question.

13 THE COURT: Well, the latter part I'm  
14 not persuaded by, but I'm not sure this is the  
15 best use of your time. So if you are  
16 withdrawing it, you may proceed.

17 MR. ZELLE: Fine. All right.

18 (By Mr. Zelle)

19 Q Is there a point in time, Mr. Cormack, where,  
20 based on your review of materials in this case,  
21 it appeared to you that all opposition to AIG's  
22 participation had been relinquished by GAF?

23 A Yes, there was, in plaintiffs' Exhibit 70.

24 Q Those are the claim notes?

1 A The claim notes, yes.

2 Q All right. And can you identify the date of the  
3 note you are referring to? Let me ask you this.

4 A Yes, I'm sorry, June 8.

5 Q Of 2004?

6 A Of 2004.

7 Q All right. Based on your review of trial  
8 testimony in this case, Mr. Cormack, did you  
9 determine when it was that Mr. Deschenes turned  
10 over control of the case to the Campbell firm?

11 MR. PRITZKER: Objection.

12 THE COURT: I'll allow it.

13 A Yes.

14 (By Mr. Zelle)

15 Q When was that?

16 A July 2004.

17 Q Actually let me show you something to refresh  
18 your recollection, Mr. Cormack, I believe it was  
19 June.

20 A June?

21 Q Yes. This is page 48 of day seven of Mr.  
22 Deschenes testimony --

23 MR. PRITZKER: Objection, again, your  
24 Honor.

1 THE COURT: Grounds?

2 MR. PRITZKER: That this is totally  
3 irrelevant to anything that the witness is an  
4 expert on. He's asking what Mr. Deschenes'  
5 testimony was as to when control was turned over  
6 from one attorney to another attorney.

7 MR. ZELLE: I'll let the record speak  
8 for itself, your Honor.

9 THE COURT: All right, let's proceed.

10 (By Mr. Zelle)

11 A Yes, this reflects --

12 Q That's all right. I withdrew the question.

13 THE COURT: There is no question before you,  
14 but let ask you, when AIG associates in counsel, whose  
15 client or clients are that counsels?

16 THE WITNESS: They represent the insured, but  
17 also they are representing AIG's interest. It's a  
18 common effort, as the policy says. The insured has  
19 their own counsel, Mr. Deschenes; and associated  
20 counsel comes into the case, participates in the case,  
21 because of the excess carrier's desire, and his  
22 representation must be for the policyholder and for  
23 National Union.

24 THE COURT: And if there is to be a dispute

1 as to coverage between the policyholder and the  
2 insurer, can that person jointly represent both?

3 THE WITNESS: If there was a dispute of  
4 coverage they can't, but there was no dispute of  
5 coverage and that was explained in one of the exhibits  
6 to the policyholder. There was no reservation; there  
7 was no coverage issue raised.

8 THE COURT: And when was that letter sent?

9 THE WITNESS: February 13, 2004.

10 THE COURT: All right, you may proceed.

11 (By Mr. Zelle)

12 Q Between November 2003 and June 2004, Mr. Cormack, were  
13 GAF still controlling defense counsel?

14 A They were.

15 Q Whose authority was required for defense counsel, Mr.  
16 Deschenes, to cooperate with Mr. Conroy?

17 MR. PRITZKER: Objection.

18 THE COURT: Well, again he's offering his  
19 opinion. He's not really here to be offering hearsay  
20 testimony. So I'm a bit confused as to what's going  
21 on.

22 MR. ZELLE: All right.

23 (By Mr. Zelle)

24 Q Let me ask it this way. What opportunity was provided

1 by GAF to AIG to investigate the claim after November  
2 and before June?

3 MR. PRITZKER: Objection.

4 THE COURT: I'll allow it. You can answer.  
5 A Okay. The typical way that an excess carrier responds  
6 to a claim like this in litigation is to associate in  
7 counsel. That's where they do their investigation,  
8 that's where they find out what needs to be done and  
9 how a defense has to be prepared; and if there were any  
10 deficiencies in the defense, they attempt to rectify  
11 those deficiencies. So, what happens is, if you won't  
12 allow the excess carrier to associate in defense, you  
13 obstruct the excess carrier from doing the kind of  
14 thing that by custom and practice it does to  
15 investigate a claim.

16 (By Mr. Zelle)

17 Q Okay. My question is, what opportunity did GAF provide  
18 to AIG between November and June?

19 A They didn't provide the opportunity.

20 Q You've identified already what was required to complete  
21 a diligent investigation after June of 2003, when was  
22 it clear that a further investigation was required to  
23 obtain pre-existing psychological records of Mrs.  
24 Rhodes?

1 A When the answers to interrogatories were filed  
2 previously by the plaintiff where there was the claim  
3 made for exacerbation of mental condition.

4 Q And in June of 2004, did AIG undertake an effort to  
5 obtain pre-accident mental health records?

6 A They did.

7 MR. ZELLE: Let me just direct the court's  
8 attention and counsel to Exhibit 72. This is the  
9 docket in the underlying case, specifically the docket  
10 entries are 52 through 52.5. I'm sorry -- yes, 52 and  
11 then 52.5.

12 (By Mr. Zelle)

13 Q Do those reflect the efforts taken by AIG?

14 A They do.

15 Q Mr. Cormack, is there any contractual duty for an  
16 excess carrier, for AIG in this case, to be more  
17 involved than it was?

18 A No.

19 Q In terms of custom and practice, was there any  
20 variation by AIG from the level of involvement that an  
21 excess carrier typically has or would have in this  
22 case?

23 A No.

24 Q Are there economic factors that shape the custom and

1 practice in the industry that an excess carrier relies  
2 on, defense counsel and whether it's retained by the  
3 insured or the insurer to develop the information  
4 deemed relevant to a determination and the valuation of  
5 the claim?

6 MR. PRITZKER: Objection.

7 THE COURT: As to the form I'm going to  
8 sustained it, because I'm not sure I understand the  
9 question.

10 MR. ZELLE: I'll ask the question again.

11 (By Mr. Zelle)

12 Q Can you identify, Mr. Cormack, economic factors that  
13 shape the industry custom and practice that an excess  
14 carrier relies upon, the primary carrier or the insured  
15 if the insured is directing defense counsel, to  
16 undertake the diligent investigation and realistic  
17 evaluation?

18 A Yes, there are economic factors. The first economic  
19 factor is the premium that is paid by the policyholder  
20 to the primary carrier is the premium which includes  
21 investigation and defense of claims. The excess  
22 carrier does not get a premium for the investigation  
23 and defense of the claims. Under the guiding  
24 principles they don't do the primary's job for them.

1 The whole theory of custom and practice in the industry  
2 and the guiding principles is that the primary is  
3 responsible for that investigation and the excess has a  
4 right to depend upon the primary to do it.

5 Q Mr. Cormack, did you review Mr. Deschenes' testimony  
6 when he testified about conversation he had with Mr.  
7 Pritzker during which Mr. Pritzker indicated that he  
8 wasn't all that -- what he said, Mr. Pritzker,  
9 according to Mr. Deschenes, said was, "I don't care  
10 about insurance, I've got deep pockets here. I've got  
11 GAF, I've got DLS, I've got Penske. I don't need the  
12 insurance carriers."

13 My question is: In your experience, would  
14 the disposition of a claim be delayed or made more  
15 difficult if a plaintiff's counsel doesn't care about  
16 the insurance?

17 MR. PRITZKER: Objection.

18 THE COURT: I'll allow the answer.

19 THE WITNESS: Pardon me?

20 THE COURT: You may answer.

21 (By Mr. Zelle)

22 Q Do you have the question?

23 A I don't have it?

24 Q Let me reframe the question, because without reference

1 to anything -- is the disposition of a claim delayed or  
 2 made more difficult -- that is, the resolution by an  
 3 insurance company -- when a plaintiff's attorney  
 4 doesn't care about insurance because he's got deep  
 5 pocket defendants?  
 6 A It makes settlement more difficult because there's no  
 7 recognition of the custom and practice in the industry  
 8 with respect to the needs of an insurance company to  
 9 obtain authority, evaluate and settle a claim. In  
 10 other words, if you ignore the needs of the insurance  
 11 company, it certainly is going to delay the disposition  
 12 and settlement of a claim.  
 13 Q In your experience, Mr. Cormack, have you dealt with  
 14 policyholders who wanted to settle claims to avoid  
 15 negative publicity?  
 16 A I've dealt with that situation.  
 17 Q Is it appropriate for an insurance company to forego a  
 18 diligent investigation and settle claims to avoid  
 19 negative publicity for a policyholder?  
 20 A No, that isn't professional, and it would be making  
 21 decisions not based upon the merits of the claim but  
 22 extraneous affairs.  
 23 Q You're familiar with what insurance companies, in  
 24 particular primary insurance companies, rely upon in

1 terms of defense counsel's development of information,  
 2 aren't you?  
 3 A I am.  
 4 Q In this case did, in your opinion, the primary carrier  
 5 have everything that it needed to assess and manage the  
 6 risk presented by the Rhodes claim?  
 7 A It didn't.  
 8 Q Is it custom and practice in the industry that the  
 9 excess insurer relies and expects from -- relies upon  
 10 and expects from the defense counsel the same  
 11 information that a primary carrier expects?  
 12 A That is the custom and practice.  
 13 Q You're familiar, from your experience, with Crawford &  
 14 Company?  
 15 A Yes.  
 16 Q The claims adjustor for Crawford, is his responsibility  
 17 any different from a claim adjustor for a primary  
 18 insurance company?  
 19 A There would be no difference.  
 20 Q Did AIG ever receive an analysis from counsel or  
 21 through Crawford or anyone else of the exposure of the  
 22 tree service?  
 23 MR. PRITZKER: Objection.  
 24 THE COURT: Well, if you're going to ask him

1 about due counsel, I don't believe those were  
 2 furnished.  
 3 MR. ZELLE: Okay. Let me -- I actually  
 4 shouldn't ask it that way.  
 5 (By Mr. Zelle)  
 6 Q Did AIG have any analysis of the tree service company's  
 7 liability?  
 8 A No.  
 9 Q Did it undertake an analysis itself?  
 10 A It did.  
 11 Q And what did AIG determine with respect to the role  
 12 that the tree service would play in settling the case?  
 13 MR. PRITZKER: Objection.  
 14 THE COURT: Basis?  
 15 MR. PRITZKER: Again, your Honor, he's  
 16 testifying on behalf of AIG.  
 17 MR. ZELLE: I thought I asked about AIG.  
 18 THE COURT: Right. But he's not a fact  
 19 witness. He's an opinion witness, so --  
 20 MR. PRITZKER: Then he should ask him his  
 21 opinion.  
 22 MR. ZELLE: Well, my question is whether what  
 23 they did was satisfactory in terms of custom and  
 24 industry practices. Just background.

1 THE COURT: Why don't you frame it that way  
 2 as opposed to asking him to testify to facts.  
 3 MR. ZELLE: Sure. That's fine.  
 4 THE COURT: You can assume certain facts and  
 5 then you can offer evidence to support them.  
 6 MR. ZELLE: That's fine.  
 7 (By Mr. Zelle)  
 8 Q What's the significance of the availability of  
 9 insurance for a third-party defendant to an insurance  
 10 company, in this case GAF -- an insurance company, AIG,  
 11 which insured GAF?  
 12 A It's very important, because it could be another source  
 13 of monies to settle a case.  
 14 Q And did AIG undertake an assessment of this available  
 15 -- other available source to settle the Rhodes case?  
 16 A They did.  
 17 Q And was that in conformance with custom and practice in  
 18 the industry?  
 19 A It was.  
 20 Q Was it in accord with custom and practice in the  
 21 industry for AIG to expect a policy limit contribution  
 22 from McMillan?  
 23 MR. PRITZKER: Objection.  
 24 THE COURT: Overruled.

1 A Yes. It would be certainly something that a claims  
 2 person handling the claim would expect.  
 3 (By Mr. Zelle)  
 4 Q And why was this an appropriate determination?  
 5 A Because the investigation disclosed that there was a \$1  
 6 million policy with no excess for the tree service, and  
 7 the exposure in this case was above the \$1 million  
 8 limit. And if this policyholder, tree service, was  
 9 found liable, their insurer -- and was found liable  
 10 beyond the \$1 million limit, the insurer might well be  
 11 on the hook for the excess because they didn't settle  
 12 within the limits of the primary policy, and it would  
 13 be normal to expect that that \$1 million would be  
 14 available for settlement.  
 15 Q Did AIG conform with the custom and standard in the  
 16 industry in terms of analyzing the attachment point of  
 17 its policy?  
 18 A Yes, but it didn't have all the information.  
 19 Q Well, what did AIG do --  
 20 A Well, they --  
 21 Q -- that complied?  
 22 A Again, they wrote, as early as April of 2002, and asked  
 23 for copies of the policies of insurance for DLS and  
 24 Penske. If, for instance, there was coverage available

1 for Zalewski under either of those policies, that would  
 2 affect the attachment point of AIG's policy, because  
 3 remember they're an excess carrier and all primary  
 4 insurance has to be exhausted before they're called  
 5 upon to pay.  
 6 Q After receiving the policies, did AIG act in time frame  
 7 within the reasonable accepted time for undertaking its  
 8 analysis?  
 9 A They did.  
 10 THE COURT: Okay. Well, I think it's one  
 11 o'clock, so we're going to call it a day.  
 12 How much longer do you have with him?  
 13 MR. ZELLE: I'm close. Certainly not more  
 14 than a half an hour, maybe 15 minutes.  
 15 THE COURT: Okay. Well, we'll have to  
 16 complete his testimony on Monday. We reconvene Monday  
 17 at nine o'clock. I'm looking at what's left.  
 18 MR. ZELLE: I can ballpark it for you, your  
 19 Honor.  
 20 THE COURT: It looks as if it's close as to  
 21 whether or not we conclude by Thursday.  
 22 MR. ZELLE: I think we will. I'm not sure  
 23 about Zurich's witness, that's the problem, or that  
 24 looms as the problem. We'll do our best.

1 THE COURT: I'm sorry, what's the problem?  
 2 MR. ZELLE: I'm quite certain we'll be able  
 3 to complete our case by Thursday. I think because  
 4 Zurich's expert will be then testifying, that's what  
 5 "looms" is, maybe not making it under the wire.  
 6 MR. VARGA: Well, we may need to take our  
 7 expert out of order because of his schedule. I have  
 8 had him flying in this weekend and here the beginning  
 9 of the week, but --  
 10 THE COURT: That's fine by me. You can work  
 11 with other counsel to get that done. I don't really  
 12 care what the order of it is.  
 13 MR. PRITZKER: That doesn't, however, deal  
 14 with closing argument, your Honor.  
 15 THE COURT: I'm aware of that. So we'll see  
 16 where we are and do it from there.  
 17 All right. Have a good weekend. We'll see  
 18 you back Monday at nine.  
 19 (Hearing adjourned at 1:02 p.m.)  
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C E R T I F I C A T E

I, Paula Pietrella and Faye LeRoux, Court Reporters, do hereby certify that the foregoing transcript, Pages 1 through 164, is a complete, true and accurate transcription of the above-referenced case.

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Paula Pietrella

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Faye LeRoux

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

**Defendants,**

JURY-WAIVED TRIAL - DAY 13

BEFORE: GANTS, J.  
BOSTON, MASSACHUSETTS  
MARCH 12, 2007

PAULA PIETRELLA  
FAYE LEROUX

## APPEARANCES

BROWN RUDNICK  
M. Frederick Pritzker  
Daniel J. Brown  
Margaret M. Pinkham  
Attorneys At Law  
One Financial Center  
Boston, MA 02111

FOR: The Plaintiffs Marcia Rhodes, et al.

ROBINSON & COLE, LLP  
Gregory P. Varga  
Elizabeth C. Sackett  
Stephen Goldman  
Attorneys At Law  
1 Boston Place  
Boston, MA 02108

FOR: The Defendant Zurich American Insurance  
Company

ZELLE McDONOUGH, LLP  
Anthony Zelle  
Brian McDonough  
Attorneys At Law  
4 Longfellow Place, 35th Floor  
Boston, MA 02114

FOR: The Defendants AIG Domestic Claims and  
National Union Fire Insurance Company

THE McCORMACK FIRM, LLC  
Mark E. Cohen  
Robert Maselek  
Attorneys At Law  
1 International Place  
Boston, MA 02110

FOR: The Defendants AIG Domestic Claims and  
National Union Fire Insurance Company

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
William Cormack (Resumed)				
(By Mr. Zelle)	6		100	
(By Mr. Varga)		34		103
(By Mr. Pritzker)		52		110

Tracey Kelly  
(By Mr. Cohen) 121

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
	None	
	<u>FOR I.D.</u>	
	None	

1 exhibit books, and they are back on the bench, I  
2 believe.  
3 THE COURT: Okay. Very good. Thank you.  
4 MR. PRITZKER: Secondly, your Honor, we have  
5 taken Exhibit 10, and we have tabbed it to be  
6 consistent with the letter. We did not put that on the  
7 bench because --  
8 THE COURT: The letter, you mean when you  
9 make references to Exhibit K, it actually is tabbed  
10 Exhibit K?  
11 MR. PRITZKER: And it isn't. It's actually  
12 numbered tabs, because the letter refers only to  
13 numbered exhibits and not to lettered exhibits. I  
14 think Mr. Goldman was mistaken on that. But, in any  
15 event, I have that book. I have not put it on the  
16 bench since I wanted the court's attention before  
17 changing an exhibit.  
18 THE COURT: I mean, if it just makes it  
19 easier for us to locate it as opposed to me having to  
20 count.  
21 MR. PRITZKER: And may I change the witness  
22 copy of Exhibit 10 as well?  
23 THE COURT: Yes. Certainly. So I assume  
24 there's no objection, and hearing none --

P R O C E E D I N G S

(In court at 9:25 a.m.)

THE COURT OFFICER: This Honorable Court is  
in session. You may be seated.

THE COURT: Good morning.

Before we start, as many of you may know, or  
may have just learned moments ago, Justice Sosman died  
on Saturday night, so for those -- many of you may have  
known her from her time on this bench and on the SJC.  
I was fortunate enough to know her both as a colleague  
at the U.S. Attorney's Office and as a fellow Superior  
Court judge. So I do ask you to give a moment of  
silence in memory of a terrific judge and a wonderful  
colleague, and a very good friend. So if you'd just  
for one moment have a moment of silence and then we  
shall start.

(A moment of silence observed.)

THE COURT: All right. Thank you.

All right, let's get us back to work. Mr.  
Cormack, as you know, you remain under oath. And with  
that we may proceed.

THE WITNESS: Under affirmation.

MR. PRITZKER: Just a couple of  
administrative things. We have updated the court's

MR. ZELLE: No.  
MR. VARGA: No.  
THE COURT: All right. Mr. Zelle, you may  
proceed.  
MR. ZELLE: Thank you, your Honor.  
WILLIAM CORMACK, Resumed.  
DIRECT EXAMINATION BY MR. ZELLE, Continued:  
Q Mr. Cormack, why don't we get right down to it this  
morning.  
Did you form any opinions, sir, as to whether  
AIG acted in accordance with industry custom and  
practice with regard to its efforts to determine  
whether there were other insurance policies that might  
be available to fund a settlement or satisfy a  
judgment?  
A I did.  
Q And what's your opinion on that subject, sir?  
A. That they were in accord with -- AIG was fully in  
accord with custom and practice in the industry.  
Q Can you explain the bases for your opinion?  
A Yes. In April of 2002, they requested copies of those  
other policies, the Penske policy and the DLS policy.  
They renewed those requests by telephone calls in

1 November of 2002; and again by correspondence in  
 2 January of 2003, they again requested those policies.  
 3 In November of 2003, there was a request for  
 4 the file. There was specific correspondence requesting  
 5 the coverage file and the policies, therefore, made by  
 6 Mr. Conroy, and then AIG again requested full copies of  
 7 the coverage file to be sent, and that was in 2004.  
 8 In June of 2004, AIG finally received the  
 9 Penske policy.  
 10 Q Following the receipt of the policy, did they undertake  
 11 an evaluation of the applicability of that policy?  
 12 A. They did.  
 13 Q I'd like to ask whether you have determined whether AIG  
 14 acted in accordance with the standard industry custom  
 15 and practice in connection with its dealings with Mr.  
 16 Bartell's letters regarding the confirmation of  
 17 coverage.  
 18 A Yes. I have an opinion.  
 19 Q And what's your opinion?  
 20 A. That AIG was within custom and practice in the industry  
 21 in their handling of the Bartell correspondence.  
 22 Q Explain the basis for that opinion, please.  
 23 A Yes. Mr. Bartell, at the time AIG had associated in  
 24 Mr. Conroy, Mr. Bartell objected on the grounds that he

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1 policyholder with notice promptly?  
 2 A. That is the custom and practice, and the law.  
 3 Q Do you have an opinion as to whether AIG acted in  
 4 accordance with the standard industry custom and  
 5 practice when it requested Zurich to provide a written  
 6 tender?  
 7 A Yes.  
 8 Q And what's your opinion?  
 9 A. That's acceptable practice.  
 10 Q What's the basis for your opinion?  
 11 A. When AIG tendered its limits, or said it was tendering  
 12 its limits orally --  
 13 Q You mean Zurich?  
 14 A. I'm sorry. Zurich. -- orally, it was not clear as to  
 15 what was entailed in that tender; were they actually  
 16 asking AIG to take over the defense that Zurich had  
 17 been conducting. We see later on that when Zurich did  
 18 write, and did write a letter tendering their limits,  
 19 they also said that they had no duty to defend, and  
 20 basically that AIG would have to defend.  
 21 Q Do you have an opinion as to whether AIG was acting in  
 22 concert with standard industry custom and practice when  
 23 it sought to obtain an IME before mediating the case?  
 24 A Yes, I do. I have an opinion.

1 wanted AIG to accept coverage. AIG had not reserved  
 2 rights, had made no coverage -- had taken no coverage  
 3 position and therefore there was no coverage issue. It  
 4 was apparent that this was a spacious attempt to stop  
 5 Mr. Conroy from coming into the case --  
 6 MR. FRITZKER: Objection, your Honor.  
 7 THE COURT: I'll allow his opinion.  
 8 A. And it was also an attempt to perhaps lead AIG into an  
 9 affirmation of a defense to cover the gap, the  
 10 insurance defense gap that we've talked about.  
 11 (By Mr. Zelle)  
 12 Q And you referred to prior testimony. Can you explain  
 13 the gap that you're referring to?  
 14 A Yes. Zurich's policy said once limits were tendered  
 15 they had no obligation to defend. AIG's policy  
 16 provided that they had no obligation to defend. So  
 17 from the time that AIG tendered its limits, the defense  
 18 of the case was in the hands of GAF.  
 19 Q I need to just go back and clarify something from the  
 20 prior testimony. I think I mis-spoke when I asked you  
 21 on Friday, so I want to ask you this question again.  
 22 Is it custom and practice in the industry  
 23 that an insurer, if there is coverage issue or a basis  
 24 for a reservation of rights, that it provides the

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1 Q What's the opinion?  
 2 A. That's within acceptable custom and practice to require  
 3 the completion of the investigation prior to evaluation  
 4 and mediation.  
 5 Q And the basis of your opinion, sir?  
 6 A. It was necessary to know, through an IME [sic] the  
 7 future rehabilitation of Mrs. Rhodes in order to  
 8 properly evaluate the case.  
 9 Q May I ask you whether you have formed an opinion as to  
 10 whether it was within industry custom and practice to  
 11 seek the depositions of Marcia Rhodes and Rebecca  
 12 Rhodes before mediating the case?  
 13 A Yes, I have an opinion.  
 14 Q And what's that?  
 15 A. It is within custom and practice to complete the  
 16 investigation of the claim by depositions of the  
 17 plaintiffs prior to an evaluation and mediation of the  
 18 case.  
 19 Q And what's the basis of your opinion?  
 20 A. One of the most important pieces of an investigation  
 21 and evaluation is the depositions of plaintiffs, not  
 22 only as witnesses but also with respect to their  
 23 appearance that they would make before a jury, any  
 24 evidence that they would give, and also if they have



1 any -- if there's any indication of they're telling the  
2 truth.  
3 Q Do you have an opinion as to whether, in industry  
4 custom and practice, an investigation that does not  
5 include an investigation in a serious personal injury  
6 case, which does not include an IME or depositions of  
7 plaintiffs, is a diligent investigation?  
8 A Yes, I do.  
9 Q And your opinion?  
10 A. Generally, an IME and depositions of the plaintiffs are  
11 required to complete investigation.  
12 Q Do you have an opinion as to whether AIG was  
13 acting in accordance with standard custom and  
14 practice in the insurance industry in pursuing a  
15 motion to compel the preaccident psychological  
16 records of Mrs. Rhodes before mediating the case?  
17 A Yes, I do.  
18 Q And what's the opinion?  
19 A It was custom and practice to obtain necessary  
20 information, medical information, past medical  
21 information, when there were allegations of  
22 exacerbation of the medical condition prior to a  
23 mediation in order to properly evaluate the  
24 exacerbation.

1 A I do.  
2 Q And your opinion is?  
3 A It's within custom and practice to associate  
4 counsel.  
5 Q And the means by which AIG went about seeking to  
6 participate through its associating in counsel,  
7 can you explain why that was appropriate?  
8 A Yes. The policy of insurance issued by AIG gave  
9 AIG the right to associate counsel. In this  
10 situation, it became apparent that there was a  
11 necessity to associate counsel because of the  
12 deficiencies in the defense of the case to date.  
13 Q Can you identify those deficiencies?  
14 A Yes. The defense attorney decided to defend by  
15 not defending. He did not obtain the kind of  
16 information that was necessary for an evaluation.  
17 His first evaluation, I believe, was in November  
18 2003. He didn't obtain depositions of the  
19 plaintiff, two of the plaintiffs. He did not  
20 obtain an IME. He did not obtain prior medical  
21 records. He did not obtain the insurance  
22 information, convey the insurance information that  
23 would be necessary with respect to the other two  
24 trucking companies.

1 Q In your opinion, sir, is it possible to undertake  
2 a realistic evaluation of a claim without having  
3 an independent medical examination, depositions of  
4 the plaintiffs, and preaccident medical history  
5 where there's a claim of exacerbation?  
6 A I have an opinion, yes.  
7 Q What is it?  
8 A That you cannot properly evaluate a case without  
9 the depositions of the plaintiffs without knowing  
10 what the future rehabilitation of the plaintiff  
11 will be and without knowing the prior condition,  
12 whether there has been an exacerbation of the  
13 prior condition and to what extent there has been  
14 an exacerbation.  
15 Q And what's the basis of that opinion?  
16 A Those are necessary, according to custom and  
17 practice, in order to complete investigation; and  
18 one, in the insurance industry, shouldn't evaluate  
19 or attempt evaluation without complete  
20 investigation.  
21 Q Do you have an opinion as to whether AIG was  
22 acting in concert with custom industry and  
23 practice in its efforts to associate in the  
24 Campbell firm?

1 Q Do you have an opinion, Mr. Cormack, as to whether  
2 AIG should have, back in accordance with insurance  
3 industry custom and practice, whether it should  
4 have attempted to associate counsel in sooner?  
5 A Yes, I have an opinion.  
6 Q And what's that opinion?  
7 A That it was not in a position before Zurich  
8 reached up and asked for money to associate in  
9 counsel.  
10 Q What's the basis for that opinion?  
11 A Because at that time, it was not clear that AIG  
12 would be involved in the case because the  
13 insurance issues with respect to the other two  
14 trucking companies had not been determined.  
15 Q Do you have an opinion, sir, as to whether AIG  
16 acted in accordance with standard custom and  
17 industry practice in not getting more involved  
18 prior to November 2003, in the investigation of  
19 the Rhodes claim?  
20 A Yes.  
21 Q And your opinion is?  
22 A That by custom and practice, excess carriers don't  
23 become involved until there are indications that  
24 an involvement is necessary; and at that time,

1 prior to Zurich asking, reaching up to AIG for  
 2 money, they had not reached that stage.

3 Q Can you explain why it's a matter of custom and  
 4 practice that an excess insurance company doesn't  
 5 make its own investigation at the outset of the  
 6 case to determine whether its policy will be  
 7 exposed?

8 A In this case, it wasn't so much a matter of  
 9 investigation as what was done by the defense in  
 10 the defense of the case. In other words, what  
 11 happened in this case was the defense of the  
 12 matter had been dysfunctional. And the only way  
 13 that -- once AIG became involved, the only way  
 14 they could do that would be associate counsel.

15 Prior to November 2003, AIG was not aware  
 16 of the dysfunctional nature of the defense.

17 Q I'm not sure I spoke clearly, because what I'm  
 18 asking you about is whether there's any  
 19 explanation, based on custom industry and  
 20 practice, as to AIG, despite not having a duty to  
 21 do so, didn't do an investigation any earlier than  
 22 it did?

23 A It did an investigation when it wrote letters  
 24 early on requesting information. Prior to finding

1 A If they don't have the information, they still  
 2 can't evaluate and they should try to get it; and  
 3 they should associate counsel and attempt to get a  
 4 continuance.

5 Q And along that same hypothetical, Mr. Cormack, if  
 6 an excess carrier does not have sufficient  
 7 information to realistically evaluate the case and  
 8 moves for a continuance and the continuance is  
 9 denied, what's the custom and practice?

10 A There's only one thing a carrier can do then and  
 11 that is to do the best they can with the  
 12 information that they have.

13 Q And do you have an opinion as to whether AIG  
 14 conformed with custom and practice in that  
 15 instance?

16 A I do.

17 Q What's your opinion?

18 A They conformed with custom and practice --

19 Q Can you explain --

20 A -- in the evaluation.

21 Q Can you explain the basis?

22 A Yes. They couldn't get a continuance and they had  
 23 to use the information that they had at hand.

24 Q I believe you have an exhibit in front of you,

1 out -- it did not know that it would be actually  
 2 involved in the case.

3 Q Okay. In your experience, Mr. Cormack, based on  
 4 your experience, do you have an opinion as to  
 5 whether it was appropriate for AIG to not make a  
 6 \$5 million offer to entice the plaintiffs to come  
 7 to mediation?

8 A Yes.

9 Q And what's your opinion?

10 A They should not have made a \$5 million offer  
 11 pursuant to custom and practice because it would  
 12 set too high a floor for negotiations and would  
 13 actually indicate and cast the perception that the  
 14 case that AIG sought was worth 10 or \$15 million,  
 15 which they didn't have that belief.

16 Q Are you familiar, Mr. Cormack, with what is  
 17 customary in the insurance industry for excess  
 18 insurers when a trial is imminent and they don't  
 19 have or have not been provided with sufficient  
 20 information to conduct a realistic evaluation?

21 A Am I familiar with what they do?

22 Q Yes.

23 A I have an opinion about it.

24 Q And what's that?

1 it's Exhibit 10, and that's a settlement demand  
 2 package that was presented by Mr. Pritzker to  
 3 defense counsel. My question is, have you had an  
 4 opportunity, in the course of preparing to  
 5 testify, to review that exhibit?

6 A Yes.

7 Q Is that exhibit in and of itself sufficient for  
 8 AIG to conduct a realistic evaluation of the case?

9 A No.

10 Q Can you explain why that's not the case?

11 A Yes.

12 Q Please do.

13 A First of all, it is the plaintiffs' package. The  
 14 defendants need to obtain the medical records on  
 15 their own to make sure that they are complete and  
 16 that they have all of the medical records.

17 Secondly, they needed the depositions of  
 18 the plaintiffs.

19 Thirdly, they needed an independent  
 20 medical examination to find out the state of  
 21 rehabilitation and the future of rehabilitation.

22 Fourth, they needed the insurance  
 23 information from the other two trucking companies.

24 And fifth, they needed an independent

1 medical exam.  
 2 Q And why is it not customary in the industry for an  
 3 insurance company to rely on the plaintiffs'  
 4 recitation of those facts?  
 5 A Because their job is to do an independent  
 6 investigation. They are charged with that  
 7 responsibility.  
 8 Q The insurers are.  
 9 A The insurer is.  
 10 O With respect to the life-care plan -- I believe  
 11 that's an exhibit attached to the plaintiffs'  
 12 demand -- do you have an opinion as to whether  
 13 that is a sufficient substitute for an independent  
 14 medical exam?  
 15 A I do.  
 16 Q What's your opinion?  
 17 A It's not.  
 18 Q And why not?  
 19 A Because it's not done by a doctor.  
 20 Q I'd like to now ask you whether you have an  
 21 opinion as to whether Crawford acted within the  
 22 standard industry practice in a number of  
 23 respects. Did you form opinions with respect to  
 24 Crawford?

1 conducted a -- strike that.  
 2 Are you aware that the Crawford reports  
 3 reflected ranges of exposure at 5 million to 10  
 4 million, at 5 million to 7 million?  
 5 A I did.  
 6 Q Do you have an opinion as to whether those were  
 7 realistic evaluations based on all relevant facts?  
 8 A They were not realistic evaluations based on all  
 9 relevant facts. They were based on incomplete  
 10 investigation.  
 11 Q Do you have an opinion, Mr. Cormack, as to whether  
 12 defense counsel retained by GAF met the expectations of  
 13 a defense counsel recently expect -- strike that.  
 14 Do you have an opinion as to whether defense  
 15 counsel retained by GAF met the expectations of a  
 16 reasonably prudent insurer?  
 17 A I do.  
 18 Q And what's your opinion?  
 19 A He did not meet those expectations.  
 20 Q And are those for the reasons of the incomplete  
 21 investigation?  
 22 A Yes, and the lack of really pursuing defense.  
 23 Q Do you have an opinion, Mr. Cormack, as to whether it  
 24 was reasonable for AIG to believe that the insurers or

1 A I did.  
 2 Q Did you form an opinion as to whether Crawford  
 3 conducted a diligent investigation?  
 4 A I did.  
 5 Q And what's your opinion?  
 6 A They did not conduct a diligent investigation.  
 7 Q And the basis for that opinion?  
 8 A Yes. Number one, they never obtained medical  
 9 records, complete medical records, independent of  
 10 what was handed to them by the plaintiff.  
 11 Two, they didn't complete their  
 12 investigation. They didn't make sure that they  
 13 had the depositions of the plaintiffs. They  
 14 didn't obtain an independent medical exam. They  
 15 did not report to Zurich; and in fact, Zurich was  
 16 unable to raise their reserve until January of  
 17 2004, because of the lack of reporting information  
 18 from Crawford.  
 19 They didn't investigate and solve the  
 20 issues of the other insurance. Their reports  
 21 contained many inaccuracies, inaccuracies of  
 22 fundamental information, and they -- well, that's  
 23 basically my opinion.  
 24 Q Do you have an opinion as to whether Crawford

1 McMillan Tree Service would pay the policy limits of  
 2 the tree service's liability policy?  
 3 A I do.  
 4 Q And what's your opinion?  
 5 A That they would pay their limits.  
 6 Q And the basis of that opinion?  
 7 A That they had evaluated the case in excess of their  
 8 limits and they would be eventually forced to pay their  
 9 limits to avoid an excess judgment.  
 10 Q And how do you know that they evaluated the case in  
 11 excess of their limits?  
 12 A They had statements that I read from their materials  
 13 where they had evaluated it at 4 to 5 -- 3 to \$5  
 14 million and they felt that they had potential  
 15 liability.  
 16 Q These were materials prepared by Specialty Insurance  
 17 Company?  
 18 A Yes.  
 19 Q I'd like now to direct your attention to the period of  
 20 time after the verdict. Have you formed any opinions  
 21 concerning AIG'S handling of the claim after the  
 22 verdict?  
 23 A I have.  
 24 Q I'd like to ask whether you reviewed in this regard the

1 portions of the underlying trial transcript?  
 2 A I did.  
 3 Q And did you review the notice of appeal?  
 4 A I did.  
 5 Q And directing your attention -- or at least the court's  
 6 attention to Exhibit 50 -- it's a request for authority  
 7 to appeal prepared by AIG. Did you review that?  
 8 A I did.  
 9 Q Did you review the claim notes of AIG?  
 10 A I did.  
 11 Q And did you review deposition testimony of Mr. Nitti  
 12 and Ms. Kelly and Mr. Pritzker concerning efforts to  
 13 resolve the case after the verdict?  
 14 A I did.  
 15 Q My first question, Mr. Cormack, is whether you formed  
 16 an opinion as to whether it was consistent with industry  
 17 custom and practice for AIG in this case to direct  
 18 trial counsel to file post-trial motions?  
 19 A I did form an opinion.  
 20 Q And what is it?  
 21 A It's well within custom and practice in the industry.  
 22 Q And what's the basis for that opinion?  
 23 A A post-trial motion is necessary to preserve any  
 24 grounds for appeal.

1 Q Let me direct your attention, Mr. Cormack, and the  
 2 court's attention to Exhibit 50.  
 3 If I could direct your attention to the  
 4 heading -- this is called "Request for Approval to  
 5 Prosecute Appeal" and it's AIG Technical Services  
 6 Inc.'s document. I'd like to direct your attention to  
 7 the second page. It's Bates No. 2128. Does that set  
 8 forth the evaluation of the likelihood of success on  
 9 appeal?  
 10 A It does. Well, it sets forth counsel's belief.  
 11 Q Okay.  
 12 A And the possibility of gaining a new trial.  
 13 Q Okay. Are you aware that this case was settled before  
 14 the transcript had been prepared?  
 15 A Yes.  
 16 Q And is that within industry custom and practice, to  
 17 settle before a transcript has been completed?  
 18 A It is.  
 19 Q What's the basis for that opinion?  
 20 A Many cases are settled before the final record is  
 21 prepared and the appeal is finalized.  
 22 Q Mr. Cormack, I'd like you to make a couple of  
 23 assumptions in connection with the next opinion I'd  
 24 like you to present.

1 Q And was it consistent with industry -- do you have an  
 2 opinion as to whether it was consistent with industry  
 3 custom and practice for AIG to direct appellate counsel  
 4 to file a notice of appeal?  
 5 A I do.  
 6 Q And what's that opinion?  
 7 A That it was well within custom and practice in this  
 8 case to file an appeal, a notice of appeal.  
 9 Q On what do you base that opinion?  
 10 A Based on the grounds for the notice of appeal and that  
 11 also the record on appeal wasn't even written at that  
 12 time, and the only way to protect the rights of AIG in  
 13 this matter until they had the written record was to  
 14 file the notice of appeal to protect their rights to  
 15 appeal.  
 16 Q Is it acceptable industry custom and practice for an  
 17 insurer to wait until a transcript is prepared to make  
 18 a final determination as to whether or not to pursue an  
 19 appeal?  
 20 A It certainly is, because the grounds that were  
 21 referenced in the report that you referred to had to do  
 22 with evidentiary matters, and is it only prudent to  
 23 read the record before you make final determination  
 24 concerning evidentiary matters.

1 I'd like you to assume that in September,  
 2 plaintiffs recovered \$550,000 from the insurers for  
 3 McMillan Tree Service; that in December the plaintiffs  
 4 recovered more than \$2.3 million from Zurich; that in  
 5 December of 2003, AIG extended to Mr. Nitti authority  
 6 of \$7 million under the National Union policy to try to  
 7 negotiate settlement.  
 8 I'd also like you to assume that plaintiffs  
 9 made a demand on November 23rd for the full amount of  
 10 the judgment plus interest and further alleged that  
 11 there was a violation by AIG of the Massachusetts  
 12 Unfair Claims Practices Act.  
 13 I'd like you to assume that, in response to  
 14 that demand, that written demand, AIG made a written  
 15 offer of \$7 million and that AIG also offered to meet  
 16 with plaintiffs' attorney to discuss the settlement.  
 17 I'd like you to assume that part of AIG's  
 18 offer was a structured settlement by which it would pay  
 19 an annuity for \$1,250,000, and that annuity would pay  
 20 Mrs. Rhodes \$3,452,000 in installment payments up to  
 21 the age of 70, that those payments were guaranteed, and  
 22 that that settlement proposal was communicated to the  
 23 plaintiffs' attorney.  
 24 I'd also like you to assume, Mr. Cormack,

1 that, in response, the plaintiffs did not lower their  
2 demand.  
3 And I would like you to assume that a meeting  
4 took place on or about January 15, 2004, that Mr. Nitti  
5 came to Boston to meet with Mr. Pritzker, that Mr.  
6 Nitti asked whether plaintiff, or Mr. Pritzker, had any  
7 response to the offer and that Mr. Pritzker said it was  
8 a nonstarter.  
9 With those facts, Mr. Cormack, I'd like to  
10 know whether you have an opinion as to whether it was  
11 reasonable for Mr. Nitti to not engage in further  
12 negotiations.  
13 MR. PRITZKER: Objection.  
14 THE COURT: Overruled.  
15 A Let me just ask one question to get the facts straight.  
16 There was a written offer of \$7 million. Did that  
17 include the Zurich money?  
18 (By Mr. Pritzker)  
19 Q It did.  
20 A Okay.  
21 Q Do you have an opinion as to whether it was reasonable  
22 for Mr. Nitti, upon hearing Mr. Pritzker's statement it  
23 was a nonstarter, to not negotiate further?  
24 A Yes, I have an opinion.

1 Q And it's your understanding that that was in excess of  
2 the \$2.9 million that plaintiffs had already received,  
3 correct?  
4 A Yes.  
5 Q Was it reasonable, in your opinion, for AIG to have  
6 extended \$7 million of authority, which would have  
7 brought at total settlement up to \$9.9 million in  
8 January of 2005?  
9 A It was reasonable.  
10 Q And what's the basis for that opinion?  
11 A Because they had a good ground for appeal and \$9  
12 million was a fair and reasonable offer.  
13 MR. PRITZKER: Your Honor, I ask that that be  
14 stricken, the opinion of Mr. Cormack that they had a  
15 good ground of appeal. I don't think Mr. Cormack knows  
16 what the ground of appeal was. There has been an  
17 advice of counsel, privilege asserted, and therefore  
18 for him to base his opinion on anything which was not  
19 discoverable is improper.  
20 MR. ZELLE: The basis of appeal, your Honor,  
21 is disclosed on Exhibit 50.  
22 THE COURT: Okay. Is your evaluation of the  
23 grounds for appeal based entirely on Exhibit 50?  
24 THE WITNESS: And the testimony of the

1 Q And what is that?  
2 A It was reasonable not to negotiate further.  
3 Q Could you explain why?  
4 A Yes, because the \$7 million offer was termed a  
5 nonstarter, Mr. Nitti only had \$7 million of AIG money  
6 in his pocket at that time, and it was obvious that --  
7 the negotiation is always the casting of perceptions,  
8 and the perception clearly there was that this case  
9 couldn't be settled for the amount of money that he had  
10 at that time and it would be counterproductive to  
11 negotiate when he couldn't settle with the money that  
12 he had available.  
13 MR. PRITZKER: I ask that that be stricken,  
14 your Honor.  
15 THE COURT: Yes. I'm going to strike it. I  
16 don't think it matters whether Nitti acted reasonably  
17 under the circumstances. The question is whether AIG  
18 acted reasonably in giving Nitti only \$7 million. So I  
19 assume that's your basis?  
20 MR. PRITZKER: It is.  
21 (By Mr. Zelle)  
22 Q Let me ask you then, Mr. Cormack, the \$7 million in  
23 authority, that was National Union money, correct?  
24 A Yes.

1 plaintiff at trial.  
2 THE COURT: With respect to?  
3 THE WITNESS: With respect to, at the end of  
4 the plaintiff's testimony, plaintiffs' counsel asked  
5 the plaintiff about her state of mind and she said that  
6 -- well, she said, in effect, that she was thinking of  
7 suicide every day, that she wanted to end it all, and  
8 that did not appear to me to be garden-variety  
9 depression. And it would appear that there was  
10 certainly grounds for appeal, that the defendant was  
11 never given the medical records that was needed to  
12 counter such testimony at trial.  
13 MR. PRITZKER: I now move again to strike,  
14 your Honor.  
15 THE COURT: I'll hear from you, Mr. Zelle.  
16 That's goes a bit beyond the scope of Exhibit 50.  
17 MR. ZELLE: I didn't open -- it does, your  
18 Honor. That's right. I didn't open that door, your  
19 Honor. I believe that was your question.  
20 THE COURT: But the question was, he offered  
21 an opinion. I need to know whether or not the opinion  
22 was based on purely Exhibit 50 or things beyond Exhibit  
23 50.  
24 MR. ZELLE: Well, then let me ask this

1 question of Mr. Cormack.  
 2 (By Mr. Zelle)  
 3 Q Can you base your opinion --  
 4 MR. PRITZKER: Excuse me. Before we do that,  
 5 your Honor, could I have a ruling on my motion to  
 6 strike, at least based upon --  
 7 THE COURT: Was that part of the opinion  
 8 disclosed in his report?  
 9 MR. PRITZKER: It was, your Honor.  
 10 THE COURT: With respect to the testimony of  
 11 the plaintiff at trial?  
 12 MR. PRITZKER: Yes, your Honor.  
 13 MR. ZELLE: Yes.  
 14 THE COURT: And then what would be the  
 15 grounds then for striking it?  
 16 MR. PRITZKER: Your Honor, as I'm going to  
 17 get into the -- there has been almost nothing that Mr.  
 18 Cormack has testified about today which is in his  
 19 report. And having said that, the court would almost  
 20 have to read the report to understand what I'm saying,  
 21 but --  
 22 THE COURT: I'm sorry. I just asked you  
 23 whether or not his --  
 24 MR. PRITZKER: I thought it was appropriate

1 to move to strike that particular basis.  
 2 THE COURT: Right. Wait. Okay, now I'm  
 3 confused.  
 4 MR. ZELLE: Well, your Honor --  
 5 THE COURT: Wait. Let me step back. I asked  
 6 you, Mr. Pritzker, whether or not the reference that  
 7 Mr. Cormack just made to the testimony of the plaintiff  
 8 at trial with respect to her contemplation of suicide  
 9 was included in his report. You told me it was.  
 10 MR. PRITZKER: I'm sorry, your Honor, but not  
 11 as it related to the appeal.  
 12 THE COURT: Oh, I'm sorry.  
 13 MR. PRITZKER: But rather, as it related to  
 14 the justification of counsel going after the records  
 15 initially, moving for the production of those records,  
 16 which was denied twice by the court.  
 17 THE COURT: I'm sorry. All right. So it was  
 18 not included in this report with regard to his opinion  
 19 as to the appropriateness of the appeal?  
 20 MR. ZELLE: That's not right, your Honor.  
 21 I'll read the report.  
 22 It said: While waiting for the trial  
 23 transcripts, AIG decided to settle the case regardless  
 24 of the merits of the appeal.

1 He goes onto describe how it was settled and  
 2 then in the next paragraph, Mr. Pritzker -- this is on  
 3 the bottom of page 17 -- it says that -- and it carries  
 4 over onto 18 -- it says, it explains that prior to the  
 5 deposition there was -- which took place -- I'm sorry.  
 6 I'm looking at the wrong testimony. Here it is.  
 7 MR. PRITZKER: Your Honor, I can read it for  
 8 the court, if the court wishes.  
 9 THE COURT: Well, Mr. Zelle has it, so we'll  
 10 let him finish it.  
 11 MR. ZELLE: It says, your Honor: AIG filed  
 12 post-trial motions based on a reason to believe that  
 13 Marcia Rhodes' testimony at trial that the accident  
 14 caused her profound emotional distress and exacerbated  
 15 her preexisting bipolar disorder demonstrated that  
 16 defendants should have been entitled to discover her  
 17 pre-accident psychiatric records.  
 18 AIG'S notes reflect the import of this issue.  
 19 And then she quotes basically -- he quotes in his  
 20 letter from the notes essentially what he testified to  
 21 about her testimony at trial. And on the subject of  
 22 emotional distress, Mrs. Rhodes testified: "I'm  
 23 depressed and it goes on from there."  
 24 THE COURT: Let me see it.

1 MR. ZELLE: Sure.  
 2 THE COURT: Why don't you begin to say, "It  
 3 goes on from there.", then it's probably faster to  
 4 read.  
 5 MR. ZELLE: It's just a quote of her trial  
 6 testimony. It starts --  
 7 MR. PRITZKER: I believe it starts, your  
 8 Honor, with the paragraph: "Plaintiffs received a jury  
 9 verdict."  
 10 THE COURT: All right. The motion to strike  
 11 is denied.  
 12 (By Mr. Zelle)  
 13 Q Mr. Cormack, we're almost done here. I'd like to ask  
 14 you to assume for this next question that, in June  
 15 2005, AIG paid \$8.965 million in addition to what had  
 16 been received by the plaintiffs from Zurich and the  
 17 tree service insurer and that that amount was paid by  
 18 AIG without receiving a release for the 93A claim. And  
 19 my question is whether you have an opinion as to  
 20 whether it was appropriate for AIG, prior to settling  
 21 that claim, to seek a release of the 93A claim.  
 22 A It was.  
 23 Q What's the basis of that opinion?  
 24 A Every insurance carrier wants to dispose of the entire

1 matter, if possible. It was a negotiation and it would  
2 be something that, by custom and practice, a carrier  
3 would want to negotiate a complete, total result.

4 MR. ZELLE: That's all I have, your Honor.

5 THE COURT: Okay. Mr. Varga and Ms. Sackett,  
6 any cross-examination that you have?

7 MR. VARGA: I was going to allow Mr. Pritzker  
8 to --

9 MR. PRITZKER: Well, I'd like for him to be  
10 able to have the entirety of yours before he starts.

11 MR. VARGA: Very well.

12 CROSS-EXAMINATION BY MR. VARGA:

13 Q Good morning, Mr. Cormack.

14 A Good morning.

15 Q On Friday afternoon, you opined that a primary insurer  
16 must discharge its duty of investigating promptly and  
17 diligently, even in those cases in which it is apparent  
18 that its policy limit may be consumed. Do you remember  
19 that testimony?

20 A I do.

21 Q Okay. And the investigation that a primary insurer  
22 like Zurich has to conduct includes an investigation of  
23 coverage, correct?

24 A It does.

1 Q It's inappropriate to do that.

2 A It is --

3 Q And it's inappropriate --

4 A -- inappropriate.

5 Q I'm sorry.

6 A It is inappropriate.

7 Q And it's inappropriate to do that because there are  
8 some times when it's in the plaintiff's lawyer's best  
9 interest to exaggerate the amount of damage, correct?

10 A It is.

11 Q And it's also true because there are instances in which  
12 lawyers make honest mistakes when they report certain  
13 aspects of damages or injuries to an insurance company,  
14 correct?

15 A They do.

16 Q And that happened in this case, didn't it?

17 A Yes.

18 Q Primary insurer's decision making with respect to case  
19 value, disposition of a claim and so forth has to be  
20 based on medical records, yes?

21 A Yes.

22 Q Nurses' notes, things like that?

23 A Correct.

24 Q Post-operative reports?

1 Q The full investigation of liability issues, correct?

2 A It does.

3 Q And a full investigation of damages and the value of  
4 injuries that were sustained in a bodily injury case?

5 A They do.

6 Q And you also recall testifying on Friday, sir, that an  
7 insurer cannot evaluate claims in the abstract.

8 A Yes.

9 Q You remember saying that?

10 A I do.

11 Q And you testified that an insurer needs facts; it needs  
12 something that it can verify, something that it can  
13 document to understand the nature of injuries and the  
14 scope of any potential future harm, correct?

15 A That's correct. That's true.

16 Q And that's all true for both primary and excess  
17 insurers.

18 A It is.

19 Q And in a case involving serious personal injury like  
20 paralysis, a primary insurer cannot make judgments  
21 regarding disposition of a claim or settlement value  
22 based strictly on secondhand information that comes on  
23 the telephone from a claimant's lawyer, correct?

24 A Correct.

1 A Yes.

2 Q Medical bills?

3 A Yes.

4 Q If there are claims for lost earnings, primary  
5 carriers' investigation of damages has to include an  
6 understanding or an investigation of the employment  
7 history of the plaintiff, correct?

8 A It does.

9 Q And it would be poor claim handling practice, would it  
10 not, for a primary insurer to make decisions regarding  
11 settlement and case value without obtaining all of that  
12 kind of information in the course of its investigation.

13 A In my opinion, it would.

14 Q And that's based in part on the fact that you work for  
15 Wausau Insurance, which is a primary insurer, correct?

16 A Yes, and also an excess carrier.

17 Q And how many years were you with Wausau, by the way?

18 A Twenty-one.

19 Q On Friday, and again this morning, you testified that  
20 to your belief that a diligent investigation in this  
21 case should have included the deposition of Marcia  
22 Rhodes and Rebecca Rhodes?

23 A I did.

24 Q And an independent medical examination of Mrs. Rhodes?

1 A Yes.

2 Q And also an investigation into other policies of

3 insurance that might be available before AIG's excess

4 layer would attach?

5 A That's correct.

6 Q You reviewed the entire claim file from Zurich and

7 Crawford, correct?

8 A I believe so.

9 Q Or at least that which had been produced in this case,

10 obviously.

11 A I think I got the documents that had been produced, so

12 I don't know if I had the complete files.

13 Q I understand. And based on your review of those

14 documents, you understand that a firm called Taylor,

15 Duane, Barton & Gilman, which was coverage counsel for

16 Zurich, made repeated efforts in 2002 and 2003 to

17 gather documentation and information regarding other

18 insurance policies for DLS and Penske, yes?

19 A I'm going to go back to answer that previous question.

20 I always -- when I'm asked a question that like, I

21 think in my report I put down what records I looked at

22 and that's what I would say I looked at.

23 Q All right. But I believe on Friday you testified that

24 you looked at the claim file that had been produced by

1 When you say "Crawford file," you're talking about

2 their reports, right?

3 Q Any materials provided to AIG by Crawford & Company.

4 A Yes. I reviewed all of those now that you're -- I just

5 want to be accurate.

6 Q And I appreciate that. And my question is, you

7 understand that the report, which informed the

8 recipients of the report of the fact that Driver

9 Logistics did not have other primary insurance

10 available to it, was a report from November 13, 2003

11 from John Chaney, correct?

12 A That's correct. But I would have a complaint about

13 that report.

14 Q And you'd agree with me, Mr. Cormack, that it was

15 reasonable and consistent with good claim handling

16 practices for Zurich to pursue the other insurance

17 information through its counsel.

18 A It was.

19 Q Now, a few moments ago you testified upon examination

20 by Mr. Zelle that when a trial is imminent and the

21 excess insurer doesn't have enough information to

22 conduct an evaluation, it should move for a

23 continuance, correct?

24 A I did.

1 Zurich. Do you remember seeing that?

2 A Yes.

3 Q Okay. And so in reviewing that file and in reviewing

4 Crawford's file, you saw that there were repeated

5 attempts made by coverage counsel for Zurich to obtain

6 documentation regarding other insurance that may have

7 been available for Driver Logistics and Zalewski,

8 correct?

9 A I don't recall repeated attempts. I'm sorry.

10 Q You don't recall seeing six different letters in the

11 claim file that showed efforts by coverage counsel to

12 obtain insurance information from those parties?

13 A No.

14 Q Do you have any reason to disagree with me that it's,

15 in fact, in the claim file?

16 A No.

17 Q You're aware, Mr. Cormack, that the first time that

18 Zurich actually learned that Driver Logistics Services

19 did not have its own policy of primary liability

20 insurance was in November of 2003?

21 A I believe that's true.

22 Q And that was based on a Crawford & Company report that

23 AIG also received, correct?

24 A I recall a Crawford report -- let me ask one question.

1 Q And then I think you said in this case that AIG --

2 strike that.

3 I think you said that where a continuance is

4 denied, the insurer has to do the best it can, based on

5 the information that it has, right?

6 A That's the only thing it can do, yes.

7 Q When you testified earlier, I think that you had said

8 that what was lacking in terms of the investigation

9 here were several things: the depositions of Marcia

10 and Rebecca Rhodes, correct?

11 A Correct.

12 Q And the independent medical investigation.

13 A Correct.

14 Q I'm sorry. The IME.

15 A Yes.

16 Q And the depositions of Mrs. Rhodes' doctors?

17 A Yes.

18 Q As of the time of the mediation that took place in the

19 underlying case, August 11, 2004, the first day of Mrs.

20 Rhodes' deposition had been taken, correct?

21 A The first day had been taken.

22 Q And the independent medical examination had been done,

23 too, correct?

24 A It had.



1 Q All right. And prior to that mediation, the Superior  
 2 Court had also denied AIG's motion to compel prior  
 3 medical or mental health records, correct?  
 4 A They had.  
 5 Q So we knew, at least as of the time of the August  
 6 mediation, that those records were not going to be  
 7 available in any event, correct?  
 8 A That's correct.  
 9 Q And between the time of the mediation and the time the  
 10 trial began. Marcia Rhodes' deposition was completed,  
 11 correct?  
 12 A It was.  
 13 Q And Rebecca Rhodes' deposition was taken, true?  
 14 A That is correct.  
 15 Q So by the time the trial began, was there anything else  
 16 that AIG, in your opinion, didn't have that it needed?  
 17 A It didn't have an evaluation of coverage under the  
 18 policies. I don't believe that they had ever verified  
 19 that DLS has no insurance. Remember, the report by  
 20 Crawford said that DLS had no insurance, and that was  
 21 based on a phone conversation with someone at DLS by  
 22 someone at Crawford. In my experience in handling  
 23 claims, very often phone conversations are not the  
 24 proper way to find out if there's insurance coverage,

1 THE COURT: You may proceed.  
 2 (By Mr. Varga)  
 3 Q Your testimony is the reason that they didn't is  
 4 because it would have been too late to request that  
 5 information from DLS in discovery?  
 6 A In discovery.  
 7 Q But there were channels other than discovery through  
 8 which they could have requested that information, true?  
 9 A Yes, but I think that the important thing, the  
 10 important point is that kind of information I believe  
 11 should be obtained by answers to interrogatories, and  
 12 that's pretty customary.  
 13 Q Did DLS have a primary policy of insurance that  
 14 applied?  
 15 A I don't know.  
 16 Q Did you ever undertake to find that out?  
 17 A I don't know if they did or didn't. The files didn't  
 18 indicate one way or -- it was just that one note that  
 19 you referred to, counsel.  
 20 Q Okay. On direct examination by Mr. Zelle, you were  
 21 asked some questions about the demand package, which is  
 22 Exhibit 10.  
 23 A Yes.  
 24 Q I'd like to ask you a few more questions about that.

1 because the person who has directed that question  
 2 doesn't have a motivation to go out and search and make  
 3 sure. And it should have been by answers to  
 4 interrogatories under oath.  
 5 Q Again, that Crawford & Company report was November  
 6 2003, correct?  
 7 A That's correct.  
 8 Q About ten months before the trial began?  
 9 A That's right.  
 10 O Okay. Before the trial, what, if any, effort did  
 11 anyone at AIG make to ascertain on their own whether  
 12 there was another policy of primary insurance that DLS  
 13 had?  
 14 A I don't recall that they had an opportunity to do that.  
 15 Q They didn't make any effort, to your knowledge,  
 16 correct?  
 17 A I don't believe so.

18 THE COURT: I'm sorry. Did not have the  
 19 opportunity to do it, or did not do it?

20 THE WITNESS: Yes. It would take an  
 21 interrogatory. I'm not sure that -- discovery was cut  
 22 off as of December -- I mean October 31 of 2003, and  
 23 therefore it would be too late to ask interrogatories  
 24 of DLS: Do you have a policy of insurance.

1 Before I get to the demand package, as of  
 2 November 19, 2003, in a conference call in which Mr.  
 3 Satriano participated with people from Zurich and folks  
 4 from the defense firms, AIG possessed a number of  
 5 reports that were prepared by Crawford & Company, true?  
 6 A They did.  
 7 Q In fact, they had a 11 different reports from that time  
 8 period, dating back to January 30, 2002, true?  
 9 A There was a number of reports, yes.  
 10 Q And among the reports that AIG had was the January 30,  
 11 full, formal report prepared by John Chaney, true?  
 12 A True.  
 13 Q And in that report Mr. Chaney set out in some detail  
 14 the circumstances of the accident?  
 15 A He did.  
 16 Q And he described the various players that were involved  
 17 in the accident, correct?  
 18 A He did.  
 19 Q And he had information there regarding the trooper's  
 20 statements and so forth?  
 21 A He did.  
 22 Q And in subsequent reports, there were discussions of  
 23 liability issues and damages issues, correct?  
 24 A There was.

1 Q And when the demand package arrived, I know that you  
 2 had testified earlier that, in your opinion, this did  
 3 not, the demand package did not provide all of the  
 4 information that AIG needed to -- I think your words  
 5 were "to perform a thorough evaluation of the claim."  
 6 Am I stating that testimony correctly?  
 7 A To evaluate the claim.  
 8 Q To evaluate it at all.  
 9 A Well, yes. From the standpoint of AIG, they had to  
 10 have the complete investigation to evaluate.  
 11 Q Okay. But let me try to understand that. I'm holding  
 12 up Exhibit 10, which, as you know because you've  
 13 reviewed it, has a number of medical bills, medical  
 14 records, discharge summaries, nurses' notes. It has  
 15 police reports. It has information in the form of a  
 16 letter regarding the claimant's injuries. It has  
 17 deposition transcripts And I'm trying to understand,  
 18 is it your testimony that, even with this information,  
 19 AIG could not even begin an evaluation?  
 20 A I didn't talk about "begin." I said they couldn't do  
 21 an evaluation without a complete investigation, which  
 22 is custom and practice.  
 23 Q So they couldn't complete the evaluation without more  
 24 information, is what you're saying.

1 Q Did you consider that in forming your opinions in this  
 2 case?  
 3 A I considered everything that I reviewed in forming my  
 4 opinions.  
 5 Q Does AIG currently ascribe to the guiding principles  
 6 for primary and excess insurers?  
 7 A I have no idea.  
 8 Q Do you know what insurance companies do, if any, today?  
 9 A Years ago there were a number that did. I have never  
 10 cited that guiding principles for the fact that people  
 11 signed up or didn't. They just contain concise  
 12 statements of what is actually today the custom and  
 13 practice in the industry.  
 14 Q I see. And those were created back in the '70s, true?  
 15 A They were.  
 16 Q Did you review Greg Deschenes' trial testimony in this  
 17 case?  
 18 A I did.  
 19 Q So you're aware that he testified during trial that he  
 20 had an agreement with Mr. Pritzker not to take Mrs.  
 21 Rhodes' deposition or Rebecca Rhodes' deposition while  
 22 they attempted to work the case out in terms of  
 23 settlement, correct?  
 24 A Yes, that's what he testified to.

1 A I've already testified as to what information was not  
 2 there, including the insurance issues, the depositions,  
 3 the IME, and the records of prior mental health.  
 4 Q You're aware that Mr. Satriano sat in that witness  
 5 stand back in February and testified that by February  
 6 of 2004, he had received just about all of the  
 7 information necessary for him to complete his  
 8 investigation of the Rhodes claim. Are you aware of  
 9 that?  
 10 A I'm aware of his testimony.  
 11 Q So you read his testimony before coming here today?  
 12 A I did.  
 13 Q And you're aware also, then, because you've read Mr.  
 14 Satriano's deposition, true?  
 15 A I did.  
 16 Q So you're aware that he testified that at the March  
 17 2004 meeting in which he and Greg Deschenes and Mr.  
 18 Conroy and others participated, that in his words,  
 19 quote, the jury was out in the mind of his attorney,  
 20 Mr. Conroy, with respect to whether Marcia Rhodes's  
 21 deposition was actually necessary in order for AIG to  
 22 proceed to mediation.  
 23 Do you remember that testimony?  
 24 A I remember that testimony.

1 Q And in your view, based on all of your experience in  
 2 the industry and having been a practicing attorney in  
 3 private practice for nine years, was that an  
 4 unreasonable thing to do in order to try to induce a  
 5 settlement?  
 6 A I did not think it was a reasonable thing to do. It  
 7 sent the wrong signals and it didn't accomplish  
 8 obtaining the deposition prior to the mediation.  
 9 Q But reasonable attorneys can disagree on whether that  
 10 kind of a strategy is a good strategy in defending a  
 11 claim, correct? Depending on the circumstances that  
 12 are presented at that time, that you're in the middle  
 13 of a litigation?  
 14 A I would rather look at it from the standpoint that  
 15 before you evaluate, you have to have completed your  
 16 investigation, and that is custom and practice without  
 17 a doubt.  
 18 Q I want to clarify this, Mr. Cormack, because you  
 19 continue to say that "before you evaluate," and I'm  
 20 trying to understand. Are you saying before you  
 21 complete your evaluation, you have to complete your  
 22 investigation? Or are you saying that before you start  
 23 your evaluation, you have to complete your  
 24 investigation?

1 A You have to complete your investigation before you put  
 2 an actual money value on the case, which is what AIG  
 3 was requested to do in November 19 of 2003, and they  
 4 didn't have the materials to do it.  
 5 Q And that statement is true also of primary insurers,  
 6 true?  
 7 A Of the primary?  
 8 Q Yes.  
 9 A It is, except that all they had to determine was  
 10 whether the damages would go over the \$2 million range,  
 11 and they still didn't have the information to do that  
 12 until they got their reserve increase in December or  
 13 January of 2004.  
 14 THE COURT: I'm sorry, in December of 2004?  
 15 THE WITNESS: '3. Actually, it was in  
 16 January of 2004 that the reserve was raised.  
 17 (By Mr. Varga)  
 18 Q Mr. Cormack, do you know if Crawford & Company had any  
 19 -- in its possession-- had any primary insurance policy  
 20 for DLS?  
 21 A I don't know.  
 22 Q Do you understand my question? It may not have been  
 23 the most artful question. I had asked you before  
 24 whether you knew if there were, in fact, any primary

1 Q Do you remember that it was in approximately September  
 2 of 2006?  
 3 A I believe that's correct.  
 4 Q And when you prepared that report, had you reviewed --  
 5 all of the information that you testified on direct  
 6 examination, you reviewed?  
 7 A No, because there was the trial -- let's see. Let me  
 8 just think.  
 9 I know there was some trial transcript that I  
 10 didn't review: Mr. Deschenes and Mr. Satriano and Ms.  
 11 Peri.  
 12 Q Is that a copy of your report that I've just handed  
 13 you?  
 14 A Yes.  
 15 Q And if you look at the second page of that report, on  
 16 the fourth paragraph, there's -- the paragraph that  
 17 starts "National Union Fire Insurance Company of  
 18 Pittsburgh issued a commercial umbrella liability  
 19 policy." Do you see that?  
 20 A I do.  
 21 MR. ZELLE: I'm sorry, what --  
 22 MR. PRITZKER: Fourth paragraph.  
 23 MR. ZELLE: Of what page?  
 24 MR. PRITZKER: Page 2.

1 policies available to Driver Logistics, and I think you  
 2 said you didn't know.  
 3 A I don't know.  
 4 Q My question now is, do you know whether Crawford &  
 5 Company had any in its file?  
 6 A I never saw one.  
 7 Q Do you know whether defense counsel, Nixon Peabody,  
 8 ever had a copy of Driver Logistics' insurance -- have  
 9 any Driver Logistics' insurance policy?  
 10 A Of all the materials I've looked at, I did not see an  
 11 insurance policy for DLS, primary or excess.  
 12 Q So the answer to that last question is no, then?  
 13 A Yes.  
 14 MR. VARGA: If I may just have moment, your  
 15 Honor?  
 16 THE COURT: You may.  
 17 MR. VARGA: Thank you.  
 18 I have no further questions. Thank you.  
 19 THE COURT: Okay. Mr. Pritzker.  
 20 CROSS-EXAMINATION BY MR. PRITZKER:  
 21 Q Mr. Cormack, when did you prepare your report in this  
 22 case which was incorporated in the answers to  
 23 interrogatories?  
 24 A Oh, I don't remember. It was a while ago.

1 MR. ZELLE: I think that's Mr. Todd's report,  
 2 this page 2.  
 3 THE WITNESS: Yeah, this is --  
 4 MR. ZELLE: His report begins on page 10.  
 5 MR. PRITZKER: This is the report itself.  
 6 MR. ZELLE: Okay. So it's page 10. Okay.  
 7 Great. Thanks.  
 8 (By Mr. Pritzker)  
 9 Q The last sentence of that paragraph, Mr. Cormack, says  
 10 that Crawford & Company, paren, Crawford, end paren,  
 11 the third-party administrator, acted as Zurich's adjustor.  
 12 Do you read that?  
 13 A Yes.  
 14 Q And that's what you said in your report, right?  
 15 A I did.  
 16 Q Not GAF's adjustor, but Zurich's adjustor, true?  
 17 A They acted as both.  
 18 Q Well, you didn't say that in your report, did you, sir?  
 19 A I don't know. I'd have to review the entire report,  
 20 but.  
 21 Q Review as much as you can, sir, but my question is why  
 22 you changed your testimony.  
 23 A I don't see anyplace else in this report where I  
 24 address that issue.

1 Q Do you see, now that you've reviewed your report, sir,  
 2 anything that indicates that GAF's -- let me get the  
 3 proper word here -- that it was atypical that GAF  
 4 doesn't have the -- it's not typical that GAF, for an  
 5 insured, to have the control over the investigation and  
 6 defense that GAF had. Do you remember testifying to  
 7 that?  
 8 A That it was atypical -- I'm sorry, you're going to have  
 9 to repeat that again.  
 10 Q Do you remember testifying that insureds usually don't  
 11 have the control that GAF had, that that was atypical  
 12 in the industry?  
 13 A Yes.  
 14 Q And that was your opinion, right?  
 15 A Yes.  
 16 Q Is there anywhere in that report that you make any  
 17 reference at all to control of GAF as it affected the  
 18 investigation, the evaluation, or the defense of this  
 19 case?  
 20 A I'd have to go through the report one more -- again.  
 21 Q Go ahead, sir, but I will represent to you that I  
 22 didn't find anything.  
 23 A I make reference to the fact that defense counsel was  
 24 retained by GAF.

1 A Okay.  
 2 Q All right. And do you see the sentence that I'm  
 3 pointing to you on page 3 of the letter, second full  
 4 paragraph, right in the middle, where it says: Defense  
 5 counsel appointed by Zurich, subject to a complete  
 6 reservation of rights, expeditiously obtained the State  
 7 Police report. And then it goes on.  
 8 Do you know of any information to indicate  
 9 that Zurich did not retain defense counsel?  
 10 A Yes. My understanding was that GAF selected counsel,  
 11 which Zurich then paid, but that counsel -- Nixon  
 12 Peabody was selected by GAF. That was my  
 13 understanding.  
 14 Q And from what did you derive that understanding, sir?  
 15 A I can't be sure as I sit here today.  
 16 Q All right. Now, you testified that --  
 17 A Certainly discussions with counsel and someplace maybe  
 18 in the records that I went through. That's the best I  
 19 can do.  
 20 Q You mean counsel for AIG?  
 21 A Yes.  
 22 Q All right. Now, you did say when you were reviewing  
 23 your experience, that defense counsel and the  
 24 investigative administrator, either a TPA or the

1 Q Yes, I know you do. That's not what I asked you, sir.  
 2 That's going to be my next question.  
 3 What I asked you was, do you have anything in  
 4 there indicating that the control which GAF exercised  
 5 on the investigation, the evaluation, or the defense of  
 6 this case was unusual?  
 7 A Not in those words, no.  
 8 Q Now, you did say that GAF was -- retained defense  
 9 counsel; isn't that so?  
 10 A I did.  
 11 Q Would you look at the Zurich exhibits, Exhibit 129 -- I  
 12 can show it to you, if you will, to save time.  
 13 A Okay. Sure.  
 14 Q And I'm going to represent to you that this is a letter  
 15 to plaintiff's counsel from Robinson & Cole, GAF's  
 16 counsel, outside counsel. And do you see --  
 17 A Not GAF. You mean AIG's outside counsel.  
 18 MR. VARGA: He mean Zurich's. I'm going to  
 19 rep  
 20 (By Mr. Pritzker)  
 21 Q Okay. I've got everybody but the right counsel. Let  
 22 me ask it another way.  
 23 I'm going to represent to you that was  
 24 Zurich's outside counsel.

1 adjustor, work as partners, didn't you?  
 2 A I did.  
 3 Q And that, in fact, is your opinion about how things are  
 4 supposed to work; is that so?  
 5 A It is. They should work as partners with overseeing --  
 6 the claim department overseeing -- the claim handler  
 7 overseeing defense counsel.  
 8 Q All right. Now, the claims handler oversees defense  
 9 counsel. Defense counsel is defending, right?  
 10 A He is.  
 11 Q The claims person is investigating, true?  
 12 A They are.  
 13 Q And the two are supposed to work together to do the  
 14 investigation and the evaluation of a claim, right?  
 15 A That is correct.  
 16 Q And in this case, Nixon Peabody was supposed to be  
 17 doing that on behalf of GAF; isn't that so?  
 18 A Yes.  
 19 Q And Crawford & Company was supposed to be doing that on  
 20 behalf of GAF; isn't that so?  
 21 A Yes.  
 22 Q All right. And the interest that GAF had was up to  
 23 \$250,000; isn't that so?  
 24 A No.

1 Q Because they had some kind of an agreement to share  
 2 defense costs beyond that, right?  
 3 A Share defense and indemnity costs under a loss  
 4 responsive premium plan.  
 5 Q I understand that. But Zurich also had a significant  
 6 stake, over \$250,000; did it not?  
 7 A They did.  
 8 Q And as a result of that, the defense counsel and the  
 9 adjuster were also working on behalf of Zurich; were  
 10 they not?  
 11 A They were.  
 12 Q And in fact, Ms. Fuell testified to that during her  
 13 testimony. Did you review her testimony?  
 14 A I did.  
 15 Q And do you remember that she testified that Crawford &  
 16 Company was working both on behalf of GAF and Zurich?  
 17 A She did.  
 18 Q And that would be appropriate in a case where it was  
 19 pretty clear that the liability, the exposure, was  
 20 going to exceed the retention, the SIF; isn't that so?  
 21 MR. ZELLE: SIR.  
 22 (By Mr. Pritzker)  
 23 Q SIR. I'm sorry.  
 24 A It would.

1 support. Do you remember that?  
 2 MR. VARGA: Objection.  
 3 A I don't remember Crawford saying we've given you  
 4 the support.  
 5 (By Mr. Zelle)  
 6 Q Do you remember that Mr. McIntosh kept asking for  
 7 your full, formal report?  
 8 A He did.  
 9 Q Do you understand what a full, formal report is?  
 10 A I do.  
 11 Q And do you understand that that's a captioned  
 12 report with all kinds of things that, in fact,  
 13 were contained in the January 30, 2002, full,  
 14 formal report from Crawford & Company?  
 15 A Except for the medical, yes.  
 16 Q So except for the fact --well, there was some  
 17 medical information in that report; was there not?  
 18 A Very sketchy.  
 19 Q Well, let's look at Exhibit 66A, Volume 1.  
 20 A I think it's in Volume 2.  
 21 Q I think you're right. Do you have 66A?  
 22 A I do.  
 23 Q Let's go through with it in some detail.  
 24 It starts off with what the existing

1 Q And as such, you would expect that Zurich, since it had  
 2 \$2 million exposed, did it not, less the 250,000 and  
 3 some sharing.  
 4 A Yes.  
 5 Q You'd expect that they'd be looking after to make sure  
 6 that the investigation and evaluation was being done to  
 7 their satisfaction; isn't that so?  
 8 A Yes.  
 9 Q And if it weren't being done to their satisfaction,  
 10 they certainly had an opportunity to do something about  
 11 it, didn't they?  
 12 A They did.  
 13 Q For once thing they could have said we want you to  
 14 do the following tasks that you haven't done.  
 15 Couldn't they have said that?  
 16 A Yes.  
 17 Q Did you see anything during 2002, a full year  
 18 after the accident, where Zurich made such a  
 19 request that anything specifically be done that  
 20 was not being done by Crawford or defense counsel?  
 21 A Other than asking for documents from Crawford, no.  
 22 Q They asked for support.  
 23 A They did.  
 24 Q And Crawford kept saying we've given you the

1 reserves are, right?  
 2 A It does.  
 3 Q And then it goes to the Authority and Handling  
 4 Requirements, true?  
 5 A It does.  
 6 Q And it indicates that the claim will be reportable  
 7 to both GAF and Zurich; does it not?  
 8 A It does.  
 9 Q And if we go to the next page, it talks about,  
 10 first, the location of the accident.  
 11 A It does.  
 12 Q And then a generalized description of the  
 13 accident.  
 14 A Yes.  
 15 Q Then the tractor-trailer operator's account of the  
 16 accident. First of all, who owned the tractor-  
 17 trailer, right?  
 18 A Yeah. It doesn't given an account. It tells who  
 19 owns it.  
 20 Q And then down at the bottom of that page, it says  
 21 "Tractor Operator's Account of the Accident"?  
 22 A Yes.  
 23 Q And if we go over to the next page, it talks about  
 24 the Massachusetts Motor Vehicle police report?

1 A It does.  
 2 Q In quite a lot of detail?  
 3 A Yes.  
 4 Q It states the State Police report is not yet  
 5 available, right?  
 6 A That's correct.  
 7 Q And then there was a site inspection that was  
 8 done, presumably by the writer, who was John  
 9 Chaney of Crawford, right?  
 10 A He did.  
 11 Q And then it talks about the various parties,  
 12 right?  
 13 A Yes.  
 14 Q It talks about representation.  
 15 A Yes.  
 16 Q And then, under "Defense Counsel," by the way, it  
 17 says: At GAF's suggestion, we -- meaning Crawford  
 18 -- engaged Nixon Peabody, right at the bottom of  
 19 that page  
 20 A It does. That was what I was looking for earlier.  
 21 Q And under "Liability," even this early, it says:  
 22 We see DLS driver as primary.  
 23 Did that ever change?  
 24 A No.

1 orange vest and white gloves was standing in front  
 2 of Mrs. Rhodes with his hand up stopping traffic,  
 3 true?  
 4 A True.  
 5 Q And you knew that the McMillan Tree Company had  
 6 put cones up around this work space; did you not?  
 7 A Right at the work space, yes.  
 8 Q So there were orange cones at the work space.  
 9 There was this officer, who was, by the way, a  
 10 rather large man. He was six foot four and  
 11 wearing an orange vest and white gloves, stopping  
 12 traffic. You knew that Mrs. Rhodes' brake lights  
 13 were working; did you not?  
 14 A Yes.  
 15 Q And that they were actually on at the time of the  
 16 crash?  
 17 A They were.  
 18 Q And with all of that, was there anything else that  
 19 Crawford & Company should have done to determine  
 20 that DLS was primarily liable?  
 21 A No.  
 22 Q So it's your testimony that more investigation  
 23 should have been done for McMillan Tree Service?  
 24 A Yes.

1 Q Was there anything that you believed that Crawford  
 2 & Company should have done other than obtain the  
 3 State Police report as it related to the liability  
 4 of the DLS driver?  
 5 A Yes. I would have done a thorough investigation  
 6 of the tree service.  
 7 Q That's not what I asked you. I asked you is there  
 8 anything more that Crawford & Company should have  
 9 done as it related to the liability of the DLS  
 10 driver?  
 11 A Excluding the professional tree company, McMillan.  
 12 Is that what your question is?  
 13 Q No. As far as liability, it says: We see the DLS  
 14 driver as primary.  
 15 You knew from your investigation, did you  
 16 not, that the DLS driver had 750 feet of a clear,  
 17 straight, downhill road, true?  
 18 A True.  
 19 Q You knew that.  
 20 A I did.  
 21 Q And you also knew that there was nobody between  
 22 him and Mrs. Rhodes; did you not?  
 23 A I did.  
 24 Q And you knew that a police officer wearing an

1 Q Well, they took McMillan's deposition, didn't  
 2 they?  
 3 A I believe they took McMillan's deposition in late  
 4 2003.  
 5 Q Okay. And that's when they determined they had  
 6 put the cones up around there. He didn't put a  
 7 sign up saying "Men Working," but he put the cones  
 8 around his truck, right?  
 9 A Yes, and he testified that he did not put the  
 10 signs up.  
 11 Q But we knew that he didn't put the signs up even  
 12 before that from the police report, didn't we?  
 13 A We did not know his procedure to always put up  
 14 signs at a good distance from the accident and the  
 15 reason why he didn't put up signs in this  
 16 situation.  
 17 Q And that was important.  
 18 A That's important.  
 19 Q Anything else that the investigation should have  
 20 determined that it wasn't until McMillan -- by the  
 21 way, do you know if there was a statement taken of  
 22 McMillan?  
 23 A I don't recall reading a statement taken by  
 24 McMillan.

1 Q Do you know whether there was one?

2 A I don't recall.

3 Q You did say earlier -- and I'm going off the

4 subject a little bit -- that you thought in order

5 to determine the primary coverage of DLS, that

6 DLS's deposition should have been taken; did you

7 not?

8 A No.

9 Q Interrogatories?

10 A Interrogatories.

11 Q All right. Who was supposed to take the

12 interrogatories?

13 A Plaintiff usually does.

14 Q So wait a minute. Let me make sure I understand

15 this, Mr. Cormack. The reason that the

16 investigation concerning coverage issues was

17 deficient was because the plaintiff didn't take

18 DLS's deposition?

19 A He didn't get anything --

20 MR. ZELLE: Objection. I think we're

21 talking about interrogatories, right?

22 (By Mr. Pritzker)

23 Q I'm sorry. Let me ask you another question.

24 The reason that the investigation of

1 coverage issues regarding DLS was deficient is

2 because no interrogatories were propounded to DLS?

3 A Nothing under oath from DLS was given to the

4 parties which indicated that they did not have

5 insurance, and I would not ever go by a telephone

6 conversation. I've had too many cases where it

7 turned out that there was insurance where they

8 said there wasn't or there wasn't insurance where

9 they said there was.

10 Q Did you know that Morrison, Mahoney & Miller was

11 retained by Zurich to represent DLS and Zalewski?

12 A Yes, I saw their name.

13 Q And you know that DLS, in fact, was a covered

14 party under the Zurich policy; isn't that so?

15 A They were.

16 Q Couldn't both Zurich and AIG have gone to counsel,

17 paid by them, representing DLS, and said would you

18 get a statement about whether they have insurance

19 or they don't have insurance?

20 MR. ZELLE: Objection, inasmuch as the

21 question suggests that AIG was paying for counsel.

22 That certainly hasn't been established.

23 THE COURT: But I think he's discussing,

24 at least initially, Zurich, so.

1 (By Mr. Pritzker)

2 Q Okay. I'll take them one at a time. Would it

3 have been inappropriate for Zurich to call up the

4 counsel that it was paying for to defend DLS and

5 say, hey, would you get whatever it is that we

6 need in order to determine whether DLS has primary

7 coverage or doesn't have primary coverage?

8 A I believe that that should have been done, yes.

9 Q And if Zurich didn't do that, when we get to the

10 next layer, because it's pretty obvious that even

11 \$2 million is less than the exposure of this case,

12 couldn't AIG have done the same thing?

13 A AIG asked for the policies and the coverage file

14 that had been prepared, and they didn't receive

15 that material until June of 2004.

16 Q Did you know, in fact, that Carlo Zalewski

17 responded to interrogatories of the plaintiff

18 indicating that there were no insurance policies,

19 other than the ones in issue in this case, that

20 would have covered him?

21 A I'd have to look at that document.

22 Q Well, I'm going to show you a document which is

23 entitled, "Defendant Carlo Zalewski's Response to

24 Plaintiff Marcia Rhodes' First Set of Requests for

1 Production of Documents and Things." Okay?

2 And Request No. 13, I'll read it along

3 with you, if you don't mind.

4 A Well, let me just look at the document.

5 Q Go ahead.

6 A You're referring to 12?

7 Q I think it was 13, but let me look again.

8 No. 13, why don't you read the request

9 and the response.

10 Q (Reading): Request No. 13: All insurance

11 policies under which any person carrying on

12 insurance business, may be liable to satisfy all

13 or part of a judgment that may be entered in this

14 case -- in this action, or to indemnify or

15 reimburse for payments made to satisfy judgment,

16 including but not limited to any umbrella or

17 excess policy issued to Penske, GAF, Driver's

18 Logistics, Zalewski or covering a tractor-trailer.

19 Answer: None.

20 Q So in fact, interrogatories, or at least request

21 for documents, was propounded; was it not?

22 MR. ZELLE: Objection. It is a request

23 for production, not interrogatory. I haven't seen

24 it, but I think it's signed by Carlo Zalewski. I

1 just want the record to reflect that. It's not an  
 2 exhibit. That's why I'm making this statement.  
 3 MR. PRITZKER: Well, let me show it to  
 4 you, Mr. Zelle, because, in fact, it's signed by  
 5 Lawrence Boyle at Morrison, Mahoney & Miller on  
 6 behalf of Carlo Zalewski because it's a response  
 7 to production of documents rather than  
 8 interrogatories.  
 9 MR. ZELLE: It's signed on behalf of  
 10 Carlo Zalewski. That's my point.  
 11 THE COURT: Okay. So it's in response  
 12 for production of documents.  
 13 MR. PRITZKER: Correct.  
 14 MR. ZELLE: What's the date?  
 15 MR. VARGA: April 28, 2003.  
 16 MR. PRITZKER: The answer was April 28th  
 17 of '03.  
 18 (By Mr. Pritzker)  
 19 Q Now, I'm going to show you another document, Mr.  
 20 Cormack, which is Marcia Rhodes' First Set of  
 21 Requests for Production of Documents directed to  
 22 Driver Logistics. And without going through a lot  
 23 of detail, do you see the same question?  
 24 A I just want to look and see.

1 THE COURT: I'm sorry, it's now L?  
 2 MR. PRITZKER: I've said several different  
 3 things, your Honor, but I'm now sticking with 66L.  
 4 (By Mr. Pritzker)  
 5 Q Do you see it, Mr. Cormack?  
 6 A I do.  
 7 Q Second page. There's, right in the middle, near  
 8 the top, "Remarks," then there's a summary, and  
 9 then there's a line. And in the middle of the  
 10 next paragraph it says: We notice nowhere is it  
 11 mentioned that it appears that DLS had no -- we  
 12 repeat -- no coverage for this accident due to an  
 13 agency error.  
 14 Did I read that accurately?  
 15 A You did.  
 16 Q And AIG had that report; did they not? It was one  
 17 of the ones that was cc'd to AIG, as we can tell  
 18 by looking at the last page.  
 19 A They did.  
 20 Q And in fact, that was prior to the November  
 21 conference call with Zurich and AIG where Zurich  
 22 was suggesting that it was going to tender its  
 23 policy to AIG; isn't that so?  
 24 MR. VARGA: Objection.

1 Q That's just the requests.  
 2 A Yes. I just wanted to see. What request are you  
 3 referring to?  
 4 Q That's what I was going to find. Again, it's No.  
 5 13 and I think you'll find it's exactly the same.  
 6 A Yes.  
 7 THE COURT: And the date of that?  
 8 MR. PRITZKER: September 27, '02.  
 9 THE COURT: Is that also signed by Mr.  
 10 Boyle?  
 11 MR. PRITZKER: This is just a request.  
 12 your Honor.  
 13 THE COURT: Oh, that's just a request.  
 14 I'm sorry.  
 15 MR. PRITZKER: I have not yet located the  
 16 answer but we will.  
 17 (By Mr. Pritzker)  
 18 Q In any event, we do know, as well, that on Exhibit  
 19 66L  
 20 -- I'm sorry, Exhibit 66J -- I take it back again,  
 21 Exhibit 66F, which is a Crawford report dated  
 22 November 13, '03 --  
 23 A Okay. Let me find that. F did you say?  
 24 Q L as in Larry.

1 THE COURT: Overruled.  
 2 A Yes.  
 3 (By Mr. Pritzker)  
 4 Q So the partnership of attorney and adjustor knew  
 5 from responses to requests for production of  
 6 documents that the parties were claiming that  
 7 there was no insurance, primary insurance, for  
 8 DLS, right?  
 9 MR. VARGA: Objection.  
 10 MR. ZELLE: Objection.  
 11 THE COURT: Sustained as to the form  
 12 (By Mr. Pritzker)  
 13 Q The partnership of defense counsel and the  
 14 investigator knew, did they not, that no primary  
 15 policies for DLS or Zalewski had been produced  
 16 pursuant to plaintiffs' request for production of  
 17 documents --  
 18 MR. ZELLE: Objection.  
 19 (By Mr. Pritzker)  
 20 Q -- prior to November of '03; isn't that so?  
 21 MR. VARGA: Objection.  
 22 THE COURT: I'll let him answer.  
 23 A I'm going to have that reread.  
 24 Q Well, we can't reread it, so I'll try it one more



1 time.  
 2 A Okay.  
 3 Q The partnership of defense counsel and Crawford &  
 4 Company knew, prior to the November conference  
 5 call, that Zalewski had responded that he knew of  
 6 no primary policies, that there were no primary  
 7 policies to be produced, which would have covered  
 8 the Rhodes accident.  
 9 MR. ZELLE: Objection.  
 10 THE COURT: Overruled. He may answer.  
 11 A Who knew that?  
 12 (By Mr. Pritzker)  
 13 Q Defense counsel.  
 14 A Defense counsel?  
 15 Q And Crawford.  
 16 A Yes. Mr. Zalewski had testified -- I mean, had  
 17 answered the document request and said that there  
 18 was no insurance. He didn't limit it to DLS. He  
 19 said there was no insurance. And the Crawford  
 20 report was simply based upon a statement that was  
 21 obtained by a telephone call to someone at DLS.  
 22 And again, it doesn't meet the  
 23 requirement of having under oath something to show  
 24 whether or not DLS had insurance coverage.

1 letter itself is many pages; is it not?  
 2 A It is.  
 3 Q And part of what it does, after we get through the  
 4 preliminaries of who the parties are, is it  
 5 profiles Marcia, Harold and Rebecca Rhodes,  
 6 starting on page 2; isn't that so?  
 7 A It does.  
 8 Q And it's a rather detailed profile, albeit written  
 9 by plaintiffs' counsel.  
 10 A I understand that.  
 11 Q But it is a rather detailed summary of the  
 12 plaintiffs in this, in the underlying case, true?  
 13 A It is a rather detailed report, albeit written by  
 14 plaintiffs' attorney.  
 15 Q And how the accident happened, the basis of  
 16 liability, is pretty much based upon the police  
 17 reports, isn't it?  
 18 A It is.  
 19 Q Okay. And by that time, of course, everyone had  
 20 the State Police report as well; did they not?  
 21 A I believe so.  
 22 Q If we then go to page 9, it gives a summary of the  
 23 treatment that Mrs. Rhodes had at the various  
 24 hospitals; does it not?

1 Q I'm going to show you plaintiffs' Exhibit 10, Mr.  
 2 Cormack, that is, plaintiffs' demand in this case.  
 3 And you've seen that before; have you not?  
 4 A I have.  
 5 Q And that is the demand that was prepared by  
 6 plaintiffs' counsel in August of '03, right?  
 7 A It was.  
 8 Q Well before AIG started to actively investigate or  
 9 defend the case, true?  
 10 A Well, their investigation began with the letter  
 11 back in April of '02.  
 12 Q What did AIG do in '02?  
 13 A They wrote a letter to Crawford, copied to GAF,  
 14 requesting all of the documents, including medical  
 15 reports, insurance policies, attorneys' analysis,  
 16 deposition summaries. All of those things were  
 17 requested in '02 in April. And there were  
 18 telephone calls, a number of telephone calls, in  
 19 November 2002, again requesting this information.  
 20 And that's what they did in '02.  
 21 Q Okay. So two letters -- well, one letter and a  
 22 telephone call.  
 23 A One letter and a number of telephone calls.  
 24 Q If you look at Exhibit 10, do you see that the

1 A It gives a summary.  
 2 Q And then on page 10, after finishing with the four  
 3 summaries, it talks about the setbacks that Mrs.  
 4 Rhodes has suffered, doesn't it?  
 5 A It does.  
 6 Q And that goes on for a page and a half, right?  
 7 A Yes.  
 8 Q And then it goes on about how Harold and Rebecca's  
 9 life has changed; isn't that so?  
 10 A It does.  
 11 Q And then it goes on, on page 13, to Mrs. Rhodes'  
 12 damages; and it talks about, during the period of  
 13 time, how many days she spent either at doctors or  
 14 in hospitals, on page 13. Do you see that chart?  
 15 A I do.  
 16 Q And then it talks about the future annual costs  
 17 and it summarizes the life-care plan, true?  
 18 A It does.  
 19 Q And then it talks about future episodic costs and  
 20 it quantifies those; isn't that so?  
 21 A It does.  
 22 Q And then it goes on to the present value of both  
 23 the life-care plan, future episodic costs, and the  
 24 household services, on page 15. Do you see the

1 present value of combined future needs?  
 2 A Yes, I see it.  
 3 Q And finally, at the bottom on page 15 is the loss  
 4 of household services, right?  
 5 A Yes.  
 6 Q And then it quantifies the out-of-pocket expenses  
 7 that the Rhodeses have expended to date, right?  
 8 A Yes.  
 9 Q Okay. And then finally the demand itself, right?  
 10 A It does.  
 11 Q Now, if we go to the exhibits that accompanied  
 12 Exhibit 10 and we start at Exhibit 26, we see that  
 13 that starts with the emergency ambulance service  
 14 notes, right?  
 15 A Yes.  
 16 Q And if we then go to 27, it talks about the --  
 17 it's the actual records from the Milford-  
 18 Whitinsville Regional Hospital where Mrs. Rhodes  
 19 was taken immediately after the accident; does it  
 20 not?  
 21 A Yes. I'm not sure if these are complete, whether  
 22 they're complete records.  
 23 Q Okay. Let's just look through, though, about what  
 24 it is that the defendants had as of August of '03.

1 Q Yes.  
 2 A Telephone conference?  
 3 Q Yes.  
 4 A I don't remember him saying that he knew about  
 5 those. I think he requested those.  
 6 Q Let's go on anyway. On Tab 25 -- I'm sorry, Tab  
 7 28 -- is the discharge summary from UMass Memorial  
 8 Medical Center, true?  
 9 A It is.  
 10 Q And it's rather extensive and complete; is it not?  
 11 A It's one and a third page report.  
 12 Q Tab 29, the discharge summary continues; does it  
 13 not?  
 14 A Yes.  
 15 Q And it identifies the different doctors, amongst  
 16 other things, that Mrs. Rhodes has seen, true?  
 17 A It does.  
 18 Q Exhibit 30 is the report of the operation now by a  
 19 different doctor; isn't that so?  
 20 A Surgeon James Cushing Baily.  
 21 Q Right. And that's a rather detailed description  
 22 of opening Mrs. Rhodes up and, amongst other  
 23 things, a finger could be placed down between the  
 24 spinous process of what appeared to be T12 and T11

1 MR. ZELLE: Objection. Not the  
 2 defendants in this case, National Union and  
 3 Zurich. I mean, as of August --  
 4 THE COURT: As of December of '03?  
 5 MR. ZELLE: I'm sorry. What was the  
 6 date?  
 7 THE COURT: December of '03.  
 8 MR. ZELLE: He said August of '03. That  
 9 was my objection.  
 10 THE COURT: Okay. We'll have to go back  
 11 to testimony as to when they received it, but you  
 12 may proceed.  
 13 (By Mr. Pritzker)  
 14 Q Whenever they received it, they received the whole  
 15 package, right?  
 16 A You're referring to?  
 17 Q Both AIG and Zurich.  
 18 A I believe they received it at different times.  
 19 Q Okay. Do you know when AIG received theirs?  
 20 A I believe it was after November of '03.  
 21 Q You don't remember Mr. Satriano saying that he  
 22 knew about the "Day in the Life" video and the  
 23 demand?  
 24 A At the time of the November 19 meeting?

1 and perhaps L1, right through the subcutaneous  
 2 tissue, amongst other things that this doctor did  
 3 before closing Mrs. Rhodes up.  
 4 Did you read that ever?  
 5 A I don't recall. I don't think I read that.  
 6 Q And if we skip a couple of picture exhibits and go  
 7 to Exhibit 34, there's an addendum to the  
 8 discharge summary; is there not?  
 9 A Yes, I recall reading some of these.  
 10 Q I guess what I'm trying to get you to agree to,  
 11 Mr. Cormack, is that reading some of these doesn't  
 12 indicate the breadth of the whole medical picture  
 13 that was presented to counsel and to the  
 14 investigator in August of '03. If you look at  
 15 each report individually, I'm going to ask you  
 16 what more you felt that either Zurich or AIG  
 17 needed in order to evaluate this case?  
 18 A Well, I think I've already testify. First of all,  
 19 I would get the entire record from each of these  
 20 hospitals as a claim handler to make sure that the  
 21 records are complete and I've got all the notes  
 22 and all the detail. And of course, with Mrs.  
 23 Rhodes' extensive hospitalizations and extensive  
 24 medical, I would expect that the reports would be

1 much larger than what are contained here with much  
 2 more detail. And that's what I would have gotten  
 3 if I was the claim handler in this case.  
 4 Q Do you know that there's an exhibit in this case,  
 5 Exhibit 80A, which is a production of documents to  
 6 defense counsel in April of '03, which contain  
 7 exactly what you describe?  
 8 A I don't know if it's complete. What I suggest is  
 9 that, to do an independent investigation, the  
 10 claim handler here should have gone to each of  
 11 these doctors and each of these hospitals and  
 12 obtained those records independently.  
 13 Q What would you have expected if this combined  
 14 partnership of defense counsel and investigator  
 15 had in April of '03 two thousand pages of backup  
 16 to Exhibit 10, what more would you have expected  
 17 to find by having the investigator go directly to  
 18 the hospital to duplicate that  
 19 MR. VARGA: Objection.  
 20 THE COURT: Overruled.  
 21 A I can't say what they would find, but I would do  
 22 that for the purpose of making sure that when I  
 23 have the records, I know I have the complete  
 24 records. And I'm not suggesting that plaintiffs'

1 '03, that it was appropriate for AIG not to  
 2 evaluate this case because it didn't have the  
 3 depositions of Marcia Rhodes and Rebecca Rhodes  
 4 and it didn't have an IME.  
 5 MR. ZELLE: Objection to the form.  
 6 THE COURT: Overruled.  
 7 A Yes. And it didn't have the mental health records  
 8 of the previous treatment for Mrs. Rhodes, and we  
 9 still had not determined the insurance.  
 10 Q And because of that, it was not appropriate to evaluate  
 11 the case, and therefore it was not appropriate to make  
 12 a settlement offer in this case to the plaintiffs prior  
 13 to August of '04. Is that your testimony?  
 14 MR. ZELLE: Object to the form "it's  
 15 appropriate." I mean, whether it was reasonable in the  
 16 industry practice is what he's talking about, not  
 17 whether it's appropriate.  
 18 THE COURT: All right. Fair enough. I'll  
 19 ask him to rephrase, and then we'll take our break for  
 20 the morning.  
 21 (By Mr. Pritzker)  
 22 Q Okay. Let me rephrase. Let me rephrase it.  
 23 In your opinion, notwithstanding all of the  
 24 stuff that we've just reviewed, is it your testimony

1 counsel withheld any or didn't. All I'm  
 2 suggesting is that to do a proper investigation,  
 3 those records should be obtained and then given to  
 4 the doctor that you're going to have look at the  
 5 patient so that you know that you have the  
 6 complete amount and that your file is complete.  
 7 Q Do you know that an IME was done of Mrs. Rhodes  
 8 directly before the trial in September of '04?  
 9 A Yes.  
 10 Q And do you know whether or not the medical records  
 11 that were obtained were given to Dr. Hanak before  
 12 he did the IME?  
 13 A I don't know what was given him.  
 14 Q Do you know that Dr. Hanak's report was never made  
 15 reference to in any evaluation by AIG?  
 16 A That's correct.  
 17 Q Do you know that Dr. Hanak did not testify at the  
 18 trial?  
 19 A I didn't know whether he testified or not.  
 20 Q But it's your position that notwithstanding the  
 21 information contained in Exhibit 10 that was  
 22 generated to the investigator and defense counsel  
 23 in August of '03 and the two thousand odd pages of  
 24 medical records that were produced in April of

1 that it was within industry practice not to make an  
 2 offer to the plaintiffs at all on behalf of AIG prior  
 3 to August of 2004?  
 4 A It was within industry custom and practice not to  
 5 attempt an evaluation until the investigation was  
 6 complete, including an investigation -- the depositions  
 7 of the plaintiffs, obtaining all of the medical  
 8 records, obtaining the mental health records of the  
 9 plaintiffs, and the determining the insurance issues.  
 10 Q And that's your opinion, notwithstanding everything  
 11 that we've reviewed and the fact that it was two years  
 12 and eight months after this accident occurred.  
 13 A That is my opinion.  
 14 Q Thank you, sir.  
 15 MR. PRITZKER:; Do you want to take a break,  
 16 or do you want me to go on?  
 17 THE COURT: Let's take our break. It's 11:15  
 18 so we'll break for 15 minutes.  
 19 (A recess was taken.)  
 20 THE COURT OFFICER: Court is back in session;  
 21 be seated.  
 22 THE COURT: Okay. Please proceed.  
 23 (By Mr. Pritzker)  
 24 Q Mr. Cormack, do you know what a medical release form

1 is?  
2 A Yes.  
3 Q What is it?  
4 A It's a form executed by a patient releasing medical  
5 records to the holder.  
6 Q Do you know whether or not Crawford & Company ever  
7 requested a medical release form from the plaintiffs?  
8 A I never saw any requests by Crawford for medical  
9 release forms.  
10 Q Do you know whether defense counsel ever requested a  
11 medical release form from the plaintiffs?  
12 A I don't recall any requests for medical release forms.  
13 There could have been. I just don't recall.  
14 Q Now, in your experience as a claims handler, that's a  
15 rather common practice, is it not, to obtain medical  
16 release forms from the plaintiff?  
17 A It is.  
18 Q And when Zurich didn't see a medical release form being  
19 requested, in your opinion, should they have asked for  
20 one?  
21 A Yes.  
22 Q And when AIG didn't see a medical release form, should  
23 they have asked for one?  
24 A At what time?

1 Q And why wouldn't it have been?  
2 A Because, by custom and practice, that is a claim  
3 handling function to be performed by the company that  
4 has the claim handling responsibilities.  
5 Q Now, AIG had \$50 million of excess coverage; did it  
6 not?  
7 A They did.  
8 Q And it was pretty clear at some point that \$2 million  
9 wasn't going to be enough to dispose of the Rhodes  
10 claim; isn't that so?  
11 A Depending upon what the insurance was for these two  
12 large trucking companies that were -- actually, three  
13 large trucking companies that were involved in this  
14 matter.  
15 Q All right. But given the fact that nobody knew what  
16 that was, is it your testimony that it is not customary  
17 and therefore it is okay for AIG to jeopardize its \$50  
18 million of exposure by not doing something as simple as  
19 requesting a medical release form so it can go get its  
20 original medical records?  
21 MR. ZELLE: Objection.  
22 THE COURT: Overruled.  
23 A It is custom and practice in the industry for an excess  
24 carrier not to request release forms, medical release

1 Q At any time between the time of the accident and the  
2 time of trial.  
3 A AIG did not become involved in the case until after  
4 November of 2003.  
5 Q Now, AIG was monitoring the file, however; were they  
6 not?  
7 A Well, "monitoring" is a technical term. There's  
8 monitoring counsel, and they were not using monitoring  
9 counsel.  
10 Q No. They were using the division at AIG that looks  
11 after excess claims files, right?  
12 A They were.  
13 Q And in doing so, they were receiving the reports from  
14 Crawford, right?  
15 A They were receiving reports from Crawford.  
16 Q And they never saw the backup to the medical  
17 information, either on Exhibit 10 or earlier on Exhibit  
18 82A, right?  
19 A They didn't.  
20 Q And if they had wanted to, they could have requested a  
21 medical release form from the plaintiffs; could they  
22 not?  
23 A They could have, but it wouldn't have been custom and  
24 practice to do so.

1 forms. That is the job of the primary claim handler,  
2 to do that.  
3 (By Mr. Pritzker)  
4 Q Is there anything that you know of which prohibits an  
5 excess carrier from requesting medical release forms?  
6 A I know of nothing that would prohibit it.  
7 THE COURT: I'm sorry. I'm not sure if I  
8 understand. Going back to that other question, is it  
9 your testimony that AIG should not have sought a  
10 medical release form even after the tender from Zurich?  
11 THE WITNESS: They hired counsel at that  
12 point and they were following direction of counsel. I  
13 don't know. I'm saying before November 2003, they  
14 would definitely not have requested medical records.  
15 THE COURT: Okay. And I'm asking you about  
16 after November 2003, was it unreasonable for Zurich not  
17 to have -- I'm sorry -- for AIG not to have obtained --  
18 not to have requested a medical release from the  
19 plaintiff?  
20 THE WITNESS: Well, as I say, they could  
21 request it, but the discovery cutoff date was October  
22 31, 2003, and there was no way to enforce the plaintiff  
23 to execute any such agreement, any such release.  
24 THE COURT: So you're saying that they should

1 not have asked for one, or that they should have asked  
 2 for one but they had no recourse?  
 3 THE WITNESS: I believe with the discovery  
 4 cutoff date, it was an indication that they would have  
 5 no recourse.  
 6 THE COURT: Okay. Let me try it again. Was  
 7 it unreasonable, in the custom and practice of the  
 8 excess insurance industry, for AIG not to have sought,  
 9 not to have requested a medical release from the  
 10 plaintiff after it took over the claim handling  
 11 responsibility?  
 12 THE WITNESS: It took over -- as far as I  
 13 could tell, it took over the claim handling  
 14 responsibilities through associated counsel in May of  
 15 2004. It would not be unreasonable at that time to  
 16 request medical release forms from the plaintiff;  
 17 although counsel, who was running the defense, I don't  
 18 believe requested that.  
 19 THE COURT: Mr. Pritzker.  
 20 (By Mr. Pritzker)  
 21 Q Were you aware, Mr. Cormack, that defense counsel and  
 22 defense life-care planner interviewed Marcia Rhodes and  
 23 Harold Rhodes at their home?  
 24 A Yes.

1 as to certain things, including appearance and  
 2 demeanor.  
 3 A Where are you looking at, counsel?  
 4 Q Well, let's just look at page 1. There's something  
 5 that's redacted there, right?  
 6 A Something is redacted, yes.  
 7 Q And we don't know what that is, do we?  
 8 A We don't.  
 9 Q And then on page 2 there's a section that says  
 10 "appearance and demeanor," and we don't know what that  
 11 says, do we?  
 12 A We don't.  
 13 Q And then later on there's two more paragraphs that  
 14 apparently have been redacted, and we don't know what  
 15 those say either, right?  
 16 A Right.  
 17 Q So we don't know whether or not defense counsel  
 18 reported to their insurer or their investigator in this  
 19 case information that would have been as useful as a  
 20 deposition or not, do we?  
 21 A No.  
 22 Q Now, let's talk a little bit about the mental health  
 23 records. Are you aware that when the defense first  
 24 requested the mental health records of Mrs. Rhodes,

1 Q And given that, is it still your opinion that Marcia  
 2 Rhodes' deposition was necessary before a proper  
 3 evaluation could be made of this case?  
 4 A Yes.  
 5 Q Why?  
 6 A Because it's under oath and there is broad-ranging  
 7 questions that would get into areas that you wouldn't  
 8 get into with a life-care plan.  
 9 Q Well, it wasn't just the life-care plan, it was defense  
 10 counsel plus the life-care planner who were at the  
 11 Rhodes' home asking her questions; isn't that so?  
 12 A I didn't see any report by that defense counsel.  
 13 Q No, but you did see a letter, did you not, Exhibit 12  
 14 in this case, in Volume 1?  
 15 A Let me look at that.  
 16 THE COURT: I'm sorry, Volume --  
 17 MR. PRITZKER: Volume 1, your Honor, Exhibit  
 18 12.  
 19 A I don't recall that letter.  
 20 (By Mr. Pritzker)  
 21 Q You've never seen that before?  
 22 A I don't think so.  
 23 Q We do see that defense counsel for DLS and Zalewski,  
 24 Lawrence Boyle and Michael Smith, did obviously opine

1 plaintiffs' counsel offered to produce the mental  
 2 health records relating to her ADHD condition and her  
 3 bipolar condition. If the --  
 4 MR. ZELLE: Objection. This certainly is  
 5 well beyond the scope of anything I would ask Mr.  
 6 Pritzker. If he's assuming it's coming into evidence  
 7 when I put him on the stand, it isn't, and he can't be  
 8 called as plaintiffs' witness except on the damages  
 9 issue.  
 10 MR. PRITZKER: Who said that?  
 11 THE COURT: I'm not necessarily saying it's  
 12 true. I will permit him to answer whether he is aware  
 13 of any communication between Mr. Pritzker and defense  
 14 counsel with respect to the psychological records.  
 15 MR. PRITZKER: I didn't finish my question,  
 16 however, your Honor.  
 17 THE COURT: Go ahead.  
 18 (By Mr. Pritzker)  
 19 Q Let me start again. Were you aware that plaintiffs'  
 20 counsel offered defense counsel to produce the mental  
 21 health records of Mrs. Rhodes, limited to ADHD and her  
 22 bipolar condition, her pre-existing conditions, if the  
 23 defendants agreed that the plaintiffs could introduce  
 24 evidence of exacerbation of those conditions and the

1 defendants refused that offer?

2 MR. ZELLE: Objection.

3 THE COURT: Overruled.

4 A I have no knowledge of any such conversation.

5 (By Mr. Pritzker)

6 Q Are you aware of the fact that two judges in the

7 Superior Court of Suffolk County in Massachusetts

8 denied plaintiffs' requests for mental health records?

9 A I'm aware that two judges denied requests in 2004 for

10 mental health records long after the expiration of the

11 discovery cutoff -- long after the discovery cutoff

12 date.

13 THE COURT: Okay. I'm sorry, Mr. Pritzker,

14 you said Suffolk County. I assume you meant Norfolk

15 County?

16 MR. PRITZKER: I did mean Norfolk. I'm

17 standing here saying, "Now which county is this?" I

18 did mean Norfolk County.

19 (By Mr. Pritzker)

20 Q You understood that?

21 A I understood that.

22 Q I'm going to ask you a hypothetical question.

23 I want you to consider that we're two and a

24 half years after the accident, specifically in August

1 the negotiation, at least in December of '04, given the

2 bidding, and I think that has opened up his expertise

3 as to the reasonableness of bidding.

4 THE COURT: Well, I think we'll save that for

5 Mr. Todd, so I will sustain the objection.

6 (By Mr. Pritzker)

7 Q You know that in December --

8 THE COURT: I'm sorry. What he spoke about

9 was with respect to the \$5 million as the offer that --

10 with regard to whether or not that should have been

11 offered in order to obtain mediation earlier, is my

12 understanding.

13 MR. PRITZKER: I'm going to get there.

14 THE COURT: I don't think he opened the door

15 by having made that assertion. So you may go on.

16 (By Mr. Pritzker)

17 Q By the way, were you here for Mr. Greg Deschenes'

18 testimony?

19 A I read it.

20 Q And do you know, therefore, that Mr. Deschenes'

21 testimony was that the plaintiffs never demanded \$5

22 million as a condition to go to mediation?

23 A I believe that's what he testified to.

24 Q All right. And do you know that he testified that

1 of '04, two years after suit was filed. Liability of

2 the driver and the motor carrier is clear. The

3 special --

4 A Do you mean liability or fault?

5 Q Fault.

6 A Fault.

7 Q Causal liability is clear. The special economic

8 damages of the plaintiff are approximately \$3 million.

9 Trial is scheduled one month hence.

10 Do you consider an offer of \$2.75 million by

11 an insurer who has access to \$52 million of insurance

12 to be a good-faith attempt to effectuate settlement?

13 MR. ZELLE: Objection, your Honor, insofar as

14 Mr. Cormack's testimony is not on the reasonableness on

15 the offers. That's Mr. Todd's area of expertise. He

16 can certainly testify with respect to efforts to

17 effectuate settlement, but I'm a little concerned that

18 this question is asking for opinion on the

19 reasonableness of the number which Mr. Cormack is not

20 opining on.

21 THE COURT: Mr. Pritzker, is it going beyond

22 the scope of what his expertise has been offered for?

23 MR. PRITZKER: I believe that he has

24 testified that it was not unreasonable not to continue

1 given the timing, the lapse of time that had occurred,

2 the plaintiffs had asked for a good-faith offer before

3 going to mediation?

4 A They did.

5 Q Do you think that that was an unreasonable thing, an

6 unreasonable request for the plaintiffs to make given

7 those circumstances?

8 A Generally, I believe that it is customary for

9 plaintiffs' attorneys to make demands for some kind of

10 offer prior to mediation, so I would not do -- request

11 a reasonable settlement offer. I wouldn't say -- I

12 would not testify that that was unreasonable.

13 Q Do you think that it is unreasonable not to make a

14 good-faith settlement offer prior to mediation on the

15 part of an insurer?

16 A Depending on what they have in their file and whether

17 they have been able to evaluate the case. And by

18 "evaluate," I mean put a dollar value on it. I do not

19 believe it's unreasonable not to make an offer.

20 Q Do you know that in December of '04, plaintiffs had

21 received a judgment with interest which approached \$12

22 million, true?

23 A They did.

24 Q And do you know that AIG offered \$7 million, including

1 Zurich's \$2 million, excluding Professional Tree's  
 2 \$550,000, in order to settle not only the judgment but  
 3 plaintiffs' 93A claim? Do you know?  
 4 A I know that they made that offer.  
 5 Q All right. Do you know that ultimately, in June of  
 6 '05, AIG settled for \$8,965,000, not including Zurich's  
 7 \$2.3 million and Professional Tree's \$550,000?  
 8 A Yes.  
 9 Q Do you know of anything which occurred between those  
 10 two dates which changed AIG's position?  
 11 A Yes.  
 12 Q What?  
 13 A Negotiations.  
 14 Q What kind of negotiations?  
 15 A The negotiations began with the offer you referred to  
 16 previously, and it finally ended with AIG paying \$8.9  
 17 plus million for a release of the judgment that they  
 18 had obtained, without a release of the 93A claim.  
 19 Q Maybe I misunderstood your testimony, Mr. Cormack, but  
 20 I thought you responded to Mr. Zelle's questions that  
 21 it was not unreasonable for AIG not to continue the  
 22 negotiations because plaintiff refused to negotiate  
 23 with the \$7 million number.  
 24 A No, that's not what I testified to.

1 A Not with respect to the defense.  
 2 (By Mr. Pritzker)  
 3 Q So it's your testimony that GAF, knowing that either  
 4 expending its \$250,000 retention for defense costs or  
 5 expending it as part of an overall settlement or  
 6 judgment, would try to save defense costs by not taking  
 7 two depositions and an IME in order to save money?  
 8 That's the inference that you drew from that?  
 9 A The inference that I drew was that they were attempting  
 10 -- it was my opinion that they were attempting to skimp  
 11 on the old family recipe by not taking necessary  
 12 discovery and not obtaining necessary documents and not  
 13 doing necessary investigation in order to properly  
 14 prepare the case for trial.  
 15 Q You knew that GAF, in March of '04, was not only  
 16 recommending that Zurich throw in its \$2 million, but  
 17 it was recommending that AIG put up a big piece of  
 18 money itself; was it not?  
 19 A Again, it was. And the reason it was saving money was  
 20 -- remember, we talked about this gap, where GAF could  
 21 well be responsible for all the defense costs.  
 22 Q And that's the inference that you drew from all of the  
 23 scenario that we've just discussed?  
 24 A Yes, and the letter of Mr. Bartell. That's the

1 Q Well, then, refresh me.  
 2 A My testimony was it was not unreasonable to end on that  
 3 day the negotiation when Mr. Nitti only had \$7 million  
 4 of AIG money in his pocket at that time. In other  
 5 words, he would have to go back to the company for more  
 6 money before any meaningful negotiations could take  
 7 place.  
 8 MR. PRITZKER: May I just have a minute, your  
 9 Honor?  
 10 THE COURT: You may.  
 11 (By Mr. Pritzker)  
 12 Q By the way, you knew that Crawford was an approved  
 13 Zurich third-party administrator; did you not?  
 14 A There was testimony to that effect, yes.  
 15 Q One other area. I believe that you testified that, in  
 16 your opinion, the limited discovery which Nixon Peabody  
 17 performed created an inference that GAF was trying to  
 18 save money. Did you testify to that?  
 19 A I did.  
 20 Q Well, GAF's money was gone as soon as it was apparent  
 21 that there was going to be more than \$2 million  
 22 exposure; isn't that so?  
 23 MR. VARGA: Objection.  
 24 THE COURT: Overruled.

1 inference I drew.  
 2 MR. PRITZKER: I have no other questions,  
 3 your Honor.  
 4 THE COURT: Okay. Any further questions of  
 5 counsel? Mr. Zelle?  
 6 MR. ZELLE: Yes, your Honor.  
 7 REDIRECT EXAMINATION BY MR. ZELLE:  
 8 Q Mr. Cormack, you were shown a Crawford report -- it was  
 9 the November 13, 2003 report -- in which there's a  
 10 statement that it does not appear that there's any  
 11 insurance policy for DLS, and you indicated that you  
 12 had a complaint. What was that complaint?  
 13 A That kind of information should have been in an answer  
 14 to interrogatory or some sworn document. It is my  
 15 experience in the claim area is that many, many,  
 16 times people make statements about insurance policies  
 17 they have or don't have that turn out to be error.  
 18 If you ask someone, "Do you have an insurance  
 19 policy?" and they don't think of one right away, they  
 20 say no, but they don't search. And the only way to  
 21 require them to do that kind of search is to ask them  
 22 in some manner, either in answer to interrogatory,  
 23 where they have to take an oath, or some other form so  
 24 that we know for sure they do or don't.

1 Q Would you expect that interrogatory to come from GAF to  
 2 DLS and to Penske?  
 3 A Yes.  
 4 Q You testified very briefly about the Penske insurance  
 5 policy. When did AIG receive a copy of the Penske  
 6 policy?  
 7 A June of 2004.  
 8 Q And did AIG undertake -- did AIG retain counsel to do a  
 9 coverage analysis?  
 10 A Of that policy? Yes, they did.  
 11 Q And your plug-in, was that done in a timely fashion  
 12 after receiving the policy?  
 13 A Yeah, I believe so.  
 14 Q Now, I'd like you to explain whether it makes any  
 15 difference -- well, strike that.  
 16 I believe you did agree with Mr. Pritzker  
 17 that you could always go to mediation. In the context  
 18 of, I think it was March, Mr. Satriano said that he  
 19 could go to mediation; you agreed with him.  
 20 My question is, why is mediation going to be  
 21 less effective if you don't have depositions of the  
 22 plaintiffs, an IME, and medical records?  
 23 A Because you cannot make an accurate evaluation. By  
 24 "evaluation," I mean put an accurate dollar figure on

1 Mrs. Rhodes had sustained in the course of her  
 2 recovery. Is that something that would be considered  
 3 in the reasonable course of analyzing the claim?  
 4 A It would.  
 5 Q And how would that affect it -- strike that.  
 6 How would that affect the analysis of the  
 7 claim?  
 8 A Well, it would be important to know what her recovery  
 9 was. In order to properly present a case to a jury,  
 10 you want to make sure that you get the final picture to  
 11 the jury as to what the future conditions are going to  
 12 be.  
 13 Q In the time period after AIG was participating in the  
 14 defense, what were the most pertinent medical records  
 15 that you believe had a bearing on putting a number on  
 16 the case?  
 17 A The mental health records.  
 18 Q And in your opinion, did the efforts reflected in the  
 19 materials you reviewed demonstrate that AIG undertook a  
 20 reasonable effort to obtain those materials?  
 21 A They did.  
 22 MR. ZELLE: That's all I have..  
 23 THE COURT: Okay. Mr. Varga?  
 24 MR. VARGA: Yes.

1 the case.  
 2 Q Now, let's go into that. You can certainly analyze the  
 3 materials that you have as soon as they're received,  
 4 correct?  
 5 A You can, and you do.  
 6 Q So what's the difference between that and evaluation,  
 7 as you're using that term?  
 8 A Evaluation is when you put the actual dollar value on  
 9 the case, a range of settlement on the case. And you  
 10 want to be very accurate about that and you want to  
 11 have all the information. And the custom and practice  
 12 in the industry is that kind of a decision, you need to  
 13 have completed your investigation.  
 14 Q Do you have an opinion, Mr. Cormack, as to whether AIG  
 15 evaluated information they received in a timely  
 16 fashion?  
 17 A I saw nothing that would indicate they didn't.  
 18 Q In reviewing the materials that were provided to AIG,  
 19 was there anything other than the Crawford report that  
 20 provided any analysis of the DLS coverage?  
 21 A No.  
 22 Q And when -- strike that.  
 23 Mr. Pritzker pointed out in the demand  
 24 package that there was a discussion of setbacks that

1 RECROSS-EXAMINATION BY MR. VARGA:

2 Q Mr. Cormack, you were asked some questions by Mr.  
 3 Pritzker regarding the inquiries made regarding other  
 4 insurance policies available for DLS and Zalewski. I'd  
 5 like to ask you to turn your attention, please, to  
 6 Exhibit 105. It's among the Zurich binder of exhibits  
 7 there.  
 8 A I don't know if I've got that. Is that on the floor  
 9 here?  
 10 Q I'll help you.  
 11 A Thank you.  
 12 Q Directing your attention to Exhibit 105, you saw this  
 13 letter in the file, correct?  
 14 A You know, I don't remember.  
 15 Q Okay. Well --  
 16 THE COURT: I'm sorry. Is 105 in evidence,  
 17 because it's not part of my book.  
 18 MR. VARGA: Your Honor, I'm mistaken. I'm  
 19 sorry. I meant 108. I'm sorry. Just allow me for a  
 20 moment. 105, your Honor, is in evidence. I don't know  
 21 why it is not in your book. I'll have to rectify that;  
 22 obviously.  
 23 THE COURT: Well, if you've got a spare copy;  
 24 it's not in the book.



1 (By Mr. Varga)

2 Q Mr. Cormack, this is a letter dated March 7, 2003 from

3 Zurich's coverage counsel to Steven Leary, counsel for

4 -- private counsel for DLS. Do you see that?

5 A Are you on 105 or 108?

6 Q 105, sir. I'm sorry.

7 A I'm sorry.

8 Q I'm sorry if I confused you with that.

9 A I do.

10 Q And if you turn to pages 4 and 5 -- I'm sorry, turn to

11 page 6, if you would, please, the last paragraph on

12 that page.

13 A Yes.

14 Q Do you see in that paragraph there's a request: It is

15 therefore important that you provide us with policy

16 information concerning any and all additional insurance

17 relevant to DLS and Mr. Zalewski in this matter.

18 A Yes.

19 Q And that's a letter from March 7, 2003, correct?

20 A It is.

21 Q And if you could turn to Exhibit 108, please.

22 And, your Honor, I'm hoping you have that in

23 your book.

24 THE COURT: No, I don't have either.

1 Q Now, let's turn to a different subject.

2 A I don't know if I saw those letters.

3 Q You were asked some questions about medical release

4 forms and whether they were requested or not. Let me

5 ask you: Based on your years of experience in the

6 insurance industry, particularly handling claims as a

7 claims professional, in your experience, is it

8 customary for a claim adjustor, a claim investigator,

9 to make early contact with the plaintiff's attorney in

10 a bodily injury case?

11 A Yes.

12 Q In fact, that's a recommended practice, correct?

13 A Oh, yes.

14 Q And what's the reason for that?

15 A So that you can immediately get the information that

16 you need and that you can begin a relationship with the

17 plaintiffs' attorney, that you can all the facts that

18 you possibly can. You might be able to get a statement

19 from the claimants or the claimant's family. There's

20 all kinds of things that you can accomplish if you can

21 make those contacts.

22 Q And one of the things that you accomplish as a claims

23 professional in that function is obtaining information

24 regarding the claimant's injuries and damages, right?

1 (By Mr. Varga)

2 Q Mr. Cormack, that's a letter dated May 29, 2003 from

3 Zurich's coverage counsel, Taylor, Duane, Barton, &

4 Gilman, to Lawrence Boyle at Morrison Mahoney, correct?

5 A It is.

6 Q And in the very last paragraph of that letter there is

7 another request for policy-related information,

8 correct? I'll direct your attention to the second

9 sentence of the last paragraph on the first page:

10 Therefore, we now renew our request for complete copies

11 of any and all insurance policies relevant to the above

12 matter, including but not limited to automobile,

13 general liability and/or excess insurance.

14 A Yes.

15 Q And those were in the files that you reviewed, correct?

16 A I didn't recall those.

17 Q Well, in fact, there were prior requests for policies

18 for DLS that predated the two that I just showed you,

19 correct? In 2002 and in 2003?

20 A I don't know. I just don't remember.

21 Q So you don't remember a letter in January of 2003, in

22 which coverage counsel made a request again to Mr.

23 Leary for policies for DLS?

24 A I don't remember.

1 A Yes.

2 Q And that's customary to do that in the initial contact

3 and in subsequent contacts, correct?

4 A Yes, it is.

5 Q And in your experience, where an injured plaintiff's

6 attorney has an interest in cooperating with the

7 insurance company in resolving the case short of going

8 to trial, does the plaintiff's attorney, again in your

9 experience, typically provide medical-related

10 information and other information regarding damages

11 voluntarily to the adjustor?

12 A Very often.

13 Q And that's common practice throughout your years of

14 experience, correct?

15 A It happens often.

16 Q And you know from reading John Chaney's deposition in

17 this case, that he made a request of Mr. Pritzker

18 during a telephone conversation they had in January of

19 2002, in which Mr. Chaney asked for damages-related

20 information and medical information for Mrs. Rhodes,

21 correct?

22 A I was given the Chaney deposition, but I don't know if

23 I ever looked at it, ever studied it.

24 Q You don't know if you actually read that testimony?

1 A I'm not sure. I don't think I did.  
 2 Q Okay. If you'd assume, please, that such a request or  
 3 that his testimony contained -- that his testimony was  
 4 that he made such a request of Mr. Pritzker, would you  
 5 agree with me that such a request is reasonable?  
 6 A Yes, it is.  
 7 Q And that's one means of getting medical-related  
 8 information from a plaintiff's attorney, correct?  
 9 A It is.  
 10 Q And do you know that Mr. Pritzker's office never  
 11 provided a single medical record to Crawford & Company  
 12 at any point in the entire year, 2002, after Mrs.  
 13 Rhodes' accident?  
 14 A That's my understanding.  
 15 Q And, in fact, they didn't produce any medical records  
 16 at all until they had to in the course of discovery,  
 17 true?  
 18 A I believe it was in April of '03 that they produced  
 19 medical records.  
 20 Q So your answer is yes?  
 21 A When you said "had to," I'm not sure -- I didn't look  
 22 at the order that required it, but I know in April they  
 23 got those documents.  
 24 Q In response to discovery requests that were propounded

1 THE COURT: Basis?  
 2 MR. VARGA: The basis is, I think it  
 3 misstates the record, your Honor, I don't think that's  
 4 been the number of times that the requests were made.  
 5 THE COURT: Oh, the number of times. Okay.  
 6 Why don't you leave out the number, apart from make a  
 7 request  
 8 (By Mr. Pritzker)  
 9 Q You knew of two requests, right?  
 10 A Right.  
 11 Q And other than that, you don't know of anything else  
 12 that was done by Zurich, true?  
 13 A The only thing I know is that --  
 14 MR. VARGA: Objection.  
 15 A -- there was somebody --  
 16 THE COURT: Overruled.  
 17 A -- that said there were six times they tried to get  
 18 that information. I don't know.  
 19 (By Mr. Pritzker)  
 20 Q And you did read the Crawford claims notes; did you  
 21 not?  
 22 A Their reports? Yes.  
 23 Q What about the claims notes?  
 24 A You'd have to show them to me. I just don't remember.

1 in litigation?  
 2 A I assume.  
 3 MR. VARGA: I have nothing further, your  
 4 Honor.  
 5 THE COURT: Mr. Pritzker?  
 6 MR. PRITZKER: Just a couple, your Honor.  
 7 RE-CROSS-EXAMINATION BY MR. PRITZKER:  
 8 Q On the last point, Mr. Cormack, is it also common, once  
 9 defense counsel become involved, plaintiff's counsel to  
 10 be working with defense counsel?  
 11 A It is.  
 12 Q And you don't know what information was imparted from  
 13 plaintiffs' counsel to defense counsel concerning the  
 14 plaintiff's medical condition, do you?  
 15 A No.  
 16 Q The apparent difficulty in getting DLS to respond to  
 17 other primary policies, if Zurich wanted to, could they  
 18 have disclaimed coverage for non-cooperation?  
 19 A Well, I haven't looked at that issue. I wouldn't  
 20 express an opinion without studying it closely.  
 21 Q In any event, they never did do anything other than  
 22 request two or three times for the coverage  
 23 information; isn't that so?  
 24 MR. VARGA: Objection.

1 Q Would you look at Volume 2, Exhibit 67.  
 2 And would you look at the notes that start on  
 3 -- the Bates number down at the bottom is 0595.  
 4 A This is the one that goes backwards. I remember these,  
 5 yes.  
 6 Q So you did see them?  
 7 A Yes.  
 8 Q Did you ever see anything -- if you look at the note at  
 9 the bottom of 0595, which says "John" and then the date  
 10 "1/25/02" and three lines from the bottom it starts:  
 11 "We called this attorney." I think it's referencing  
 12 me. Do you see that?  
 13 A I do.  
 14 Q Do you see any reference in this claims note to any  
 15 requests for medical information?  
 16 A There seem to be a number of notes for 1/25/02.  
 17 Q Well, you can look at all of them, sir, if you wish,  
 18 but I represent to you that the only one talking about  
 19 a telephone call with plaintiffs' counsel is the one  
 20 I've just referred you to.  
 21 A Okay. I'll take that representation as true.  
 22 Q And do you see anything in there noticing anything  
 23 other than a discussion about plaintiff's counsel  
 24 sending to Mr. Chaney a police report?

1 A No.

2 Q And I will represent to you, sir, that Mr. Chaney has

3 testified that this is the only conversation that he

4 and I ever had. And given that, sir, do you have any

5 information that Crawford & Company requested medical

6 information from the plaintiff?

7 A No.

8 MR. PRITZKER: I have no other questions.

9 THE COURT: Any further questions of counsel?

10 All right. I've got some questions for

11 myself, just to make sure I understand.

12 THE WITNESS: Before you do, your Honor, you

13 were asking me about these claim notes, you know, and I

14 have such a poor memory on notes, I don't recall when I

15 -- or what I saw in the notes, so I don't want to

16 represent something that's not true.

17 THE COURT: I'm sorry. When you say that

18 "you were asking about claim notes," you're referring

19 to Mr. Pritzker or me?

20 THE WITNESS: Crawford claim notes that I

21 just testified to.

22 THE COURT: But who is the "you" you were

23 saying were asking you about that?

24 THE WITNESS: Mr. Pritzker.

1 investigation wasn't complete.

2 THE COURT: All right. And why is it that

3 they had -- you had earlier said that they had no

4 obligation, I believe, until the investigation was

5 complete. Why do you say now that they had an

6 obligation to make a reasonable settlement offer even

7 before the investigation was complete?

8 THE WITNESS: Simply because they were going

9 to complete the investigation, they had taken one day

10 of deposition. they had completed the IME, they had an

11 opportunity to look at the Penske insurance policy, and

12 for the most part, those loose ends were being tied up.

13 THE COURT: Now, you had said earlier, I had

14 thought, that it would be unreasonable to make a

15 settlement offer until the depositions of all the

16 plaintiffs had been completed.

17 THE WITNESS: I did.

18 THE COURT: And Rebecca Rhodes was a

19 plaintiff?

20 THE WITNESS: She was.

21 THE COURT: And had a loss of parental

22 consortium claim.

23 THE WITNESS: Yes.

24 THE COURT: So why is it that you're saying

1 THE COURT: Oh, okay.

2 When, in your opinion, did AIG, if ever, have

3 an obligation to make a reasonable offer of settlement

4 to the Rhodes family?

5 THE WITNESS: When they had completed the

6 investigation.

7 THE COURT: And when, in view of your

8 understanding of this case, was that done?

9 THE WITNESS: Immediately before the

10 mediation. But actually, they hadn't gotten the

11 finishing -- they hadn't finished the plaintiff's

12 deposition at the mediation. It was finished on the

13 25th of August.

14 THE COURT: So you're saying it began on

15 August 4, but was continued until August 25?

16 THE WITNESS: Yes.

17 THE COURT: And when did you understand that

18 Rebecca Rhodes had been deposed?

19 THE WITNESS: August 25.

20 THE COURT: All right, let me ask again.

21 When, in your opinion, did AIG have an obligation to

22 make a reasonable settlement offer in this case?

23 THE WITNESS: Again, I'd have to answer that

24 that at the time of the mediation, although the

1 that it was reasonable to make a reasonable settlement

2 offer and arguably reach a settlement before Rebecca

3 Rhodes' deposition had been conducted?

4 THE WITNESS: Because at that time they

5 reached the stage of a mediation which was very

6 important in terms of settling the case, and although,

7 as I said, testified to, insurance companies have to,

8 when they're and put into this difficult position,

9 they're going to have to evaluate based upon what

10 information they have in those situations.

11 THE COURT: As of the time of the mediation,

12 is it your understanding that the motion for an

13 in camera review of Marcia Rhodes' psychological

14 records had not even been filed?

15 THE WITNESS: I believe that the motion had

16 been denied at the time of the mediation.

17 THE COURT: Well, why don't you go through

18 Exhibit 72. It should be in Book 2, if you have it,

19 and turn to page 15 of that docket sheet, at least what

20 we call in Massachusetts a docket sheet. I'm not sure

21 what it's called in Illinois.

22 THE WITNESS: Docket sheet.

23 THE COURT: Okay. I guess that's why it's

24 called the United States of America.

1 All right. Now you'll see, I believe, that  
2 on June 8 of 2004 there was a motion to compel Marcia  
3 Rhodes to produce mental health records, correct?  
4 THE WITNESS: Yes.  
5 THE COURT: And then you'll see on June 16th  
6 that that motion was denied. And below that, in Docket  
7 No. 53, it says, "Defendant's motion to compel the  
8 production of all of Plaintiff Rhodes' mental health  
9 records is denied. This court orders that the  
10 defendant be allowed to discover a post-accident  
11 summary of mental health condition, which alludes to  
12 her mental state prior to the accident, if such exists.  
13 The court may well require an in camera inspection of  
14 plaintiff's medical records."  
15 Is that what you understood to be the denial?  
16 THE WITNESS: Yes.  
17 THE COURT: Now if you turn to the next page,  
18 you'll see on August 19 that at that time defense  
19 counsel followed up on Judge Chernoff's reference to  
20 in camera review and made a motion for in camera  
21 review, correct?  
22 THE WITNESS: They did.  
23 THE COURT: And that was filed after the  
24 mediation had already taken place.

1 THE COURT: All right. Any further questions  
2 of counsel within the scope of mine?  
3 MR. ZELLE: Yes, your Honor.  
4 EXAMINATION BY MR. ZELLE:  
5 Q You answered Judge Gants' questions about an obligation  
6 to make an offer. My question, Mr. Cormack, is are you  
7 aware that under Massachusetts law the obligation to  
8 effectuate settlement only arises when liability is  
9 reasonably clear?  
10 A Yes.  
11 Q You understand that liability within the term of that  
12 -- that term within the statute includes both fault and  
13 damages?  
14 A It does.  
15 Q Do you have an opinion as to whether the amount of  
16 damages was clear at any time prior to the verdict?  
17 A I do have an opinion.  
18 Q And what's your opinion?  
19 A That the rehabilitation was underdetermined at that  
20 time. It hadn't really begun and therefore the damages  
21 were not reasonably certain.  
22 MR. ZELLE: Thank you.  
23 THE COURT: Any further questions?  
24 MR. PRITZKER: One quick one.

1 THE WITNESS: It was.  
2 THE COURT: Was it your understanding that  
3 after that, at the mediation, that the evaluation was  
4 complete before the opportunity for in camera review  
5 had been exhausted?  
6 THE WITNESS: They had evaluated before the  
7 in camera inspection had been exhausted.  
8 THE COURT: I'm sorry. I lost that.  
9 THE WITNESS: They had begun evaluation prior  
10 to the in camera inspection of the mental health  
11 records having been ruled upon.  
12 THE COURT: Okay. And was that reasonable or  
13 unreasonable on the part of AIG?  
14 THE WITNESS: They were in a position that it  
15 was reasonable because the mediation took place in the  
16 interim.  
17 THE COURT: All right. So do I understand  
18 your testimony to be that when a mediation is  
19 scheduled, even if there are some steps which you  
20 otherwise would consider to be obligatory, not yet  
21 completed, the fact of mediation does obligate an  
22 insurance company to, in good faith, make a reasonable  
23 offer during the course of the mediation.  
24 THE WITNESS: It does.

1 EXAMINATION BY MR. PRITZKER:  
2 Q Isn't it common, Mr. Cormack, in severe personal injury  
3 cases where there is ongoing problems, that those  
4 problems not be resolved by the time of even trial?  
5 A It's uncommon. Usually you talk about percentages of  
6 impairment or future disabilities that are evaluated  
7 when the plaintiff reaches a medical condition that  
8 makes it possible to look into the future. You do that  
9 and doctors do that. In this situation, since she  
10 really hadn't begun much rehabilitation at all, we  
11 don't know where she was going to end up.  
12 Q Well, we do know that both life-care planners were able  
13 to evaluate within very close ranges the expected  
14 episodic episodes in the future; were they not?  
15 A Yeah, but they had different ideas about -- one was  
16 more optimistic than the other with respect to  
17 rehabilitation, and they're not doctors.  
18 Q But they were both within very close ranges; were they  
19 not?  
20 A Very close ranges in terms of?  
21 Q In terms of the monetary value of the future episodic  
22 events.  
23 A I think one was 2 million and one was 1.4 One was 2.2  
24 and one was 1.4, total.

1 Q That wasn't for future episodic events, was it, sir?

2 A You know, I don't recall.

3 MR. PRITZKER: All right. I have no other

4 questions.

5 THE COURT: Any further questions of counsel?

6 All right. Thank you, you may step down.

7 All right, next witness. And have a safe

8 flight back to Chicago, sir.

9 THE WITNESS: Thank you.

10 MR. COHEN: I call Tracey Kelly, your Honor.

11 TRACEY KELLY, Sworn

12 THE COURT: Good afternoon.

13 THE WITNESS: Good afternoon, your Honor.

14 THE COURT: If you would, in a loud, clear

15 voice please state your name and spell your last name

16 for the court reporter.

17 THE WITNESS: My name is Tracey Lenore Kelly,

18 K-e-l-l-y.

19 THE COURT: And is Tracey with or without an

20 E?

21 THE WITNESS: It's e-y. Tracey, T-r-a-c-e-y.

22 All right, you may proceed, Mr. Vargas -- I'm

23 sorry, Mr. Cohen. I knew that.

24 DIRECT EXAMINATION BY MR. COHEN:

1 trying those cases. Then I did felony trials, all

2 types: murders, guns, drugs. Following my stint at

3 the District Attorney's Office, I went into civil

4 practice.

5 Q Just generally, can you tell us what your civil

6 practice experience was before you got to AIG?

7 A I worked in a couple of different firms. They all did

8 the same thing. It was negligence firms for mostly

9 defense work, and those were motor vehicle cases,

10 products liability cases, labor law cases, which in New

11 York are construction cases. There's a very specific

12 statute that generates a lot of litigation. And that

13 was basically it for that. And I joined AIG in October

14 of 2000.

15 Q When you say you did negligence work, I assume you're

16 talking about personal injury cases?

17 A Yes, bodily injury cases and property damage, but most

18 were bodily injury.

19 Q And during your time as an attorney, before you got to

20 AIG, did you have any trial experience?

21 A I did. I tried dozens of cases for the District

22 Attorney's Office and then I tried, I would say, I

23 don't know how many, a handful of cases during civil

24 practice. Many juries picked but not many cases go to

1 Q Can you tell us by whom you're employed, Ms. Kelly?

2 A AIG Domestic Claims, Incorporated.

3 Q And what is your current job title with AIG Domestic

4 Claims?

5 A I'm a vice president in the excess claims department.

6 Q And was AIGDC known as something else towards the

7 beginning of this case?

8 A It was known as AIG Technical Services.

9 Q And was that just a name change?

10 A As far as I know, yes.

11 Q Now, can you tell me your educational background,

12 starting with college?

13 A I went to the State University of New York at Stony

14 Brook. I got a B.A. in political science. Immediately

15 thereafter, I attended Brooklyn Law School, where I

16 received my J.D.

17 Q What did you do after law school? What was your first

18 job?

19 A My first job was with King's County District Attorney's

20 Office as an assistant district attorney. I was there

21 about five and a half years. I did criminal

22 misdemeanor trials, felony grand jury cases. For a

23 while I worked in a law enforcement investigations

24 bureau which was investigating police corruption and

1 verdict in the civil field.

2 Q Now, can you tell us what your first position was at

3 AIG?

4 A I was a complex claims director.

5 Q And when did you arrive at AIG?

6 A October of 2000.

7 Q Were you a complex claims director in a particular unit

8 at AIG?

9 A I was a complex claims director in a couple of

10 different units. The first unit --

11 Q I'm just asking your first job.

12 A I'm sorry?

13 Q I'm just asking about your first job.

14 A I was a complex claims director in two different units.

15 Q Okay.

16 A Originally I started in a unit that was called national

17 accounts, which was across the entire country; then

18 specifically I got transferred to a unit that was

19 called complex north. And all of my case files dealt

20 with claims that were taking place in the Northeast,

21 mostly from Maine down to Virginia, all the way out to

22 Illinois.

23 Q That included Massachusetts cases?

24 A Yes, it did.

1 Q And did you work in the excess department at AIGDC?  
 2 A I've only ever worked in the excess department at AIG.  
 3 Q Can you tell me what is the excess department? What  
 4 does that refer to?  
 5 A It's claims handling for insureds who have excess  
 6 coverage from a AIG-based company. National Union Fire  
 7 Insurance of Pittsburgh appeared as the policy here.  
 8 That's an AIG company.  
 9 Q So does that means that you only handle cases in which  
 10 AIG had written an excess insurance policy?  
 11 A Yes, it does.  
 12 Q And what does the term "excess insurance policy" --  
 13 what does that mean?  
 14 A Well, there's two types of coverage. There's the  
 15 primary coverage or an SAR, which is an initial layer  
 16 of insurance company that an insured maintains.  
 17 Usually the limits of that are lower, maybe a million  
 18 dollars to \$5 million. The primary policies are the  
 19 policies that have the duty to defend and investigate,  
 20 and then an insured will often purchase a second layer  
 21 of insurance known as excess coverage, which tend to be  
 22 larger limits, in this case up to \$50 million dollars.  
 23 Q And can there be multiple layers of excess insurance,  
 24 one on top of each other?

1 A When I say SIR, yes, self-insured retention.  
 2 Q And can it be that there are other primary  
 3 policies that also insure your insureds in  
 4 addition to the policy that you're specifically  
 5 written over?  
 6 A Yes. Again, an example of that is, very often  
 7 in the construction industry you'll have a sub-  
 8 contractor and a contractor and they're both  
 9 working on a project, and the sub-contract  
 10 requires that the contractor be named as an  
 11 additional insured on their primary policy. And  
 12 they are. So that coverage would come before  
 13 the excess coverage.  
 14 Q Okay. And can you explain what the term  
 15 "complex" means when you talk about you were a  
 16 complex director? What does that refer to?  
 17 A There's a couple of different departments or  
 18 units within the excess department, specifically  
 19 there is the mainstream unit and there's the  
 20 complex unit. The mainstream unit is cases that  
 21 are perceived to have a potential value within  
 22 \$1 million of the excess layer, and the complex  
 23 cases are cases that are initially perceived to  
 24 have a potential value in excess of \$1 million.

1 A Absolutely. Some companies have into the hundreds of  
 2 millions.  
 3 Q And do you work on -- at AIGDC, have you worked on  
 4 second- and third- and higher level excess policies, as  
 5 well as first-level policies?  
 6 A My level is almost always the second level. Sometimes  
 7 you're the third level.  
 8 Q Now, do you understand what the term "attachment point"  
 9 means in the excess insurance field?  
 10 A I do.  
 11 Q What does it mean?  
 12 A It's the point at which the excess policy indemnity  
 13 obligation is triggered. There can be a primary policy  
 14 of X amount of dollars or an SIR of X amounts of  
 15 dollars. Then there can be insurance available from  
 16 another source. Like the case we have here, if the  
 17 driver of a tractor-trailer is covered under another  
 18 policy of insurance, say as a permissive user, then  
 19 that policy of insurance typically comes ahead of the  
 20 excess policy. So all of those limits together equal  
 21 the attachment point before the excess.  
 22 Q Now, you said before an excess policy is  
 23 typically written either over a primary policy  
 24 or a self-insured retention amount, correct?

1 Q Who determines whether a case is perceived to  
 2 have a potential value of \$1 million into your  
 3 layer or not?  
 4 A Initially cases come in through the segmentation  
 5 unit, they can make the decision. Or sometimes  
 6 cases can be in mainstream and then as discovery  
 7 continues the determination is made that the  
 8 case should be in the complex unit, and that can  
 9 come that way as well.  
 10 Q We'll get into the segmentation unit in a  
 11 minute. But if a case is assigned to the  
 12 complex unit, does that mean that invariably  
 13 you're going to pay \$1 million or more on it?  
 14 A No. Sometimes cases will come into the unit and  
 15 we don't pay anything on them or we pay up to \$1  
 16 million. It depends on what the discovery shows  
 17 you during the course of a case. Sometimes  
 18 there is greater underlying limits than you knew  
 19 about. Sometimes the recovery is better than  
 20 it's expected to be. Different things can  
 21 happen.  
 22 Q What are the types of cases that you generally  
 23 handle in the excess complex department or unit,  
 24 whatever you call it?

1 A Our cases are catastrophic injury cases and  
 2 property damage cases. All of the injuries in  
 3 the excess department, nobody is faking it, you  
 4 know, you don't have your legs or you've been  
 5 burned. They're all serious physical injury  
 6 cases.  
 7 Q So you handle burn cases?  
 8 A We handle burn cases, traumatic brain injury  
 9 cases, quadriplegia cases, amputation cases,  
 10 multiple amputation cases and the like.  
 11 Q Okay. And I take it death cases?  
 12 A Death cases, yes, multiple.  
 13 Q I take it that you've had occasion to settle or  
 14 make a settlement evaluation on cases during  
 15 your time at AIG?  
 16 A That's all I do, every day.  
 17 Q And in your experience, over the last six and a  
 18 half years or so at AIG what types of injuries  
 19 produce the highest injury awards or  
 20 settlements?  
 21 A The worst cases we see are the burn cases.  
 22 That's usually because they have -- the future  
 23 care costs are usually the largest costs that  
 24 are affiliated with catastrophic injury cases.

1 THE COURT: Grounds?  
 2 MS. PINKHAM: An insufficient basis.  
 3 THE COURT: Denied. You may answer.  
 4 A In the order in which I was just discussing  
 5 them.  
 6 THE COURT: So they fall below burn  
 7 cases, wrongful death --  
 8 THE WITNESS: Traumatic brain injury.  
 9 Not all wrongful death. But definitely  
 10 traumatic brain injuries, quadriplegics. And  
 11 then wrongful deaths, it depends on the number  
 12 and what the person was earning.  
 13 THE COURT: Okay.  
 14 (By Mr. Cohen)  
 15 Q Now, you said you handled some property damage  
 16 cases also?  
 17 A Yes.  
 18 Q Do you have an estimate as to what percentage of  
 19 your cases are personal injury cases versus  
 20 property damage?  
 21 A I don't deal with percentages, but the vast  
 22 majority are bodily injury, not property damage.  
 23 Q Now, can you explain to me what your day-to-day  
 24 duties and responsibilities were when you were a

1 And then burn cases also have not only  
 2 disfigurement looks-wise, but oftentimes  
 3 disfigurement in terms of use of the hands, use  
 4 of the arms, so that the person is also  
 5 physically debilitated as well as disfigured.  
 6 Also, the treatment for burn cases is very bad  
 7 and very painful. So those tend to be the cases  
 8 with the highest values.  
 9 Then traumatic brain injuries.  
 10 Oftentimes you have people who are vegetables.  
 11 It's 24-hour care for the rest of their lives,  
 12 you know, 24/7.  
 13 Then I would say quadriplegic cases,  
 14 again because of the amount of future care  
 15 that's required.  
 16 Of course, wrongful death, too. You  
 17 can either have multiple deaths or you can have  
 18 a very high wage earner who is the sole support  
 19 of the family. They, too, have high values.  
 20 Then, of course, paraplegic cases.  
 21 Q Where do paraplegia cases generally fall in the  
 22 range of these horrible injuries that you deal  
 23 with?  
 24 MS. PINKHAM: Objection, your Honor.

1 complex claims director in the excess unit at  
 2 AIGDC?  
 3 A Yes. My responsibilities as a complex claims  
 4 director were to evaluate coverage, liability,  
 5 damages, then to make an evaluation as to the  
 6 value of the case and then to go out and settle  
 7 that case.  
 8 Q And you told us that now you're a claim  
 9 supervisor, a vice-president and claim  
 10 supervisor, right?  
 11 A Yes.  
 12 Q What are those responsibilities at AIGDC?  
 13 A I oversee six complex claims directors who are  
 14 undertaking the function I just described.  
 15 Q Approximately how many cases on average do the  
 16 complex claim directors handle at any one time?  
 17 A They have about 40 or 45.  
 18 Q And so then how many as a claim supervisor, how  
 19 many are you handling currently?  
 20 A I supervise approximately 240 cases.  
 21 Q Now, you said that you have handled cases in  
 22 Massachusetts, right?  
 23 A Yes.  
 24 Q And currently in your job as a claim supervisor

1 are you also in the same geographic area we  
 2 talked about before?  
 3 A Yes, most of my experience has been in the  
 4 Northeast.  
 5 Q Have you heard the words "liberal" and  
 6 "conservative" used to describe jury and  
 7 settlement values in different jurisdictions?  
 8 A Yes.  
 9 Q What does that mean?  
 10 A My understanding of those terms is that liberal  
 11 means that the jury is expected to give higher  
 12 awards; whereas conservative means they are  
 13 expected to give lower awards.  
 14 Q And does that translate into higher settlement  
 15 values in so-called liberal jurisdictions?  
 16 A It can, yes.  
 17 Q Now, in general, is Massachusetts considered to  
 18 be a conservative or a liberal jurisdiction in  
 19 terms of the areas that you handle?  
 20 MS. PINKHAM: Objection.  
 21 THE COURT: Overruled.  
 22 A It's considered to be a more conservative venue.  
 23 (By Mr. Cohen)  
 24 Q Now, are there some counties in Massachusetts

1 regarding that state's particular laws.  
 2 Q Have you attended such training sessions prior  
 3 to the time you first became involved in the  
 4 Rhodes case?  
 5 A Regularly, yes.  
 6 Q Had you participated in any training session  
 7 regarding valuing various types of injuries or  
 8 sessions regarding valuing various types of  
 9 injuries that were put on by attorneys that  
 10 would come in and talk to you?  
 11 A Yes, they would be specific topics.  
 12 Q And specifically did you have any training  
 13 sessions that dealt with the valuation of  
 14 paraplegic cases?  
 15 A I did. I attended -- honestly, I don't remember  
 16 when I know it was before the Rhodes case, and  
 17 I received a handout during that lecture  
 18 prepared by an attorney regarding the valuation  
 19 of paraplegic cases.  
 20 Q Were these training sessions that you attended  
 21 part of your general knowledge base that you  
 22 have as a claims person at AIGDC?  
 23 A That was part of it, yes.  
 24 Q Did you review the handout regarding paraplegic

1 that are more liberal or conservative than  
 2 others?  
 3 A Yes, well the bigger city, Boston, is considered  
 4 to be more liberal than Norfolk county.  
 5 Q Did you have any formal training program at  
 6 AIGDC whether you arrived?  
 7 A No, I didn't. It's on-the-job training.  
 8 Q I'm sorry I didn't catch your --  
 9 A No, I didn't. It's on-the-job training.  
 10 Q Okay. Tell me what types of on-the-job training  
 11 you have received at AIGDC?  
 12 A Well, when I joined, again I had been a  
 13 practicing attorney for about ten years, so I  
 14 understood the basic elements of a bodily injury  
 15 case. So your supervisors and your colleagues  
 16 help you answer some of the questions about, you  
 17 know, how to -- common issues that you're going  
 18 to see in excess cases, coverage issues. Your  
 19 supervisor has an open-door policy, you can ask  
 20 them any questions that you want to. They have  
 21 attorneys come in and give lectures regarding  
 22 various topics such as catastrophic brain injury  
 23 or paraplegia, and they have attorneys from  
 24 various states come in and give lectures

1 case verdicts and settlements?  
 2 A Yes.  
 3 Q Did some of those involve cases in  
 4 Massachusetts?  
 5 A They did.  
 6 Q Do you recall whether you specifically consulted  
 7 those materials when you decided on a settlement  
 8 number for the Rhodes case?  
 9 A I don't remember whether I did or I didn't, but  
 10 I know that I had reviewed it prior to handling  
 11 the Rhodes case.  
 12 Q Now, when you are attempting to put a value on  
 13 settlement in any given case, how valuable are  
 14 the jury verdict reports and settlement reports  
 15 that are published by different companies?  
 16 A I think jury verdict reports are good in terms  
 17 of giving you some general information, but  
 18 since every claim is fact-specific, they are not  
 19 reliable.  
 20 Q Okay. Do all cases dealing with a certain type  
 21 of injury, such as paraplegia, result in the  
 22 same type of verdict and settlement?  
 23 A No, absolutely not.  
 24 Q Have you ever had occasion to have a mock trial



1 put on?

2 A Yes.

3 Q What's a mock trial? How does that work?

4 A A mock trial is you get a group of people

5 together, hopefully that you think are going to

6 reflect the jury pool in your particular area

7 for a particular case, and then you present sort

8 of a truncated view of the trial or the case

9 that you're involved in, and then the juries go

10 back and -- multiple juries -- they go back and

11 they discuss the facts of the case and then they

12 come up with whatever they feel is the verdict

13 on the case; and you get to eye-spy on all of

14 this.

15 Q So there are multiple jury panels who are

16 hearing exactly the same evidence from the same

17 people, right?

18 A That's correct.

19 Q And do they always come back with the same

20 result?

21 A Almost never.

22 Q Does it vary widely?

23 A It can.

24 Q Now, what is the standard operating procedure at

1 there's expert reports, you want expert reports.

2 Q Okay. And you were here when Mr. Cormack

3 testified just now, right?

4 A For some of his testimony, yes.

5 Q Do you recall he was asked about whether you

6 should do up a medical authorization and ask the

7 plaintiff to sign it. Is that something that

8 you do generally?

9 A Well, as an excess carrier we don't have the

10 duty to defend or investigate, so that isn't

11 something that we generally do. We expect that

12 primary is going to that, defense counsel is

13 going to do that, and those materials thereafter

14 are going to be forwarded to us.

15 Q Is it your standard operating practice at AIG's

16 excess unit that when a case comes in, to engage

17 your own experts?

18 A No. Again, the price of an excess policy and

19 the premium that comes from an excess policy,

20 part of what determines that is the fact that

21 you don't have the duty to defend or do the

22 investigation.

23 MS. PINKHAM: Your Honor, I move to

24 strike that as non-responsive.

1 the excess department at AIGDC when a claim is

2 first reported to the company; what happens

3 next?

4 A It's my understanding -- I get them -- I know

5 that they go to segmentation first, I consider

6 segmentation the intake unit at AIG.

7 Q Okay. And then assume that segmentation

8 segments the case to your department and it's

9 given to a claims director, what is the claims

10 director expected to do first?

11 A He would contact the primary and figure out what

12 the current status of the case was and then tell

13 the primary what it is you would expect to

14 receive from them on a going-forward basis.

15 Also, you would order a copy of the policy to

16 try to establish coverage for your particular

17 insured for this particular loss.

18 Q Okay. And when you initially contact the

19 primary carrier or defense counsel or TPA, what

20 are the types of information that you're

21 generally looking for in a personal injury case?

22 A You want investigative materials, medical

23 documentation, deposition summaries, contracts,

24 policies. I like to see dispositive motions If

1 THE COURT: Overruled. I'll allow it.

2 (By Mr. Cohen)

3 Q When a case comes in to you, do you typically

4 hire investigators to go out and take statements

5 and interview witnesses, and such as that?

6 A No.

7 Q Do you expect that somebody else is going to do

8 that?

9 A We expect that the primary carrier will do that,

10 or defense counsel will undertake those duties.

11 Q Now, let's talk about your involvement in the

12 Rhodes case. You have been involved in the

13 Rhodes case, or you were involved in the

14 accident case two separate periods of time,

15 right?

16 A As the complex claims director and then when I

17 came back to the unit as a supervisor, yes.

18 Q And the first period of time you said that you

19 were a complex claims director you were the

20 claims handler who was assigned to the case,

21 right?

22 A That's correct, yes.

23 Q Do you recall when you first got involved in

24 this case?

1 A I think it was March of '02.  
 2 Q Okay. And can you refer to Exhibit 70, that's  
 3 you're AIG claim notes. And specifically --  
 4 A I'm not sure which of these many binders I'm  
 5 looking at.  
 6 Q Okay, it should be Volume 2, I believe it's in.  
 7 Plaintiff's Volume 2.  
 8 A Plaintiff's trial exhibits Volume 2. Okay.  
 9 Sorry, what number?  
 10 THE COURT: I'm sorry, you joined AIG,  
 11 when?  
 12 THE WITNESS: In October of 2000.  
 13 THE COURT: Of 2000.  
 14 THE WITNESS: I'm sorry, which exhibit?  
 15 (By Mr. Cohen)  
 16 Q Exhibit 70, page 2206. It's Bates stamped 2206.  
 17 A Bates stamp 2206.  
 18 THE COURT: This is exhibit, I'm sorry?  
 19 MS. PINKHAM: 70.  
 20 A Okay, I see where you are referring to.  
 21 (By Mr. Cohen)  
 22 Q And just to clarify the judge's question, you  
 23 had been at AIG for about a year and a half when  
 24 you got involved in the Rhodes case?

1 A Yes.  
 2 Q Now, do you see the note towards the bottom of  
 3 that page that says it was written by a  
 4 gentleman named John Kurila?  
 5 A I do.  
 6 Q What date was that note written?  
 7 A 2/11/02.  
 8 Q Okay, and who is John Kurila?  
 9 A He was a manager in the segmentation department.  
 10 I don't know what his title was.  
 11 Q Okay. And the next note was written by whom?  
 12 It starts on the previous page, 2205.  
 13 A Jim Joanos.  
 14 Q I'm sorry?  
 15 A Jim Joanos.  
 16 Q Okay. And what is Jim Joanos' function, or job  
 17 title, I should say?  
 18 A I think he was a segmentation technician.  
 19 Again, it's of an intake position, a clerical  
 20 entry-level position.  
 21 Q And Mr. Joanos wrote a note which included some  
 22 facts about the case?  
 23 A Yes.  
 24 Q Do you have any idea where he got the

1 information that's included in his notes?  
 2 A I don't.  
 3 Q Now, what reliance did you put on what  
 4 information the segmentation technician --  
 5 strike that. Is that a typical first note by  
 6 the segmentation, or notes by the segmentation  
 7 department?  
 8 A Generally speaking, yes.  
 9 Q Okay. And what reliance do you put on the  
 10 segmentation department notes?  
 11 A None, except for contact information. Again,  
 12 this is a clerical position and I would verify  
 13 anything that I saw in the segmentation note.  
 14 Q Okay. And if you look on page 2205, the next  
 15 note was written by whom and when?  
 16 A Bryan Pedro on 3/11/02.  
 17 Q What was Bryan Pedro's job title on March 11,  
 18 '02, right?  
 19 A March 11, '02, I'm sorry, what did I say?  
 20 Q What was Mr. Pedro's job title on March 11, '02?  
 21 A He ran the complex north unit, the job I have  
 22 now. At that time I believe he was an assistant  
 23 vice-president, but I'm not really sure. He was  
 24 definitely the boss of the north unit.

1 Q Okay. And was he your direct supervisor at that  
 2 time?  
 3 A He was.  
 4 Q Now, Mr. Pedro's note -- in Mr. Pedro's note he  
 5 asked a number of questions, right?  
 6 A Yes.  
 7 Q And did you respond to those questions in  
 8 writing?  
 9 A I didn't, because he's not really asking  
 10 questions. This is an assignment note. What  
 11 he's really doing is highlighting areas that he  
 12 thinks may come up in the handling of the claim.  
 13 He doesn't expect me to provide an answer to  
 14 him.  
 15 MS. PINKHAM: Objection, your Honor. I  
 16 move to strike as to what Mr. Pedro's  
 17 expectations were.  
 18 THE COURT: I will allow it only as to  
 19 what she understood him to be expecting as his  
 20 subordinate at that time. So with that you may  
 21 proceed.  
 22 (By Mr. Cohen)  
 23 Q Was this a typical assignment note that you  
 24 received from Mr. Pedro, in other words, asking

1 a bunch of questions?

2 A Yes.

3 Q And was it your practice to respond

4 contemporaneously to those questions?

5 A No.

6 Q Now, Mr. Pedro's note mentions a gentleman named

7 Frank Garrity, or Francis Garrity. Who is Mr.

8 Garrity?

9 A He was a coverage attorney who specialized in

10 trucking losses in New Jersey.

11 Q Okay. And just to be clear, what is a coverage

12 attorney or coverage counsel. We've heard that

13 term in the case before.

14 A It's an attorney who specializes in

15 interpretation of policies and coverage

16 litigation.

17 Q Okay. And did you make contact with Mr. Garrity

18 after you got that note?

19 A I didn't.

20 Q Why not?

21 A Because I had seen Mr. Garrity's lecture on many

22 occasions, and I understood the relationships of

23 parties in trucking cases and the coverage that

24 I should be looking for.

1 one, you know, the owner of the tractor as

2 against the owner of the trailer, they could

3 have indemnity agreements and people focus on

4 those. But the real issue is, is the driver of

5 the tractor covered, because in nine times out

6 of ten, it's the driver who is the actual

7 tortfeasor. So if there's primary coverage for

8 the driver, typically the primary coverage for

9 the driver comes ahead of all other excess

10 coverage.

11 Q Is it common for a truck driver to be covered by

12 more than one insurance policy?

13 A It is. Oftentimes the trailer, they're actually

14 a permissive user, so they do quality as an

15 insured under the trailer's policy.

16 Q Okay. And in addition to the tractor's policy?

17 A In addition to the tractor policy, yes.

18 Q And sometimes in trucking cases are the drivers

19 employed by a different entity than the entity

20 that owns the tractor or the trailer?

21 A Yes.

22 Q And does the employer of the truck driver

23 oftentimes have its own insurance coverage?

24 A They can as well, yes.

1 Q Okay. Was he one of the people who would come

2 in and give you in-house training sessions?

3 A He had come in, yes.

4 Q And generally what types of information did he

5 indicate you should be looking for in terms of

6 coverage for trucking accident cases?

7 MS. PINKHAM: Objection, your Honor.

8 THE COURT: Sustained as to what he

9 said she should be looking for. I will allow

10 her to testify as to what she thought she should

11 be looking for.

12 MR. COHEN: Let me rephrase the

13 question, then, your Honor.

14 (By Mr. Cohen)

15 Q What was your understanding at the time you

16 first got the Rhodes case as to what coverage

17 issues you should be looking for in terms of

18 trucking cases?

19 A Well, in every case you want to find out what

20 coverage every defendant has. The particular

21 thing about trucking cases is trying to identify

22 how much coverage the driver himself has. Very

23 often people get clouded by the contracts that

24 exist and the indemnification provisions from

1 Q Okay. Now, did you have occasion to work on any

2 trucking cases before you worked on the Rhodes

3 case?

4 A Oh, yes.

5 Q How many trucking accident cases have you worked

6 on at AIG?

7 A Many, many, many.

8 Q Okay. And was that also -- had you also worked

9 on a number of trucking cases before you became

10 involved in the Rhodes case in 2002?

11 A Yes.

12 Q Now, your initial note, if you turn also to page

13 2205, was written on April 8, 2002, correct?

14 A That's what the note indicates, yes.

15 Q Okay. What did you do with respect to the file

16 before you wrote that note?

17 A I don't remember specifically what I did in this

18 particular file, but I see from the note that

19 what I had done is that I called John Chaney and

20 I spoke to him about the status of the case and

21 I talked to him about what I wanted him to send

22 me.

23 Q Okay. And did he make any statements to you

24 about the case based on what you said in your

1 note?  
 2 A The case wasn't in suit yet.  
 3 Q Okay. And now did you follow-up your  
 4 conversation with Mr. Chaney with a letter?  
 5 A I did.  
 6 Q Can you turn to plaintiffs' Exhibit 5 and that  
 7 should be in Volume 1. I'm going to ask you if  
 8 that's the initial letter that you wrote to Mr.  
 9 Chaney?  
 10 A Plaintiffs' 1.  
 11 Q Book 1, Exhibit 5.  
 12 A Yes.  
 13 Q And what date was that letter written?  
 14 A It says April 9, 2002.  
 15 Q In addition to sending that letter to Mr.  
 16 Chaney, did you cc the letter to anyone?  
 17 A I did, I cc'd it to defense counsel and to GAF.  
 18 Q And defense counsel at the time was Dennis  
 19 Duggan of Nixon Peabody?  
 20 A That was my understanding.  
 21 Q And who did you send it to at GAF?  
 22 A Robert Manning.  
 23 Q What position was Mr. Manning in as far as you  
 24 understood?

1 A I don't specifically recall, but I know it was I  
 2 think in the winter. I had received a report  
 3 that had indicated that the case had gone into  
 4 suit, but I had never received any suit papers  
 5 from Mr. Chaney so I telephoned him regarding  
 6 this.  
 7 Q Okay. Could you refer to Exhibit 66D, and I  
 8 think that's in Plaintiffs' second exhibit  
 9 folder.  
 10 THE COURT: Okay. We'll do that and  
 11 then we'll break for the day.  
 12 A 66D. Okay, I see it.  
 13 (By Mr. Cohen)  
 14 Q Is that the -- that's a Crawford report, right?  
 15 A Yes.  
 16 Q And it's dated in September of 2002?  
 17 A Yes, it is.  
 18 Q Is that the report that first made you aware  
 19 that the case was in suit?  
 20 A I don't remember, but it certainly seems logical  
 21 that this was it.  
 22 Q Okay. Well does it -- looking at the report on  
 23 the second page, does it indicate that the case  
 24 was in suit?

1 A Risk manager.  
 2 Q Now, I'm not going to ask you to read what you  
 3 asked for, but generally can you describe the  
 4 types of information that you asked for in the  
 5 April 9 letter to Mr. Chaney?  
 6 A Again, investigative materials, deposition  
 7 summaries, medical record summaries, analysis of  
 8 liability and damages by defense counsel. I  
 9 wanted copies of the policies between the  
 10 various entities, and I asked for copies of the  
 11 policies for Penske and Driver Logistics  
 12 Services.  
 13 Q Okay. Were these typical types of information  
 14 that you asked for in an initial letter to the  
 15 primary carrier, its representative and/or  
 16 defense counsel?  
 17 A Yes.  
 18 Q And I notice that the letter wasn't copied to  
 19 anybody at Zurich. Why was that?  
 20 A I thought Crawford was Zurich.  
 21 Q What do you mean by that?  
 22 A They were handling the case for Zurich.  
 23 Q When was your next communication with Mr. Chaney  
 24 after the April 2002 phone call and letter?

1 A Yes. It makes reference to answering a  
 2 complaint which indicated to me that the case  
 3 was in suit.  
 4 Q Okay.  
 5 MR. COHEN: I guess we're going to  
 6 break here, your Honor?  
 7 THE COURT: Yes, we will break now.  
 8 Tomorrow we start at 2:15 -- I'm sorry at 10:15.  
 9 So we shall reconvene at 10:15 tomorrow.  
 10 MR. COHEN: Your Honor, I have a  
 11 question about the trial brief. I was talking  
 12 to Attorney Sackett and it seems we have a  
 13 differing understanding as to what you are  
 14 looking for in the trial brief. So I'd just  
 15 like to clarify whether you want numbered  
 16 paragraphs as to findings of fact and  
 17 conclusions of law, or you don't want that.  
 18 THE COURT: I generally don't frankly  
 19 care, because I usually -- it's unlikely that  
 20 I'm going to be adopting them by number. I  
 21 think formally you're obligated to, but the fact  
 22 of the matter is that generally I think is going  
 23 to increase its length. So I will let you do  
 24 what you want with regard to it.

1 MR. COHEN: Okay, thank you, that's  
2 what I thought you said --  
3 THE COURT: Now that we're talking  
4 about that, let me at least make one comment.  
5 We can all sit, I guess. This will not take  
6 long.  
7 I did speak with an attorney in  
8 Washington who appears, I guess, before the  
9 International Trade Commission and learned about  
10 a proposed findings of fact, conclusions of law  
11 filed in a particular case that that person was  
12 involved with, which was more than 1,000 pages  
13 long; and of course, they had to respond to each  
14 of the assertions in that 1,000-page findings of  
15 fact, conclusions of law. I then asked this  
16 gentleman how long generally are the findings of  
17 fact, conclusions of law prepared by the judge  
18 or administrative law judge, and the answer was  
19 roughly 150 pages.  
20 So I asked the rhetorical question:  
21 Why would one file a document that is roughly  
22 ten times longer as proposed findings than one  
23 anticipates the court will be taking to actually  
24 render his or her findings?

1 prevail upon.  
2 All right, we are adjourned.  
3 (Hearing adjourned at 1:03 a.m.)  
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1 So I tell you that story for whatever  
2 value that it may have with regard to it --  
3 MR. ZELLE: I think at this point  
4 you've got to tell us how long your opinion is  
5 going to be so we can do our calculation here.  
6 THE COURT: Well, I do not know that.  
7 MR. BROWN: Fewer than a thousand?  
8 THE COURT: I can fairly say that Judge  
9 Wolf's record in the Bulger case will be secure,  
10 so one need not worry about that.  
11 I am as interested in your proposals  
12 with respect to matters of law as I am in  
13 findings of fact. I have listened and I do have  
14 -- I'm now on page 84 of my own notes, so I  
15 would focus on things that you think matter with  
16 respect to getting where you think I should get  
17 to as opposed to presenting every particular  
18 finding of fact.  
19 I also do have a copy of the  
20 transcript. So focus basically on what matters,  
21 focus on what you think you'll need to win, and  
22 recognize that to the extent that you're engaged  
23 in diversions, you're arguably simply blurring  
24 the point you actually may wish to make and

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