Court Reporters

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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 16

BEFORE: GANTS, J.
BOSTON, MASSACHUSETTS
MARCH 15, 2007

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FAYE LEROUX

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EXHIBITS

FOR I.D.

None

PROCEEDINGS

(In court at 10:21 a.m.)

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

THE COURT: Good morning. Are we all set to proceed?

MR. ZELLE: We are, your Honor. I'd like to start by offering as either an exhibit or it's -- there's nine lines of deposition testimony from that which was shown to the court and offered as Exhibit 93 and 93A from Tracey Kelly. For completeness of one answer, there's nine lines of continuing testimony we'd like to add. We can simply submit it as an exhibit or I can read it.

THE COURT: Well, let me hear whether there's any objection.

MS. PINKHAM: I don't know what nine lines they're referencing, your Honor.

MR. ZELLE: Page 110, line 7 is where your exhibit ended, and I'd like to add lines 8 through 17.

THE COURT: All right. Why don't we -- we can address that after the break now that they know what it is.

MR. ZELLE: That's fine. There's one

exhibit, Exhibit 226, that has been offered by AIG that was objected to. It is being -- it's a series of e-mails, two e-mails actually, from Mr. Pritzker. It's an exchange with a former partner of his. If the objection is withdrawn, we will not be calling Mr. Pritzker as a witness. If the objection persists, we will simply confine our examination, our direct of Mr. Pritzker, to the authentication of that document.

MS. PINKHAM: Your Honor, we maintain our objection, and the objection's not solely as to authenticity. It contains hearsay and frankly it's irrelevant, your Honor.

THE COURT: Okay. Well, we'll cross that bridge when we come to it, but let's get Mr. Todd --

MR. ZELLE: Actually, your Honor, we thought we'd do Mr. Pritzker first so they can close their case, and then we'll go through the procedure of presenting our 41B motion and finish up with Mr. Todd.

THE COURT: All right. Okay. So are you calling Mr. Pritzker?

MR. ZELLE: We are going to call him, yes.

THE COURT: All right.

M. FREDERICK PRITZKER, Sworn.

THE WITNESS: Your Honor.

THE COURT: Good morning.

THE WITNESS: An unusual role for me.

THE COURT: Well, if you would please state your name and spell your last name for the court reporter?

THE WITNESS: My full name is M, as in Michael, Frederick, F-r-e-d-e-r-i-c-k, Pritzker, P-r-i-t-z-k-e-r.

THE COURT: All right. You may proceed.

DIRECT EXAMINATION BY MR. ZELLE:

Q I'm going to show you, Mr. Pritzker, a two-page document that we marked as Exhibit 226. It's for identification at this point. Let me show this to you. Do you recognize that, Mr. Pritzker?

A I do recognize it.

Q You testified about that during your deposition?

A I did testify to it.

Q And is this a true copy of a business record maintained on your e-mail server at Brown Rudnick?

A It is a copy of an e-mail stream contained on my computer. Whether or not it's a business record, I doubt.

Q And what's the subject of this?

A The subject is to Abby Hechtman -- to and from Abby

Hechtman, who was a partner at Brown Rudnick, recently left, concerning the results of the Rhodes case.

Q And it speaks about the --

MS. PINKHAM: Your Honor, I would object to the extent that Mr. Zelle is asking about any communications from Abby Hechtman to Mr. Pritzker. She's not here and those are hearsay.

THE COURT: Well, is this --

MR. ZELLE: It's not being offered for the truth at all, your Honor. It's being offered -- not Ms. Hechtman's statement anyways. It's being offered with respect to the reference or discussion of the resolution of the Rhodes claim without dismissal of the 93A claim, which is the subject of this case, inasmuch as there has been a suggestion that AIG acted unfairly in connection with the negotiations, inasmuch as they ask for a release of the 93A claim.

MS. PINKHAM: Your Honor, if the statements are not being offered for the truth of the matter asserted, I assume there's some other basis?

MR. ZELLE: No. That statement is being offered for the truth of the matter asserted. Ms. Hechtman's is not.

THE COURT: And this is statement by Ms.

Hechtman or a statement by Mr. Pritzker?

MR. ZELLE: By Mr. Pritzker as to the release of the 93A claim that is referred to by Mr. Pritzker as the best part of the settlement.

THE COURT: All right. Now, first of all, I think I've heard this before in some other context. Maybe it was part of a motion.

With regard to its admissibility, it's an out-of-court statement made by Mr. Pritzker. And why is it -- what's the grounds for its admissibility?

MR. ZELLE: It is evidence that inasmuch as there has been argument by plaintiffs --

THE COURT: Let's assume it's relevant.

MR. ZELLE: Okay.

THE COURT: So the question is, what is its grounds for admissibility?

MR. ZELLE: It's a statement by Mr. Pritzker, who is representing at this time the plaintiffs. I think it can be imputed to the plaintiffs. If not, then I think it's ripe for cross.

THE COURT: Well, you can certainly impeach him with respect to it. I understand that.

All right. It's not clear to me that it comes in as an admission of a party, because while he

is an agent of a party, it's not clear from what you describe to me that his e-mail to a fellow partner is during the course of his employment. Is that viewed to be part and parcel of his representation or is it basically him chatting with another attorney or having to chat by e-mail as opposed to in person?

MR. ZELLE: I think it is -- the context is how good the result is for the client, how the client feels about it, their reference to the client's feelings, and I think --

MS. PINKHAM: Your Honor, I would --

MR. ZELLE: -- this is a representation of the client's impression. Thus, clearly, it is a statement that can be attributed to the Rhodeses.

MS. PINKHAM: Your Honor, if I may?

THE COURT: Well, before we get there, is Ms. Chapman [sic] alleged to be an attorney involved in this case at all?

MR. ZELLE: She was not.

THE COURT: All right.

THE WITNESS: She was the relationship attorney, your Honor, when she was at Brown Rudnick.

THE COURT: What does it mean to be a "relationship attorney"?

THE WITNESS: She was the attorney who introduced the client to the office.

THE COURT: Oh. You call that the relationship attorney?

THE WITNESS: We do.

MR. ZELLE: We call it the originating attorney.

THE COURT: What a sensitive law firm you have.

THE WITNESS: We don't have originations in our firm.

THE COURT: You don't have originations, you just have relationships. God, that is beautiful.

MS. PINKHAM: Ms. Hechtman was not involved in litigation, your Honor. In fact, the communication with her was after she had left the firm. She was no longer an attorney at Brown Rudnick at the time of this e-mail communications.

THE COURT: All right. Well, let me turn back to Mr. Zelle.

It happens to be in writing. Let's assume that you had perfect knowledge of a conversation that Mr. Pritzker had in the cafeteria of Brown Rudnick, assuming they have a cafeteria, which they probably do,

then somebody overhears him speaking to Ms. Chapman about let me tell you what happened with regard to this matter, and let's assume that he orally tells her all that is written, does that come in as an admission of an agent to a party in that context?

MR. ZELLE: Not likely. Not likely, but I think I can circumvent the problem here by asking a question to Mr. Pritzker.

THE COURT: Well, certainly -- well, let me ask Ms. Pinkham. Is there any dispute that it may come in -- to the extent that an assertion was made by Mr. Pritzker and this is impeaching of it, is there any question that the statement would be admissible as impeachment?

MS. PINKHAM: No, your Honor. I don't believe it would come in as impeachment as described by Mr. Zelle.

THE COURT: Why would it not come in as impeachment? If Mr. Pritzker signs a -- or makes an assertion --

MS. PINKHAM: Your Honor, if I could. I don't believe that Mr. Pritzker's characterization of the settlement, first, is relevant; and, second, I don't believe it has any probative value in the case.

THE COURT: Any probative value because of the unreliability of the witness or because of the --

MS. PINKHAM: Certainly not, your Honor.

THE COURT: -- nature of the assertion?

MS. PINKHAM: Because of the nature of the assertion.

THE COURT: All right.

MS. PINKHAM: It has -- the plaintiffs' attorneys characterization of the final settlement I don't believe has any probative value in consideration of whether the last of several offers that AIG made were in good faith or not.

THE COURT: All right. Well, I think that goes to weight. It may not bear any weight, but I do think if it is -- again, I don't know what the statement is yet, although I've got an inkling of it.

To the extent that there is an assertion made that something that was done by AIG was unfair and there is an assertion by Mr. Pritzker that indeed that the assertion he made in memoranda or briefs or to the court is contradicted by another assertion which would say that that's not true or accurate, then it would come in as impeachment. It may turn out that this doesn't bear on that, but I'll find that out, but I

think I'm not -- I will permit you to question him. You'd have to identify a statement that he made to the contrary; and if this statement is impeaching of that, then I would consider it.

But I think that's -- I don't think it's -- since it was made in the context of the equivalent of a cafeteria conversation made to a client, happens to be done by e-mail, I don't think that the form of it matters, so I don't think it qualifies as an admission by an agent to a party, because I think it has to be made in a more -- in a different context from a chatty, social context to be held against the party. But any assertion made that contradicts or tends to impugn an assertion that was made to the court I think is fair game.

You may proceed.

(By Mr. Zelle)

Q All right. Let me ask you a question, Mr. Pritzker. Is it your view that the best part of the deal, meaning the settlement with AIG in June of 2005, other than your clients got almost all of their judgment, was that the 93A action remains open?

A In the context of the fact that it was the first

time that AIG had been willing to unbundle any negotiations, the answer is yes.

MR. ZELLE: Then I don't need to offer this exhibit, your Honor.

THE COURT: Okay. Anything else?

MR. ZELLE: That's all we've got.

THE COURT: Okay.

Ms. Pinkham, do you wish to -- well, it's not really cross. I guess there's essentially direct examination with regard to the reasonableness of the billing.

MS. PINKHAM: Yes, your Honor. There is one matter that we seek to elicit rebuttal testimony from Mr. Pritzker.

THE COURT: I'm sorry? Rebuttal or is it -- it's not ripe for rebuttal. It may be ripe for testimony that you deferred with regard to the reasonableness of bills. Is that its purpose?

MS. PINKHAM: There's two purposes, your Honor. The reasonableness of the bills and in response to some of Tracey Kelly's testimony, we have one item of rebuttal.

THE COURT: Well, if it's going to be

that, that would be after the defense rests and then we'll consider whether rebuttal is appropriate. So put aside the rebuttal because one doesn't even consider rebuttal until the defense has rested. So why don't you focus on what essentially would be part of your case-in-chief, which was deferred.

MS. PINKHAM: Thank you, your Honor.

DIRECT EXAMINATION BY MS. PINKHAM:

Q Mr. Pritzker, were you the billing attorney for the Rhodes case in the underlying matter?

A Yes, I was.

Q Do you have an opinion as to whether the charges that were paid by the Rhodes family in the underlying matter were fair and reasonable?

A Yes, I do.

Q Can you explain the basis for that position?

A This basis is both as my position as billing attorney, which required me to, in a contingent case, to review both time and costs on a periodic basis with a billing coordinator, in this case, Ms. Kelly. But also my experience, 40 years plus as a litigator, a lot of that in personal injury work; 20 years plus as the chair

of the litigation department; and 15 years approximately on the management committee of Brown Rudnick.

Q And apart from your experience as an attorney, what do you rely on in describing the disbursements that were billed and paid to the Rhodes family as reasonable?

A Well, the process that Brown Rudnick had put in place is multifaceted. Every non-automatic charge, as Ms. Kelly described it, the automatic charges are the ones where a computer number is plugged in automatically for such things as copies, telephone, facsimiles, et cetera. The non-automatic charges had to be submitted with either an invoice or a receipt to bookkeeping, and if the invoices were over or the request was over $500 it had to be approved by a partner. And then either on a monthly basis for monthly billing clients or periodic basis for contingent clients, they were reviewed by the billing attorney and they were reviewed for both inaccuracies and inappropriateness before the final charges were posted to the account.

Q And did your review of the Rhodes charges

disclose any inaccuracies or errors?

A Generally, yes, and in particular when I reviewed them in preparation for today's testimony, I found three that I had missed along the way.

Q And what were the three that you had missed over the --

THE COURT: I'm sorry. When you say you "you missed", what do you mean by "missed"?

THE WITNESS: I found three additional errors, your Honor, that made their way into the final disbursement charges that the Rhodeses paid. They totaled under $350.

(By Ms. Pinkham)

Q And what were those errors, Mr. Pritzker?

A There was one on September 30, '04 for $82.04 that was a cellular bill charge; another cellular telephone charge for November 11, 2004 for $92.04; and somehow an airfare bill for $164.99 was also posted to this account. That was in December of '04.

Q And are the plaintiffs seeking to recover those three charges that you just described in this case?

A No, they're not.
Q Are the plaintiffs reducing their request for the reasonable costs and attorneys fees by those three items?
A By those three items, yes.
Q Are you familiar with what the total, then, is that the plaintiffs are alleging are fair and reasonable costs in the underlying matter?
A If my calculation is correct, $142,192.73.
Q In your review of the charges in the Rhodes case, had you removed any other charges?
A Yes.
Q Can you describe what you did and why?
A We -- I decided that really for expedience sake we would only be seeking the charges from the date that we were retained through December 31 of '04, even though charges continued to be posted to this account after that date. And the reason for that is that the activities became intermingled with the 93A claim and yet they were kept under the same Brown Rudnick case number and it became very difficult to separate those.

As an example, the transcript charges

were originally -- the trial transcript charges were originally incurred for the underlying case but then utilized for the 93A case, and there were other charges where we just couldn't tell. And so rather than go back and try to unbundle them, we decided -- and by the way, all of these are attributable to the Rhodes family and were paid by the Rhodes family. But rather than unbundle them for the purpose of this case, we just decided to cut off at December 31, '04.
Q How did the Rhodes family pay for the costs in the underlying matter?
A They were paid by deductions from the fees -- I'm sorry -- from -- strike that.

We received on behalf of the Rhodes family the settlement amounts, and as those amounts were disbursed to the Rhodes family, fees were deducted and a portion of costs were reducted until they reached the total.
Q And were the fees deducted from the $2.3 million that had been paid by Zurich in December of 2004?
A Yes.
Q And were subsequent deductions made from

payments that were made by AIG over the summer of 2005?
A Yes. Not every payment had a deduction for costs, but they came out of those three sources.
Q And has the total that you've testified to as the reasonable charges incurred in the underlying matter been paid by the Rhodes family?
A Yes, they've all been paid.

MS. PINKHAM: I have nothing further, your Honor.

THE COURT: Okay. Cross-examination.

MR. COHEN: I have a few questions, your Honor.

THE COURT: Mr. Cohen.

CROSS-EXAMINATION BY MR. COHEN:

Q You were here, Mr. Pritzker, when Janet Kelley testified, correct?
A Janet Kelley, yes.
Q And she indicated that there are something like 6,600 separate cost entries on your over 200-page list of costs that you're seeking recovery for in this case. Do you remember that?
A I remember her testifying on that subject. I

don't remember the number particularly.
Q Okay. Well --
A It is what it is.
Q Okay. And it's 202 pages, right?
A I won't dispute that. It's not before me.
Q Okay. In any event, you went through all these costs during the time the trial was going on, the accident case was going on, right?
A Well, not all at once. We went on for the ones --
Q During that period, you had had occasion to go through all those costs and you deducted certain costs that you felt were inappropriate, right?
A Correct.
Q Okay. Other than the three examples or the three costs that you talked about today, do you recall any other costs that you deducted and didn't charge the Rhodes on the grounds that it was inappropriate or unreasonable to charge your clients that?
A Yes.
Q What were they?
A Well, I don't remember particularly, but I can remember generally that when a cost was posted

by a person that had nothing to do with the case, where obviously a number was inappropriately plugged in or bookkeeping just posted it to the wrong case, that became apparent.

Q Is that the case --

A I don't remember other examples, but I'm sure over the course of the two years with this volume of costs there were several.

Q Okay. And those are all due to mistakes and entering costs on this case that had to do with another case?

A Yes.

Q Was there any single cost item in the 6,600 or whatever it is entries that you didn't charge the Rhodeses because you didn't think it was reasonable or appropriate to charge your client for that?

A Probably, but I have no specific memory.

Q Now, after the trial of the accident case, the Rhodeses filed a motion for costs; did they not?

A Yes.

Q And you signed an affidavit in connection with that motion for costs, right?

A I don't remember whether I signed it, but I certainly remember that one was presented.

Q Well, let me show you this document and see if that refreshes your recollection at all. Is that the motion for costs that the Rhodes signed after the accident case?

A Yes.

Q And you singed the certificate of service, right?

A Yes.

Q The 12th of October?

A Yes.

Q 2004?

A Yes.

Q And do you see your affidavit that you also signed on the back of that, it's two pages?

A Yes.

Q Okay. And in that motion for costs you sought recovery as part of the accident case of costs in the amount of $54,057.37, right?

A No.

Q No?

A That's what we sought. Those were the statutory costs.

Q That's what you sought, right?

A Yes.

Q And those consisted of, among other things, expert fees, right?

A Yes.

Q And transcript fees? Deposition transcripts?

A Yes.

Q Service of process fees?

A Yes.

Q Okay. Most of it was expert fees, right? If you look at your affidavit -- or most of it certainly was.

A No, I wouldn't say most of it, but certainly a lot of it.

Q Okay. And much of those costs are the same costs you're seeking to recover as damages in this case, right?

A That is true.

Q And after you filed a motion for costs, it was decided, right?

A It was not decided.

Q And that's because the case settled before it could be decided, right?

A Correct.

Q And as part of the settlement, you filed an agreement for judgment, right?

A True.

Q And one of the things that the Rhodeses forewent as part of the agreement for judgment or the

A We didn't file an agreement for judgment.

Q A judgment satisfied form.

A It was a judgment satisfied.

Q One of the things that the Rhodeses forewent as part of the judgment satisfied form in the settlement they reached was the costs that they were claiming, right?

A No.

Q Where did I go wrong?

A It's true that the costs were not paid as part of the settlement. Neither was the post-judgment interest paid. That does not mean, however, that the judgment satisfied implied or intended to forego those costs.

Q Well, is it your testimony that you feel you have a right to recover those costs in connection with the underlying case despite having filed the judgment satisfied form?

A That is definitely our position and my position

and my understanding.
Q Have you taken any steps in the almost two years since the settlement to recover those costs in the underlying case?
A In the underlying case, no.
Q In the underlying case. That was my question.
A I'm sorry. I misunderstood your question.
Q Is it your position that you're currently entitled to recover those costs in the underlying case despite having filed the judgment satisfied form?
A We are not entitled to recover the underlying costs nor the post-judgment interest in the underlying case.
Q And that's because you reached a settlement, right?
A We reached a settlement where we forewent those in the underlying case.
Q Exactly.
MR. COHEN: Could I mark this as an exhibit, your Honor.
THE COURT: Any objection?
MS. PINKHAM: No objection.
THE COURT: It may come in as, I guess, 229, is that right, for an AIG number?

THE COURT REPORTER: We're on 229, yes.

(Exhibit No. 229, marked; Request for Post-Judgment Costs.)

(By Mr. Cohen)
Q Now, with respect to the outside costs that are included in this 202-page document, in other words, everything other than the fax costs and the in-house telephone costs and the copying costs, we have no idea exactly when those costs were incurred, correct, because all we know is when Brown Rudnick paid them.
A We don't know exactly. We know within a range definitely.
Q Now, Ms. Kelley came in and we had marked, I think it ended up being marked as an exhibit, I'm not sure of the number, but it was a pleading entitled --
THE COURT: For the sake of clarity, you're referring to Janet Kelley?
MR. COHEN: Janet Kelley, yes.
THE COURT: We have two Kelleys.

(By Mr. Cohen)
Q -- "Costs and Payment Reports for Rhodes' Matter," and it was kind of a summary of this 202-page document. Do you recall that?
A Yes. There was the document and then there was a summary of the document.
Q And the documents under Tab B had two pages and the first was -- and it broke it down by cost categories. Do you recall that?
A I do.
Q And the first page was for 33-odd thousand dollars, right?
A Do you want me to get it or not?
Q Why don't I show it to you.
MS. PINKHAM: Are you referencing Exhibit 92?
MR. COHEN: I don't recall what number it is.
MS. PINKHAM: That's Exhibit 92. Would you like a copy of that, Mr. Pritzker
MR. BROWN: Exhibit 90.
(By Mr. Cohen)
Q If you turn to Tab A first, it goes by month, right? And the first page is through August of

2003?
A That's correct.
Q And the second page is from September 2003 onward, right?
A Yes.
Q And then the second page breaks it down by cost category -- I mean, Tab B breaks it down by cost category for those same periods of time, right?
A Yes.
Q If you would turn to the second page in which it's broken down by cost category, we have listed under Category 24 $1,043.72 in cell phone expenses. Can you explain to us what that was for?
A Yes. Those were the cell phone expenses.
Q Whose cell phone?
A I believe they're primarily mine, but I can't tell for certain.
Q How was that calculated?
A How was it calculated?
Q Yeah.
A It was calculated in two ways. I suppose I should explain that for those of mine, and it's mostly mine, there were three major cases that I was working on during this period: one in Delaware,

one in New York, and this one. And a lot of my business, therefore, was conducted over the cell phone. And when either it was identified as a call to or from the Rhodes family, which was easy to identify, or a call to the office, then I took the time to determine for that month what portion of my time was spent on any particular matter, and I apportioned the cell phone costs appropriately.

Q If it was a call to the office, you're saying you apportioned it to the Rhodes case?

A No -- yes. Not all to the Rhodes case, but whatever the proportion that I felt was reasonable for that month was then attributed to the Rhodes case.

Q Okay. And we have no backup information to determine whether that was accurate or not, right?

A No, but it was very carefully done by me and my secretary on a monthly basis.

Q And you were down in Florida much of that time, I take it, when you had those cell phone charges?

A No. Most of it was in Delaware during this period. Was in Delaware or New York and other areas as well, because I traveled extensively for those other two cases, but some of it was in

Florida, yes.

Q Now, under Category 19, it says $13,355.31 for miscellaneous expenses. Do you know what that's for?

A Yes. That's for any expense which we don't have a category number for.

Q And would that be detailed further in the 202-page exhibit?

A Yes. For instance, videographers. We don't have, I don't think, a category for videographers, or for the Day In The Life videography, that kind of thing that is easily identified. They're usually relatively large charges but one that doesn't have a category number.

Q Well, speaking of videographers, did you take any video depositions in connection with the accident case other than the video depositions of the physicians that were taken in May of 2004?

A I believe there were three of those.

Q Yes.

A And those were the only three.

Q And none of those three -- those were taken to preserve their testimony for trial; were they not?

A They were.

Q And none of them were actually played at trial, right?

A No, because the doctors were available.

Q Now, there's also expenses, quite a bit, for copying charges. It looks like there's a couple of separate entries. There's, under Category 160, $3,549.40 for copying and 159, $1,370.25 for color copies. Was that copying done in-house at Brown Rudnick?

A Without going through the detail, I can't tell you. Some of it was in-house and some of it was sent out.

Q With respect to the in-house copying, how much was charged per page by Brown Rudnick to the Rhodes family?

A In-house I think was twenty cents.

Q How did you determine that?

A It's determined by our accounting department, taking into account both what other firms in the city were charging at the time, the cost for the actual copying, and an overhead factor, because our copying center is used.

Q I see. So do you have a copying place in your building over at 1 Financial Plaza?

A We have both a copy center, which takes up a very, very large space on the 17th floor, and then we have individual copy areas scattered throughout the five floors of the office.

Q But in addition to that, is there a private copying company in that building?

A There is now. In the building? No, there is not. And there was not.

Q Are you aware of how much the private companies pay for a page for copies?

A No.

Q In charging --

A We did send out some copying jobs, very large jobs, to an outside copying company.

Q In determining the amount of copying costs that you charged the Rhodeses, do you believe it's appropriate to charge them for firm overhead?

A Firm overhead?

Q Yeah.

A General firm overhead, no. Overhead connected with the copying, absolutely. It's a very common practice throughout the country, let alone for the large firms in the city.

Q There is an entry here in terms of 108. It says

Specialized On-Line Research Services, $4,146.93. And I take it that's either Westlaw or LEXIS charges?

A Yes.

Q I presume that your firm, big firm, has a contract with whichever one of those providers or both that you use, right?

A Yes.

Q And how is the amount that you charge to a client determined?

A Both from the contract, which is on both -- we pay a licensing fee on a periodic basis to both Westlaw and to LEXIS-NEXIS. In addition to that, the research facilities have space in our library and I believe, but I'm not certain, in a very small portion of overhead for that space is attributed. And then there's the usage charge by the vendors, which is also calculated into the charge.

Q Do you pay a flat rate for LEXIS and Westlaw?

A No.

Q Your firm contract doesn't call for you paying a flat rate?

A When you say a flat rate, you mean per minute?

Q In other words, X amount per month no matter how much you use?

A No, we do not. At least we did not at this time. I'm not sure what we do now.

Q There is a charge for $4,047.98 for consulting expenses which is separate from the expert fees. Do you know what those consulting expenses are referring to?

A Yes. I think that it's experts. We had experts that were consulting with us on Mrs. Rhodes' condition, and they were identified as consulting costs before we identified them as experts.

Q Were they later identified as experts?

A I believe all of them were later identified as experts.

Q So despite the fact that there are two categories for expert fees and consulting costs, those are all experts you're saying?

A I can't tell for sure without, again, going back into the larger exhibit, because the larger exhibit will identify to whom those expenses were paid. My recollection is that they were all medical personnel, or almost all medical personnel.

Q How about the $765 for secretarial overtime, what was that for?

A That was for secretarial overtime.

Q Why is that charged to the Rhodeses?

A If there were particular circumstances which required secretaries to stay late, not just because they couldn't get their work done, but because of a particular project which had to be done on either an emergency basis or a time basis that required them to stay at night, then we charged for secretarial overtime.

Q And do you recall what any of those situations were that they couldn't get it done during their regular work hours?

A I certainly recall a lot of that during the trial itself.

Q Don't you have a night secretarial staff over there?

A Yes, but not always available on a quick basis.

Q Now, there are charges for $1,080.48 for mileage. What's that for?

A Travel.

Q Travel to where?

A To wherever we had to go for the case.

Q And how was that calculated?

A On a per mile basis.

Q How much per mile?

A It changed from time to time. I believe it was whatever the IRS allowed for the particular year.

Q Now, may I ask you about a couple of specific charges. On page 41 of the big cost exhibit, it talks about --

A I'll have to get it, unless you don't want me to.

Q Page 41 of Exhibit 91, there's a charge for Rampion Visual Productions of $4,200.

A Yes.

Q Do you know what that's for?

A Yes.

Q What?

A Day In The Life video.

Q We've heard testimony in this case that the Day In The Life video was actually performed in or made in the spring of 2003, right?

A The first part of it, yes.

Q There were two parts of it?

A Yes.

Q Was the $4,200 charge just for the second part?

A I'm going to have to look now, but what we did was

we took the Day In The Life video that was attached to the demand and we felt that it would not be appropriate to show that to the jury without them supplementing it with a later Day In The Life to show the progress that Mrs. Rhodes had made, and so we had a second Day In The Life video and it was the combined two videos that was shown to the jury.

Q And you were here when you heard the Rhodeses testify about the Day In The Life video and how difficult that was for them, and I believe Steven Rhodes testified that he was told by Harold Rhodes that that was the worst part of the whole process for him. Do you recall that testimony?

A I not only recall the testimony, but I certainly concur with the testimony.

Q Nonetheless, you felt it was necessary for the trial to put Mrs. Rhodes and the family through a second Day In The Life video?

A I felt that not to do that would be misleading both to the court and to the jury and I didn't want to do that.

Q Now, if you could compare the video costs of $4,200 on page 41 and also look at page 89, it

talks about another Rampion video cost of $4,700.67. Is that the second Day In The Life video?

A 89. Yes, that appears to be.

Q Okay. So the first charge that's on page 41 that I referred to below, $4,200, even though it was actually paid by your firm in April 2004, that was for services that were actually rendered in the spring of 2003; right?

A That's correct.

Q Now, can you turn to page 137. And there's an entry there for mileage for you for $159 at forty cents a mile, which if I'm doing my math right, comes out to 397 miles. Do you know what that's for?

A Given the date of it --

Q It was August 30, 2004.

A The answer is no, I don't. I have a feeling, however, that it was a bundling of many auto trips.

Q On page 81 [sic], there's charges of $2,912 for a hotel on October 6, 2004. Do you have any idea what that's for?

A What page again?

Q It is page 181 of Exhibit 91.

A The American Express charge? The $29 -- the $2,900 was for the Holiday Inn in Dedham where Brown Rudnick rented a conference room for the duration of the trial for us to use what we call the "War Room" to utilize during the trial itself.

MR. COHEN: That's all I have. Thank you.

THE COURT: Mr. Varga.

MR. VARGA: Yes, thank you, your Honor. Just a few questions.

CROSS-EXAMINATION BY MR. VARGA:

Q Mr. Pritzker, prior to preparing or in preparation for testifying today, did you do any sort of study or research into what other firms of Brown Rudnick's size in Boston, the types of costs and expenses that they pass along to their clients?

A Did I do any research for this case or --

Q Yes.

A -- did I do any research generally?

Q For this case.

A No.

Q Did you do any investigation or research in

preparation for this case to ascertain what, for example, Choate, Hall & Stewart charges its clients in terms of in-house coping, if any?

A For this case?

Q Yes.

A No. Choate, Hall & Stewart, however, I believe is part of the a group where the comptrollers of all of the firms get together and discuss these kinds of things.

Q In this case, Brown Rudnick charged the Rhodes family $1.25 per page for faxes that were sent, right?

A Yes.

Q That was a cost you passed along to your clients?

A Correct.

Q And you don't know what, if anything, other firms in Boston charge for faxes, do you?

A Today or back then?

Q At the time of the Rhodes claim.

A At that time I did know. I don't remember what it was, but I did know because at the time I was on the management committee.

Q You were on the managing committee, you said?

A The management committee, yes.

Q Do you know based on any investigation you've done prior to today what firms like Ropes & Gray or other major firms in Boston, whether they charge clients for cellphone expenses incurred by lawyers?
A Yes.
Q You do know?
A Did I know at the time?
Q Yes.
A Yes.
Q You did. And your conclusion was that was a reasonable thing to charge.
A Absolutely.
Q Absolutely, you said?
A Yes.
Q And in this case you haven't produced any of those cellphone bills at all for any of the defense to look at, correct?
A Correct.
Q You have a second home in South Florida, right?
A Yes.
Q And did you own that home at the time of the Rhodes case, the underlying case?
A At least part of it and maybe all of it.
Q You went there as often as you had time to given your

busy schedule, correct?
A I like to go there a lot, less in those days than I am these days.
Q And from time to time when you went down to Florida during the course of the Rhodes case, your colleagues would sometimes send you materials for you to review, things that you needed to take a look at in the Rhodes case, true?
A That is true.
Q And you charged your clients Fedex charges for sending files for your convenience from Boston to Florida. Those are among the expenses you passed along to the Rhodes family.
A Yes. If they accounted for $50, I'd be surprised, but, yes.
Q That wasn't my question. My question was whether you passed those costs along to the client. Answer is yes?
A And the answer is yes.
Q The Day In The Life video that Mr. Cohen asked you about, it wasn't just $4,200 in charges that you paid to Rampion, correct? It was much more than that, true?
A We paid in two tranches. If there's another bill, and there may very well be for editing, I won't disagree with that.

Q Would you be surprised if I were to tell you that the total charges for the Day In The Life video that were paid to Rampion totaled more than $17,000?
A I wouldn't be surprised at all.
Q And you had no reason to disagree with that number correct?
A No. And, in fact, it's consistent with what they've charged for other catastrophic cases.
Q And you have no reason to disagree with the number I just gave to you.
A I don't know that that's the correct number.
Q Do you have any reason to doubt that?
A I don't have any reason to doubt it or to confirm it at this point.
Q Let's just take a moment. Let's look at Exhibit 91. If I could ask you just to turn to -- let's start with -- there's a smaller package, I think, and then there's a larger package, and it's Exhibit 91. If you could turn in the smaller package to Bates No. 3652, the bottom right-hand corner.
A I have it.
Q There's a charge there for April 24, 2003 for $5,250, true, for Rampion?
A Yes.

Q And if you turn to 3655 in the same packet.
A Just let me look at that for a minute. So that was '03. Okay. Yes.
Q 3655, please.
A Yes.
Q There's a charge for Rampion Video for June 10, 2003 for $2,389 and change, correct?
A I'm looking. I'm looking.
Q Take your time.
A Yes.
Q Your answer is yes?
A My answer is yes.
Q All right. If you could look at the larger packet now, please, and turn to Bates No. 34 --
A I'm sorry. What number did you give for that?
Q $2,389 and change.
A Yes.
Q And the large packet, Mr. Pritzker, Bates No. 3437, please.
A Yes.
Q There's a charge there, about the middle of the page, August 21, 2003, $5,770 paid to Rampion, true?
A Yes.
Q And then we also talked before about the $4,200 charge

that Mr. Cohen asked you about.
A Correct.
Q Okay So those are all charges, at least that we've reviewed, that we know about, that were paid to Rampion?
A Yes.
Q And those were for a Day In The Life video that it was not essential -- strike that.
It's for a Day In The Life video that you were under no obligation to prepare pursuant to any court order, true?
A No. I considered it, however, one of the most important elements of presentation in the case.
Q And it was done voluntarily by the plaintiffs, true?
A Definitely done voluntarily.
Q Mr. Pritzker, all of these charges that are in Exhibit 91 and referenced also in Exhibit 90, the personal cellphone expenses, the Fedex packages sent to your home in Florida, the taxicabs around the city of Boston, secretarial overtime, in-house copying, LEXIS and Westlaw research, faxes at a $1.25 a page, the voluntarily incurred Rampion video charges for a Day In The Life" video, Brown Rudnick had the Rhodeses pay all those charges on top of the nearly $4 million

contingent fee that Brown Rudnick took in, true?
A Yes, they did.
MR. VARGA: I have no further questions.
THE COURT: Any redirect?
MS. PINKHAM: Yes, your Honor.
REDIRECT EXAMINATION BY MS. PINKHAM:
Q Mr. Pritzker, when the first part of the Day In The Life video was filmed, how many days of filming were involved?
A The first day?
Q For the first Day In The Life video that was shown in this court.
A It was two, plus preparation time for the videographer.
Q Why was it filmed over two days?
A Because Mrs. Rhodes couldn't tolerate having a full day of disruption physically.
Q The second portion of the Day In The Life video that you prepared that was shown at trial, did that show Mrs. Rhodes in any state of undress?
A I don't remember, to be honest.
Q Did it show her playing the piano?
A Yes.
Q Did it show her using her Easy-Stand equipment?
A Yes.

Q Did it show her eating dinner with her family in the new dining room that was put on the house?
A Yes.
MS. PINKHAM: I have nothing further.
MR. COHEN: I have nothing, your Honor.
MR. VARGA: Nothing, your Honor.
THE COURT: Okay. I've got one question -- well, a few questions.
With respect to charges for expenses that do not occur within Brown Rudnick, such as airplane bills or Fedex bills, is any amount added to the amount charged to Brown Rudnick?
THE WITNESS: None.
THE COURT: With respect to those charges which occur within Brown Rudnick -- let's begin, I guess with copying charges -- is there any part of profit that -- does Brown Rudnick profit from the per-page costs for copying or faxes?
THE WITNESS: I don't believe that they profit, but that is a function of the way the accounting department accounts for it. In other words, they take the overhead costs, or a very small part of that overhead cost, attributable to that particular function and then it's a wash.

THE COURT: So you're saying that it is not viewed as a profit center?
THE WITNESS: It's not viewed as a profit center. The only possible exception to that is the telephone, because over the period of time we had different plans with different telephone vendors. Some of those were on a flat basis, and yet I believe that the computer was set up to charge, at least for a period of time, on what the Bell rates were, Bell telephone rates were for long-distance calls, and there may have been a profit there.
THE COURT: And with respect to secretarial overtime, did you bill the amount that Brown Rudnick paid for wages and benefits to those secretaries for their overtime or was there any amount above and beyond that charged to your client?
THE WITNESS: It was the wages and benefits times one and a half, I believe. But the one and a half was then attributable or paid to the secretary.
THE COURT: Was there any amount above and beyond that?
THE WITNESS: I do not believe so.
THE COURT: All right. Any further questions of counsel?

RECROSS-EXAMINATION BY MR. COHEN:

Q If this wasn't a profit center for you, why was it relevant what any other firm charges?

A Because there's all kinds of ways to do it.

MR. COHEN: That's all.

THE COURT: All right. Thank you. You may step down.

All right. The next witness.

MR. ZELLE: Before the next witness, your Honor, is plaintiff resting now?

MS. PINKHAM: Yes, your Honor, although we do reserve the right to call Mr. Pritzker as a rebuttal. And at this point, we would move for a directed verdict.

THE COURT: That is denied.

Do you wish to reserve your rights with regard to a motion at this time?

MR. ZELLE: That's fine. We will reserve our rights and submit it at the close of the case.

THE COURT: Okay. Well, just to be clear. You are moving now for directed verdict on behalf of AIG?

MR. ZELLE: That's correct.

THE COURT: And, Mr. Varga, you're moving on

behalf of Zurich?

MR. VARGA: That's correct, your Honor.

THE COURT: All right.

MR. ZELLE: To clarify it on the record, it's a 41B(2) motion for involuntary dismissal. I'll hand it up.

THE COURT: Okay. That may be filed. I will reserve such motions, as you know. Given that we're at the end of the trial, I expect to decide the matter on the totality of the evidence and not be limited to directed verdict standard. I don't know that the Appeals Court would be very happy with me if I were to rule and they were to differ with my ruling at this stage of the case . Your rights are reserved. And with that you may call your next witness.

MR. ZELLE: Owen Todd, your Honor.

J. OWEN TODD, Sworn.

THE COURT: Good morning, Mr. Todd. What is that?

THE WITNESS: I think they're exhibits, your Honor.

THE COURT: All right. Why don't you return those to the court reporter, and when you get settled, you can tell us your full name and spell your last

name.

THE WITNESS: May name is J. Owen, O-w-e-n, Todd, T-o-d-d.

THE COURT: Okay. You may proceed.

DIRECT EXAMINATION BY MR. ZELLE:

Q Mr. Todd, will you give us a rundown of your education history?

A Well, I graduated from Harvard College in 1957, and I went to Boston College Law School and graduated in 1960. And then I had a year's clerkship on the Supreme Judicial Court and then I went to work.

Q And do you have any other degrees besides your B.A. and J.D.?

A I have an honorary doctor of law in letters.

Q From?

A New England School of Law.

Q You began working with Hale and Dorr?

A In 1961.

Q And what did you do there?

A I practiced law. I started as a tax lawyer for one year and then I went into litigation, initially anti-trust work and then general litigation.

Q How long did you practice with Hale and Dorr?

A Until 1988. From 1960 or '61 to 1988.

Q What responsibilities did you have at that firm in connection with litigation?

A Well, I was chairman of the firm in 1988 when I left. I was vice chairman of the litigation department, a member of the executive committee, and a member of the litigation department.

Q Did you in the course of your practice at Hale and Dorr have personal injury claims, whether they were products claims or any other types of claims?

A Yes. When I started out in 1960, I was the thirtieth lawyer, so we had no specialties. We tried everything and I tried a good many personal injury cases. I defended Sears on swimming pool accident cases, defended Toro on its serious amputation cases. I did a lot of plaintiffs work as well.

Q Did the work you did for Sears involve spinal cord injury cases?

A Usually they were quadriplegic, paraplegic cases, diving accidents.

Q You took the bench in 1988?

A I did.

Q And that was as a Superior Court judge here in Massachusetts, right?

A Correct.

Q What counties did you sit in?
A Suffolk, Middlesex, Worcester, Plymouth, others, Dedham.
Q That's Norfolk County?
A Norfolk, and both courts in Plymouth County. I didn't sit in any of the western counties.
Q Did you develop a sense on the bench as to which counties were more liberal and which were more conservative in terms of the juries?
A On the bench?
Q As you were practicing as a judge, did you develop a perception of which counties were more liberal and which counties were more conservative in terms of jury verdicts?
A Over the years, I have, yes.
MR. PRITZKER: Objection.
THE COURT: Grounds?
MR. PRITZKER: Irrelevant.
THE COURT: No, I'll allow him to testify.
A Over the years, I have developed that perception as well as, you know, looking at research about it.
Q And how would you characterize Norfolk County?
A Well, Norfolk County recently -- it wasn't always the case -- but in recent years, I would say probably since

the mid-90s, has become and is generally regarded as a difficult court for plaintiffs in terms of liability findings having a plaintiff's verdict, and in personal injury cases, a conservative lower verdict. These were all published in "Lawyers Weekly" about two years ago.
Q How long did you sit on the bench?
A Five years.
Q And can you give the court a sense as to how many cases you tried in Norfolk County?
A I really have no idea.
Q At the time you were a judge, Mr. Todd, did the justices revolve around the different superior courts?
A They did.
Q And Norfolk was one that you frequented?
A I think that was the first county I ever sat in.
Q How long were you on the bench?
A From 1988 to 1992.
Q And what did you do after that?
A After that, I established a law firm with four young lawyers with whom I worked at Hale and Dorr, and my son.
Q As part of your private practice after 1992, did you do work as a mediator?
A I did.

Q Initially, was that associated with another firm?
A I was associated with Endispute, JAMS Endispute, for, I think, two years, one or two years -- two years, I believe. And after that, I did it privately out of my office.
Q And how many cases have you mediated?
A Hundreds. Hundreds. I'd say two or three hundred cases.
Q Do you do arbitrations as well?
A I do.
Q How many cases have you arbitrated?
A Well, I've only kept records for recent years, and about 95 to 100 cases since I've been keeping records, but that did not involve my years with Endispute or my initial years in practice.
Q Do you keep records of the cases you mediate as well just as a count?
A I do now; mediations and arbitrations.
Q And how many cases are reflected on your counts since whenever it is you started counting?
A In mediations?
Q Yes.
A Two, three hundred.
Q Okay. It's not all --

A I should tell you, if I may, that my firm is not now made up of five or six lawyers. It's now perhaps forty, in the forties.
Q Well, we'll get there. Your mediation work, does that include all sorts of matters?
A All sorts of matters, business matters, personal injury matters.
Q Can you describe -- feel free to give examples, if you like, but type of personal injury cases that you have mediated. And let me do this. Let me ask it within the last five years.
A Well, I mediate personal injury cases for the MBTA, or the serious ones. I mediated cases involving electrocutions at the Boston Gardens. Mediated cases involving -- well, one case involving a hockey player for the Bruins. An electrocution case up in -- for an electrical worker up in Pittsfield. A swimming pool accident case down in Rhode Island. Just all kinds of cases. I mean, I don't think there's a kind of personal injury case I haven't mediated or arbitrated.
Q Have you had cases involving plaintiffs that were paraplegics?
A Yes.
Q Cases involving quadriplegics?

A Yes, both as a lawyer, judge, and a mediator/arbitrator. All three categories I've had contact with those cases.
Q All right. Can you explain which types of cases in your experience as a mediator, as a judge and as an attorney, which types of personal injury cases generate the highest settlements and verdicts?
A Well, there are types of cases, I refer to them as skin crawlers, that if you tend -- the injuries tend to make jurors' skins crawl, and mine too, and the top of the list are burn cases. I think burn cases are really terrible, terrible cases. Mental -- brain injury cases, very bad. Crush injuries, crushing of the hands seem to be very bothersome to persons. Quadriplegics, people that can't move at all, except to turn their head or blink an eye, those are terrible, terrible cases and bring very high verdicts. Those are the ones. Electrocution cases are tough cases.
Q Let's move on to your present firm, Mr. Todd. You indicated you started with four or five lawyers. And what type of practice was it at that time?
A All we do is trial work. We don't have any other practice.
Q And how many lawyers do you have now?

A I'd say forty, in the forties.
Q Do you handle personal injury cases?
A We do. We have a section that does personal injury work.
Q Do you have a role in the case in terms of personal injury work?
A Yes, it's the same as with other cases. I supervise all cases, and in a personal injury case I'm always, almost always involved in setting the values..
Q When you say "setting the values," can you describe how you go about doing that?
A Well, generally, the attorney that is handling the case, whether it be Lisa Arrowood or Jeff Catalano or any of the lawyers, Kevin Peters, any of them that try the bulk of our personal injury cases, initially we'll sit down and we'll talk about the case and what we think is the settlement value of the case, what the potential jury verdict range is, and we'll revisit that from time to time. And then when it gets to the point before trial or before a mediation, I will participate in determining what our negotiating strategy should be and what our bottom line number should be.
Q I'd like to now direct your attention to the Rhodes case. Have you evaluated or reviewed materials that

have been provided to you in connection with this case?
A Yes, I have.
Q All right. And that includes deposition transcripts, trial transcripts from the underlying case, trial transcripts in this case, claims file materials. Do you feel that you've been provided with enough information to develop opinions as to whether the offers made by AIG in this case were reasonable?
A Yes. That information, coupled with research I've done on my own and my experience with cases similar to or that I felt would be germane to determining a settlement value for the Rhodes case.
Q The first thing I'd like to direct your attention to is the valuation of the case that was done by AIG in August of 2004. That was a $4.75 million valuation. Did you review documents reflecting that valuation?
A I did.
Q And do you have an opinion as to whether that was a reasonable evaluation of the case?
A Yes. I believe $4.75 million was in the range of reasonable settlement value of this case.
Q And what's the basis of your opinion?
A Well, looking at the injuries in the case, you know, that there were serious injuries permanent in nature,

that there was a difficult recuperation period, that there were medical expenses involved up until the time of trial. There was a life-care plan that -- two life-care plans, one presented by the plaintiff, another by the defendants, that posited what the medical expenses and equipment expenses going forward would be.

There was no lost wage claim involved. There was no emotional distress claim being made, just, as I understand it, garden-variety but not more than that. And then an examination both of my own files -- I have a computer program in which I put verdicts and settlements reported by "Verdict Magazine" and "Verdict Reporter" and "Lawyers Weekly" and my own mediations and arbitrations. The cases in the office all go onto this, describing the injuries, the amount, the lawyers and so forth, so I do research with that. And based on where I could see the verdicts were for quadriplegic, paraplegic, tetraplegic cases, I determined what I felt was a reasonable settlement range, and 4.75 million fell within that range.

MR. PRITZKER: Your Honor, I object, and I move that that answer be stricken. This was the subject of an earlier motion before this court, and defendants made it clear that Mr. Todd had not done any

research which needed to be disclosed to the plaintiffs, but it was rather his general understanding of research that allowed him to evaluate the settlement case. That's not what he has just testified to.

THE COURT: I'll hear from Mr. Zelle.

MR. ZELLE: Your Honor, we've been down this road many times. Your Honor asked us to set forth what the bases were. We did that. We informed the court that Mr. Todd's opinions would be based on his general knowledge. You asked, "Well, what does that mean?" I explained that he has a database, he looks at "Lawyers Weekly," he looks at "Jury Verdict Reporter." You asked us to identify those for the plaintiffs' counsel; we've done that.

MR. PRITZKER: That, however, is not what Mr. Todd has just testified to, but rather that he utilized that in a program in order to come up with a value. And that's the very kind of thing --

MR. ZELLE: That misstates the answer.

THE COURT: You can question him. I don't understand him to say that he put -- well, I'll ask you.

Mr. Todd, did you put certain variables into a computer and the computer generated a number?

THE WITNESS: For this case, no, sir, I did not. I have -- that's an ongoing software. Before any mediation, I pull up all the cases that look like the case I'm trying to mediate, and I find it's very helpful discussing with the parties these are the kinds of verdicts, these are the kinds of settlements we have in these kinds of cases. I did not do any of that for this case.

THE COURT: All right. It's overruled. You may proceed.

(By Mr. Zelle)

Q I'd like to now direct your attention to the offers that were made by AIG at the mediation.

Have you formed an opinion as to whether the offers were reasonable?

A I did.

Q And what's the basis of your opinion -- well, what is your opinion?

A I felt that the offers, the original starting offer, was a reasonable starting offer. I felt that the second offer, which it turns out was the last offer.

THE COURT: Okay. I'm sorry. I'm worried that there may be ambiguity in terms of the numbers, so when you refer to "original" and "second" --

THE WITNESS: May I mention --

THE COURT: -- I'd like to know what the numbers are that you're referring to so that we don't have the risk of confusion.

MR. ZELLE: Well, just so you're aware of the ground rules, Mr. Todd, there is not any -- though the parties are not suggesting that there's any privilege over the offers or demands made at any point in this case --

THE WITNESS: The mediation privilege does not --

THE COURT: With regard to the offers that are made. With regard to discussions made with respect to that, it applies.

THE WITNESS: Okay.

THE COURT: But since the very nature of the case is that the offers were not reasonable, then the case law provides that the offers and counteroffers are admissible in evidence. So we have that already in evidence. That's already been resolved.

THE WITNESS: Thank you.

MR. ZELLE: If you can just refer to the numbers for clarity. I think that's what we need.

THE COURT: So when you say the original

starting offer, what did you understand that to be?

THE WITNESS: Well, from AIG and it was 2,750,000, and then the expectation --

(By Mr. Zelle)

Q Let me set it up this way for you, Mr. Todd. I'd like you to assume that pre-mediation there had been an offer -- excuse me -- a demand by the plaintiffs of $19.5 million.

A Correct.

Q That there had been an offer of $2 million pre-mediation.

A Correct.

Q Now, starting at mediation, I'd like you to assume that the first offer or demand made was an offer made by AIG for $2.75 million. Do you have an opinion --

A Over and above what another defendant would pay, which they expected would be about a million dollars.

Q Well, we'll get to there. Let me just ask you about the offer made by AIG, the $2.75 million. Do you have an opinion as whether that was a reasonable opening offer?

A I do.

THE COURT: All right. I'm actually going to stop you, because there may be confusion as to whether

he understand the 2.75 to be the total amount including the Zurich money or not.

MR. ZELLE: I'll ask that.

THE COURT: So it matters to me whether he's saying 2.75 is reasonable or 4.75 is reasonable.

THE WITNESS: Well, it would be 3.75.

THE COURT: Well, we need to work this --

MR. ZELLE: Well, let's go back.

THE COURT: -- out, because I need to know what numbers he says are reasonable and I'm worried about confusion already.

MR. ZELLE: That's fine.

(By Mr. Zelle)

Q Well, let's go back and just talk about the valuation of the case first.

The $4.75 million you've explained you believed was a reasonable valuation, correct?

A Yes.

Q Now I'd like to direct your attention to the negotiations and break down the specific offers that were made by AIG. So I'm asking you with respect to an offer that was made by AIG of $2.75 million during the mediation, do you have an opinion as to whether that was a reasonable opening offer?

A I do. I believe it was a reasonable opening offer.

Q And can you explain why?

A Coming from the defendants that AIG represented.

Q Okay. And in forming your opinion, did you consider the other defendants involved in mediation, the McMillan Tree Service?

A I did.

Q Why don't you explain to the court why it is your opinion that the $2.75 million opening offer was a reasonable opening offer.

A I considered it was a reasonable opening offer from AIG because it was in -- first of all, it was in response to a $19.5 million offer and that was a component in whether or not this offer was reasonable. Also, it would have been the understanding that the other defendant, the tree company, would be contributing money presumably close to a million dollars to a general settlement, and the offer of $2.75 million towards that general settlement from these four defendants I felt was a reasonable opening offer.

Q You made reference to the plaintiffs' demand as a component in determining the reasonableness of an offer. Will you explain why the plaintiffs' demand is something that you factor in in determining the

reasonableness of an offer?

A Based on my experience in negotiating with defendant's and plaintiff's settlements, and most particularly in mediations, that context, when a plaintiff comes in to a mediation and as his first demand recites the same number that he has recited before, it has recited before, and does not come down at all, and that initial number is huge and in my judgment way out of the ballpark, it puts the insurance company in a very difficult -- or the defendants -- in a very difficult position as to how to respond. They want to reasonable, they want to show good faith, and yet they want to send a message that we're not anywhere near there and you've got to get realistic with your demands before we start to negotiate where we ought to be negotiating. So I think it was a reasonable opening offer in that it represents a lot of money for that case. $3.75 million is a great deal of money.

Q And when you say 3.5, you're making an assumption that there's a million dollar offer being made by the tree service; is that right?

A Or close to that.

Q Can you explain why it was reasonable for AIG to expect a million dollar offer to be made by McMillan's Tree

Service?

A Well, the tree company -- I can't remember the name of it, but it doesn't matter --

Q McMillan's.

A Do you understand what I say when I say --

THE COURT: It's McMillan, he told you.

A McMillan Tree Company was in there as a joint tortfeasor. And under, of course, Massachusetts laws, everybody in the room knows that that makes them jointly and severally liable for the total verdict, if they're just one percent liable, and it looked that they would be. Because of the failure to place cones and the failure to follow their usual practice, it was a likelihood that they'd be tagged for some percentage of negligence. And I was familiar with what their reserves against the case were and what their insurance was and so forth. So this is a break-your-company situation that McMillan Tree Company was in, and I would have assumed that the McMillan Tree Company would put their insurance company on notice that if you don't offer the policy, we're going to sue you. So I expected that the insurance company might try to save something off of its million dollars, but not much.

Q Where you previously testified about the effect of an

extremely high offer, how did you view the -- or let me ask you this. Do you have an opinion as to the effect of the $19.5 million demand at the time mediation began on the negotiations in this case?

A Well, I wasn't there, but in my experience an offer that is multiples out of where it would be reasonable -- a demand that is multiples beyond a reasonable demand just chills negotiations entirely. You have an insurance adjustor sitting there with authority and you've got a plaintiff that's sending signals that I believe this case is worth many, many more times what other cases, other settlement experience dictates that a case of this nature is worth, and it doesn't move measurably off that mark. It puts the insurance company adjustor in a very bad spot. He's trying to send messages by increasing the offer the second time around by a substantial amount, that, look, I'm here in good faith. You've got to get realistic here. This is not a realistic demand you're giving me.

Q Can you explain how effective negotiation depends on sending signals through the offers and demands?

A Yes. The experienced personal injury lawyers will have discussed with their clients, one,

what they hope to achieve, bottom line of what we will accept -- the walk-away number we call it -- and then the strategy of how to get there, what the bidding will be or what particular guideposts will be along with way.

And the defendant will be doing the same thing. The defendant, if it's an insurance company involved and usually is, the adjuster is there with authority that's he's received from one of several layers above his particular authority, and he's got to negotiate against that authority. And obviously he's got to start significantly lower than the limit of his authority, but he knows where he's got to end up and he's got a strategy of how to get there -- or she or it or they or whatever.

Q Let me ask you to make a couple of assumptions in addition to the ones I previously asked; that there was a $19.5 million pre-mediation demand; that there was a $2.75 million offer made by AIG; that there was a response by the plaintiffs of a demand of $15 million or $15 million plus medicals; and that AIG then responded with an offer of $3.5 million.

A Over and above the tree company.

Q Okay. I'll ask you to assume that that was over and above the million dollars they expected from the tree company.

Do you have an opinion as to whether that was a reasonable offer on the part of AIG?

A Yes, I believe that was a reasonable offer.

Q And the reasons are?

A Again, it's in reaction to a much inflated demand, but yet when you put it together with a million or nearly a million dollars, it's $4.75 million or 4.5, in that range, and that is in the reasonable settlement range for this case.

Q Based on the facts I've asked you to assume with respect to the plaintiffs' demands, do you have an opinion as to how a mediator or an experienced negotiator would perceive the bottom dollar, as you've referred to it, or the bottom line of the plaintiffs.

Let me reframe the question.

A Yes, please.

Q Based on --

A Oh, of the plaintiff. Okay. I've got it.

Q I'll restate the question, Mr. Todd.

Based on the demands that had been presented by the plaintiff up to the time of the end of the mediation, do you have an opinion as to what a mediator or an experienced negotiator for an insurance company would perceive the plaintiffs' bottom line to be?

A Yes. The negotiating experience is that the plaintiff first asked for sixteen and a half million dollars, which it multiples over any verdict or the bell curve of paraplegic, quadriplegic verdicts, then about four months later increases the demand to $19.5 million, and then at the start of the mediation starts with the increased number of 19.5 without reducing it all, then in response to the initial offer comes back with $15 million, plus future medical expenses, which are open ended, could exceed 19 million, who knows, and which no insurance company would ever undertake to an ongoing, continuous, without definition, without any limit number. It just wasn't an offer that could be entertained by an insurance company, 15 million, plus future medical expenses with no cap or anything else. They just wouldn't do it.

But yet they came back, which I thought was quite unusual. In my experience, generally the reaction is, look, unless you can get these people to come down to under such and such, an insurance company will say that's enough, we're just not getting anywhere here.

But I would think that, in my experience, that the insurance adjustor would read that as the plaintiff is not going to come down to any number north of $10 million. I don't think --

MR. PRITZKER: Objection, your Honor.

THE COURT: Sustained as to what somebody else may think.

(By Mr. Zelle)

Q Let me ask it this way. Based on the facts that I've asked you to assume about the pre-mediation demands and the demands through mediation, I'd like to know your opinion as to what you would perceive the Rhodeses' bottom-dollar threshold settlement number to be.

A I would say they had no chance of getting that plaintiff down to the $10 million range. It would be up into the $12 million range that I

could foresee getting him to come down to.

Q Let me now ask you to assume that during the mediation a settlement was reached between the plaintiffs and the tree service for $550,000; also that the case proceeded to trial a few weeks after the mediation; that during trial there were almost daily discussions between Mr. Nitti, a representative of AIG, and Mr. Pritzker with regard to settlement; that multiple offers were made during trial, the last of which was made at the conclusion of the evidence and was a $6 million offer; that that offer included a structured piece, which $1.8 million would not be paid as part of the lump sum but would be paid to fund the future medical and attendant costs of Mrs. Rhodes.

Do you have an opinion as to whether a series of offers at trial, which led up to a final offer of $6 million, was reasonable?

A My understanding was that the final offer was six and a half million, that the initial offer was $6 million before the trial.

Q Yeah, it was maybe the way I framed the hypothetical, but that $500,000 had been paid by

the tree service by that time.

A So I believe that was reasonable. You're still in the context of the risk of trial, the case had not gone to the jury, nobody knew how it was going to come out. The defendants obviously felt that the trial had gone well for the plaintiffs, because they had raised their offer from three and a half to six or six and half. And so if they felt the trial had gone that well, I think that's high side of reasonable. But the risks were still there that the verdict -- that the jury would come in within the bell curve, which would be much lower or would be a homerun. So both were still at risk, both sides.

Q On the subjects of plaintiff risks, would it be reasonable for a plaintiff who's trying their case in Norfolk County, or plaintiffs' counsel to fear that a Norfolk jury could come in with a $2 million verdict, which that jury thought was a lot of money?

MR. PRITZKER: Objection.

THE COURT: I'm sorry. I'm going to sustain it. I'm not quite sure if you're

referring in general or with regard to this case.

(By Mr. Zelle)

Q I'm referring to this case. And I can ask you to assume that fact that I believe is in evidence, that Ms. Pinkham stated that plaintiffs' counsel feared that a Norfolk jury could come in with a $2 million verdict that they thought was a lot of money. Do you agree that -- or do you have an opinion whether it was reasonable for plaintiffs' counsel in this case to have that concern?

A Absolutely. I think that a $2 million verdict would not be outrageously low in Norfolk County. I think that's a verdict you could expect might very well be returned by a jury, particularly if the jury was composed of some people from the blue collar towns in Norfolk rather than Dedham or Wellesley. And $2 million is a huge, huge amount of money.

MR. ZELLE: I have nothing further. Thanks.

THE COURT: All right. Well, let's take our morning break, just a short break. We

convene at 12:00. So back at high noon.

(A recess was taken.)

THE COURT OFFICER: Court is back in session. Please be seated.

THE COURT: Okay, Mr. Pritzker.

MR. PRITZKER: I believe Mr. Varga may have a few, your Honor.

THE COURT: I'm sorry. Mr. Varga.

MR. VARGA: Your Honor, the good news is I only have a few minutes. I'll try to keep it as short as we can to finish up today.

CROSS-EXAMINATION BY VARGA:

Q Good morning. Mr. Todd.

A Good morning.

Q The negotiations that you've been describing all took place between AIG and Mr. Pritzker, true?

A Yes.

Q And you'd agree with me that the only way that the underlying law suit was going to settle and the only way that a trial on the merits of the case could be avoided was if AIG and Mr. Pritzker, on behalf of the plaintiffs, agreed to a number to settle it, true?

A Agreed to a --

Q To a number, to a figure to settle it.

A Correct. And there are some cases you can't settle, true.

Q And in your opinion, the reason that this case went to trial and ultimately went to a verdict is that AIG and the plaintiffs had what you called a substantial but legitimate difference of opinion regarding the appropriate settlement value of the case that was just too great to bridge, true?

A Correct.

Q I want to just ask you a few questions about the timing of the settlement discussions, which, as I recall, was part of the expert opinion that you offered in the form of answers to interrogatories in this case.

I believe you offered the opinion, and correct me if I'm wrong, that experienced lawyers will not consider settlement of personal injury case until there is a high degree of certainty that the nature and costs of future medical care can be accurately determined. Is that your opinion?

A Well, I hope I didn't say "generally". I mean

in the context of a very serious injury case with substantial medical bills and requirement for equipment going forward.

Q So in a case like the Rhodes case.

A In a case like the Rhodes case, there are cases, you know, where the facts are not so complex and the injuries are not so severe that that would not hold true for.

Q And you are of the opinion, Mr. Todd, that as of August 2003, Mrs. Rhodes medical treatment and her rehabilitation had not reached a point yet from which an accurate evaluation of her need for future care and treatment and the costs of that treatment could be adequately analyzed; are you not?

MR. PRITZKER: Objection.

THE COURT: Grounds?

MR. PRITZKER: He didn't opine to anything concerning that at all, your Honor.

THE COURT: Is it within his report?

MR. VARGA: It's clearly within his report, your Honor. I'm literally quoting from his report right now.

THE COURT: All right. Then it's

overruled.

(By Mr. Varga)

Q Would you like me to restate the question, sir?

A No. As I understand the question, you're asking me whether on August 13, 2004 -- no, 2003 excuse me.

Q In August, as of August 2003.?

A -- whether there was sufficient information available to the defendants -- you better restate it.

Q I will. I'm sorry. I don't mean to cut you off, but I think it would probably be easier if I restate the question.

A Yes, I think you're right.

Q My question is, you are of the opinion, Mr. Todd, that as of August 2003, Mrs. Rhodes' medical treatment and her rehabilitation had not reached a point from which an accurate evaluation of her need for future care and treatment and the cost of that treatment could be adequately analyzed as of that point in time?

A From the defendants' perspective. I assume the plaintiffs were in better position, but from the defendants' perspective, I believe that to be

true.
Q And that's because is it your opinion that as of August of 2003, it would have been -- I'm sorry, because of that, it's your opinion that as of August of 2003, it would have been premature for AIG to engage in settlement discussions with plaintiffs' counsel?
A Well, I wouldn't say you couldn't engage in settlement discussions, but I think it would be very difficult to have arrived at a reliable settlement number or settlement evaluation without that information.
Q Because of the fact --
Q You can always engage in the discussions, but you wouldn't have been informed by what I would call requisite information about what are the future costs, what is the prognosis for this patient and how long will she be in rehabilitation, when will an end result occur, what will the end result be.
Q And so based on your extensive experience certainly as a lawyer, as a mediator, and as a Superior Court judge, you are of the view that it would have been -- that the case was not ripe

for settlement as of August of 2003, true?
A I think it would have been difficult to arrive at a reasonable settlement at that point.
Q In your opinion, Mr. Todd, were all of the amounts that AIG authorized its complex director, Warren Nitti, to extend as settlement offers to the plaintiff, were all of those amounts reasonable under the circumstances?
A When you say "all of those amounts," the two offers that were made in mediation and the two offers made during the trial?
Q Yes.
A And the offers after the trial?
Q No, just the offers before a verdict was entered.
A I think each of those offers, given the context in which they were made, were reasonable. And I think they all actually were within what I regard as the reasonable settlement value of this case, high range, low range.
Q So each of those offers, when they were made, were the right offers at the right time?
A Well, I don't know they are right offers. They were reasonable settlement offers.

Q Okay. If AIGDC had called upon you for advice at that time with respect to the offers being made, would you have disagreed with the amounts that they were offering based on your expert opinion?
A I would have told them the range, and all of those offers fell within what I regard as the range of reasonable settlement value of this case.
Q So you would not have disagreed, then, with the numbers that they put out there at various times?
A No.
Q Okay.
MR. VARGA: I have nothing further, your Honor.
THE COURT: Okay. Now Mr. Pritzker.
MR. PRITZKER: Thank you, your Honor.
CROSS-EXAMINATION BY MR. PRITZKER
Q Mr. Todd, on that last point, do you have any information that the defendants could not have developed enough information about the plaintiffs' prognosis for future recovery or future costs earlier than August of '03?

MR. ZELLE: Objection.
A You said the plaintiff.
MR. ZELLE: Let me object just on the use of the word "defendants" in that question, because we're in an area where I think we should talk about Zurich or AIG.
MR. PRITZKER: All right, let me do that.
THE COURT: Well, I think the question is generic, so I don't think it applies, but I do take your point for future questions. But you may proceed.
(By Mr. Pritzker)
Q You indicated, sir, in your report, and I'm quoting: Before August of '03, Marcia Rhodes' medical treatment and rehabilitation had not reached a point from which an accurate evaluation of the extent of the need for future care and treatment costs could be adequately analyzed.
Do you remember saying that?
A Yes.
Q All right. And the question is, sir, what occurred between August of '03 and the time of

trial that the insurers couldn't have learned before August of '03?

MR. ZELLE: Objection. He's not here to comment on what the insurers could have done. He can certainly testify as to what they did after August '03 that made it more -- facilitated a more accurate evaluation, if that's what the question is.

THE COURT: I'll allow him to answer the question as asked, if you remember it.

THE WITNESS: I do, I think I do.

A As of August 2003, Mrs. Rhodes was still having a great deal of problems, medical problems, recuperation problems, that had interfered with her undertaking rehabilitation in the sense of learning to transfer from bed to chair. She was still being treated for, or watched more than treated, for her antibiotic resistant pneumonia. She was still suffering from the fractured leg. She still had recurrent pressure wounds. And I don't think that she had progressed to the point where she could be instructed -- as it turns out the recommendation was that she go to a school, or a hospital rather, in Colorado, to learn how

to assist herself and how to rehabilitate, and she hadn't gotten to the point where she could do that in 2003.

More than that, the defendants had not deposed any of the plaintiffs, Mister, Mrs. Rhodes or their child. They had not had an IME of their own. They hadn't had an examination, medical examination by an independent medical examiner of Mrs. Rhodes, and I don't think she was anywhere an end result as of August of 2003.

(By Mr. Pritzker)

Q You knew that in August of '03, a life-care plan had been presented to the defendants from the plaintiff; did you not?

A Yes.

Q And you knew that directly --

A In connection with the settlement.

Q Yes.

A Yes.

Q And you knew that directly thereafter, the defendants retained their own life-care planner to assess the future needs of Mrs. Rhodes, true?

A Thereafter they had, yes.

Q Is there any reason why the defendants couldn't

have done that earlier?

MR. ZELLE: Objection. Again, in as much as this doesn't distinguish between AIG --

THE COURT: I don't want to hear much argument because we'll lose the question. It's overruled. He may answer.

A Both of the life-care plans posited that Mrs. Rhodes at some point would get on the plane or the scale of rehabilitation and would progress in the normal commonly experienced fashion, but she hadn't gotten to the point where that premise was fact under either of the life-care plans. They both had as their premise -- for instance, the defendants' life-care plan, that she could start to self-catheterize, and she wasn't anywhere near that point, and that both of them had materially reduced the amount of homecare assistance she would have.

So they were prognosticating what hopefully and expectedly would be the case going down the road into the future, but she hadn't arrived at the point where she had come to the point where she could start down that road.

(By Mr. Pritzker)

Q All right. But both the plaintiffs and the defendants' life-care planners had enough information to develop their life-care plans as of August of '03; did they not?

A They had enough information to say that when she gets to a certain point, these are the costs going forward or what we would expect medical care to be and the necessary equipment.

Q All right.

A And that's all they did and that's how they assign numbers to it, but they're not medical persons, they're economists.

Q They're economists?

A Well, they're people who price out how much medical care will be on a recurring basis 20 years out, 24 in this case, what equipment will be necessary and what it will cost. They go around pricing things.

Q All right. And they were pretty close in their pricing, weren't they?

A Yes, they were.

Q All right. And they had enough information to do that prognosticating in August of '03; did they not?

A They felt they did, yes.
Q All right. And do you know of any reason why they couldn't have done that prognosticating earlier than August of '03?
A I can't answer that question. I don't know one way or the other.
Q You don't know, okay.
Now, you do know, do you not, Mr. Todd, that there is a legal requirement to insurers to promptly effect a fair settlement once liability is believe reasonably clear; isn't that so?
A I have an understanding of that area.
Q And you also know that lawyers generally are required under the disciplinary rules to represent their clients zealously; isn't that so?
A That is also so.
Q And you know that the lawyers are not restricted to cases in Norfolk County, or even in Massachusetts, when they try to evaluate a case; isn't that so?
A They're not restricted, no. They're not restricted. But if that's the county you're in, that's the county you want to focus on.

Q And you, because you did a fair amount of keeping up with jury verdicts around the area --
A And settlements.
Q -- knew that in 2002, there had been a rather extraordinary verdict in Rhode Island, just 35 miles from this accident; isn't that so?
A I came to learn of that case.
Q And that case was referred to as the Oliveira case, right?
A That's the name of it, yes.
Q And the Oliveira case, did you know was one that was insured by AIG?
A Yes.
Q And did you know that the complex director who was adjusting that case for AIG was the same complex director who was assigned to the Rhodes case?
MR. ZELLE: Objection. Can we get a time frame on that? Knew when? Who?
MR. PRITZKER: When what? I'm asking generally do you know that.
MR. ZELLE: That's right. When what is my objection.
THE COURT: I'm sorry, I don't know

what -- do you at this time know that?
THE WITNESS: I don't think I did know that.
(By Mr. Pritzker)
Q Do you know it now?
A If what you say is true, I know it now. But I don't know whether what you say is true.
Q No, prior to me asking the question, Mr. Todd, did you know that.
A I do not know that.
Q But you did know that AIG was the insurer.
A I did know that.
Q And so presumably they would know that there was a $19 million verdict in Rhode Island on a case where liability was clear in 2002, relatively close to the time that Mr. Rhodes was injured; isn't that so?
MR. ZELLE: Objection.
THE COURT: Overruled. I'll allow it. You may answer.
A Totally different case than the case we're talking about, as you know.
(By Mr. Pritzker)
Q One of the things that you reviewed was the Verdict

Reporter, isn't that so, on a general basis?
A On an ongoing basis. I read it every month.
Q So I'm going to hand you a copy of the Verdict Reporter dealing with that case and ask whether or not you reviewed that at or about the time it was published?
A I can't remember specifically reviewing this, but I can tell you that I have had conversations with a partner and the lawyers -- a partner in the law office that represented the insurance company about this case.
Q At or about the time that it happened?
A No, more recently.
MR. PRITZKER: Your Honor, I'm going to offer a certified copy of the Verdict Reporter that Mr. Todd said that he generally reviewed as it deals with the Oliveira case.
THE COURT: I'll hear from opposing counsel.
MR. ZELLE: We object, your Honor. He didn't say that he reviewed this. If we're going to open the door to general review, then we're going to examine him on all of the cases that we've disclosed to plaintiff that were among those that he generally reviewed. From the outset of the case we've tried not to open that door. If it's open, so be it, but we object.
THE COURT: Well, I'm going to sustain the

objection. You may use it to impeach his opinion to the extent that it is evidence that his opinion may not be credible, but we're not going to be admitting alternative settlements or jury cases in this or other jurisdictions because there is no end to it. So you may proceed.

(By Mr. Pritzker)

Q Do you know, Mr. Todd, that the verdict before interest in that case was $18.904 million?

A Yes, I know. And again I emphasize that it's a totally different case on its facts, its liability, its jurisdiction --

THE COURT: Okay. You'll get a chance, I'm sure, to testify to that, but why don't you stick with his questions right now.

(By Mr. Pritzker)

Q Did you know that the jury was evaluating only damages and not liability?

A I do.

Q Do you know that the plaintiff was injured by being rendered a paraplegic?

A No. I know that that was among the many injuries, much more serious injuries than that.

Q And do you know that the special damages were of

$3.9 million?

A Well, define what you mean by "special damages." Are you including the life-care plan and all?

Q Yes.

A No, much more than $3.9 million.

Q Once again, if I read, and I'll let you read along with me, Mr. Todd, from the "Jury Verdict Reporter" that at the trial the only issue before the jury was damages: Plaintiff claimed past medical expenses in excess of $1 million, future medical expenses of $3.9 million and past and future lost wages of $330,000.

Is that right?

A That's not right. That may be what that says, but I have information more accurate and deeper than that. Information from the defendant's counsel himself.

Q Well, would you agree with me that this is what was generally reported to the public by way of the "Jury Verdict Reporter"?

A No. I don't know whether that is the sole reporter, but I have information that's in much more detail than that.

Q But that's not what I'm asking you, Mr. Todd.

What I'm asking you is, is this the information that was generally reported to at least the legal public about this case?

A I don't know what was generally reported. I assume it was written up in whatever legal magazine is akin to "Lawyers Weekly" in Rhode Island. That is a report.

Q It is a report that you subscribe to, right?

A It is one of the reports I subscribe to.

Q In fact, in your report you say that you regularly review "Massachusetts Lawyers Weekly," verdict and settlement reports, and that you subscribe to two other publications that collect and report on verdicts and settlements, and one of them is this publication, right?

A One of them is that publication.

Q All right. And you would expect other lawyers in this area to do the same thing so that they have some basis in order to evaluate their own cases and use comparables in order to that; isn't that so?

A I have no expectation of what other lawyers will do.

Q You have no expectation at all?

A It's not my business what other lawyers do. I just tell you what I do.

Q Well, you did opine that $16.5 million was an outrageously high settlement demand in this case; isn't that --

A I don't think I used the word "outrageously" high. I said it's multiples above what I would regard as a reasonable settlement value and multiples beyond what the cases in Massachusetts for paraplegics, quadriplegics, tetraplegics have brought by settlement or by verdict.

Q Would you expect a lawyer making a demand about a case where liability was clear and where a case had just come down 35 miles away with a jury verdict of $19 million before interest, albeit with some differences of the case, not to take that into consideration in making the demand?

MR. VARGA: Objection.

A Yes. I would expect not to take that into consideration.

THE COURT: Overruled.

A And I have any number of reasons if you're interested in them.

(By Mr. Pritzker)
Q Would you expect an insurer to make its initial offer two and a half years, more than two and a half years after the case, where liability is clear and where special economic damages are $3 million less than the special economic damages?
MR. VARGA: Objection.
THE COURT: Well, I'm going to sustain that because that assumes what may not be understood, which is -- are you referring in general or are you referring to this case?
MR. PRITZKER: Let me ask a hypothetical.
THE COURT: Well, if you're asking him did he understand that the special economic damages were over that amount, then you may ask him that question. But I'm not sure if that's what your question is.
(By Mr. Pritzker)
Q You knew that the special damages were approximately $3 million in the Rhodes case; did you not?
THE WITNESS: Your Honor, I just want to point out, I'm not here to testify as to timing of offers or anything, just to the

reasonable amount of settlements, values.
MR. PRITZKER: May I proceed, your Honor?
THE COURT: You may proceed.
(By Mr. Pritzker)
Q You knew that the special damages in the Rhodes case were approximately $3 million; did you not?
A No, I didn't --
Q You didn't know that?
A -- think they were $3 million. There were $467,000 in medicals up to the point that -- then there was the life-care plan, which was about a million and a half. So if you include the life-care plan, we're talking about in the area of -- and then they had some expenses in modifying their house. So I would say that the specials, if you include the non-medical expenses and include the modifications to the house, were probably in the area of two to two and a half million.
Q Would you take a look at Exhibit 10, Mr. Todd?
A I'd be happy to. I don't have it though.
Q Exhibit 10 is the plaintiffs' demand in August of '03.

A Ten you want me to look at?
Q Yes. It's all ten.
A What am I looking at, then?
Q The whole book is Exhibit 10.
A What do you want me to look at, then?
Q What I want you to look at is the first letter, page 16. In fact, let's start on page 15.?
A I'm looking at what, page 16 of this letter?
Q Page 15 first.
A Fifteen, okay.
Q Do you see that the average future costs in the middle of the page, right before sub-section C, were listed as $1.953 million?
A The average what? I don't see that number, no.
Q Let me help you.
A Please.
THE COURT: I think you're on page 14. No? You're on page 15?
(By Mr. Pritzker)
Q I'm sorry, page 14, but I wanted you to be on 15. I read it wrong. Let's go back to page 15. Are you on 15, Mr. Todd?
A Fifteen?
Q Fifteen. I was on the right page, but I was

reading you the wrong number.
A Okay.
Q The average present value of combined future needs is listed as $2.07 million; is it not -- 027 million dollars -- let me start again.
It is listed as $2.027 million; is it not?
A Right, I see that.
Q And then the loss of household services is listed as $292,000; is it not?
A I don't see that.
Q Going over to the top of page 16.
A I see that, right.
Q And then the out-of-pocket expenses are listed as $83,000, right?
A I see that, right.
Q And you knew that the medical expenses were $413,000; did you not?
A Already incurred. Past medical expenses, yes. Yes, I knew the past medical expenses. I've read both of the health -- the life-care plans.
Q Yes.
A And I know the numbers, the discounted present value numbers on your plan, and I know the

present value number on the defendants' plan.
Q Which was also discounted; was it not?
A The life-care plan doesn't discount it, but I assume that it was discounted at trial.
Q The plaintiffs' numbers indicated here were discounted numbers back to the time that suit was brought; isn't that so?
A These are higher than the discount numbers I saw.
Q In any event --
THE COURT: I'm sorry. Meaning that you understood these not to be discounted or to be discounted at a higher than appropriate value?
THE WITNESS: My understanding is that -- let me read it. We're on page 15, right?
MR. PRITZKER: Well, it depends where you want to look, sir.
THE WITNESS: Yes. Okay. Those are the life-care, the upper and the lower, depending on the years, that I had, yes.
(By Mr. Pritzker)
Q And do you see back on page 15, it says: Average present value of combined future needs.

Do you see that?
A Yes. Two million --
Q So present value is present valued --
A 2,027,000.
Q And that's just part of the number which adds up to $2.817 million on page 16; is it not?
A Yes. That's what this letter you wrote to the insurance company says.
Q So we're talking about present value numbers, not total numbers, but total numbers then reduced to present value as of the date that suit was brought; isn't that so?
A That's correct.
Q And as of the date of this document, which is April of -- I'm sorry, August of '03 -- they were $2.817 million; were they not?
A Well, we had 400 -- approximately 450 of past medical expenses. We had about 2 million of life-care plan expenses reduced to present value. So you had about two and a half million.
Q And then you've got approximately 300,000 of lost of household services, right?
A Well, that's not a number that -- I mean, that's an estimated number. I didn't --

Q Isn't it estimated almost --
A I know that number, and, yes, I'm familiar with that number.
Q And in fact, the defendants' life-care planner had almost the same number for loss of household services?
A That's more of a consortium number than a --
Q I'm sorry?
A That's more of a consortium number, what the husband has lost and the value of services. That's how that's considered.
Q Well, I don't think that's how that's considered, but in any event, it's an element of damage; is it not?
A Arguably.
Q And that totals almost $3 million in August of '03 and continuing, right? You'd expect that the expenses, the medical expenses, were going to be continuing.
A Well, that's all on the life-care plan, the medical expenses and the equipment costs.
Q Are you aware that as of the time of trial they were $3.2 million?
A I don't have any information on that.

Q Well, let's assume for a minute, Mr. Todd, that in this case the economic damages as we've just been discussing were $3 million.
A Yes.
Q And let's assume further that liability of the defendants was clear?
A Yes.
Q In those circumstances, is it your opinion that the first offer from an insurer made two and a half years after the accident less than the amount of those economic damages is a reasonable attempt to effect settlement?
A Well, I'm going to disregard the two-and-a-half-year period because I'm not here to talk about the time, but the amounts I regard as -- I testified and it is my opinion that a two and a half million dollar offer that was made at the mediation was a reasonable initial offer of settlement.
Q Now, part of that was because, in your opinion, the defendant, AIG, expected the plaintiff to realize the benefit of the claim against Professional Tree, McMillan's Professional Tree Is that your testimony?

A Part of that, yes. On top of that they expected McMillan would pay, be required to pay close to a million dollars in order to settle the case.
Q Now you knew that McMillan's was not a defendant who was brought into the case by the plaintiff, didn't you?
A I did.
Q McMillan's was a third-party defendant brought into the case by DLS and the driver, right?
A I did know that, yes.
Q And you just testified that everyone knows that because Professional Tree, McMillan's Tree, would be jointly and severally liable, that that was a reasonable expectation that the plaintiffs would get the benefit of the million dollar policy. Is that what you testified to?
A That was my testimony -- or close to the million dollars.
Q Can you tell me, sir, whether or not, under the third-party suit, it was a claim for contribution by DLS to the Professional Tree Company?
A That's what a third-party claim is, yes. Indemnity and contribution.

Q And how does joint and several liability in your opinion play into the fact that there was a separate claim by DLS and Zalewski against McMillan's Professional Tree?
A Because I think the jury could have found them liable for the accident and then the other plaintiffs -- the other defendants could have gone after them.
Q The other defendants could have gone after them for contribution?
A Yes.
Q The plaintiff wouldn't have benefited from that; would they, sir?
A The plaintiff?
Q Yes, the plaintiff.
A Well, this is beyond my understanding..There would have been a verdict, right, and then the plaintiff could have -- the defendant could have gone after the tree company, but I'm talking in terms of settlement.
Q I know.
Q That they could have expected the tree company to want to settle this case as they did, but I think they could have gotten more from them in a

settlement context.
Q Well, in fact, the defendants were trying to settle with the tree company; were they not?
A The plaintiffs were.
Q The defendants were as part of the mediation. They were trying to settle with the tree company for their benefit; were they not?
A Well, for the plaintiffs' benefit, actually. Everybody was trying to get money into the plaintiffs' hands.
Q Let me understand this, Mr. Todd. You understood that the authority that Mr. Nitti had at the mediation was $3.75 million, right?
A No, I didn't understand -- I understand he had higher authority.
Q You understood that he had higher authority than $3.75 million?
A What's that?
Q You understood that he had higher authority at the mediation than 3.75 million?
A Well, I know they had valued it at 4.75, their contribution.
Q They had valued it at 4.75 and then reduced that authority by the million dollars that they

expected to get from Professional Tree; isn't that so?
A I don't know what authority he went in to that mediation with.
Q All right. So your opinions are based upon your understanding that it was 4.75 million available for the plaintiff?
A That there was -- I'm sorry, I don't understand your question. Available when and from what?
Q Let's talk about AIG.
A Right.
Q AIG valued the case at 4.75 million?
A Correct.
Q And you opined that that was reasonable?
A I did.
Q Was it also reasonable to give the adjustor, the claims person who was negotiating at the mediation, authority for 3.75 million?
A Yes.
Q Why?
A Because if you got any money from the -- well, first of all, you'd have to know what my reasonable settlement range is, and that 3.75 is very near what I consider the low end of a

reasonable settlement range. So on top of that 3.75 million, they expected, and obviously the plaintiffs expected, that the tree company would contribute money from their million dollar policy; and as the facts are in this case, they had authority to offer as much as the policy itself, a million dollars.

Q Are you aware of the fact that Crawford & Company, the adjustor for GAF and Zurich, opined that 16.5 was not an unreasonable offer?

A I'm not going to comment on anyone else's opinion.

Q I didn't ask you to comment on it. Were you aware of it?

MR VARGA: Ob.

THE COURT: Overruled.

A I don't think I was, no.

(By Mr. Pritzker)

Q Were you aware of the fact that Kathleen Fuell, who was the last claims person for Zurich, valued the case at $17.4 million?

MR. ZELLE: Objection.

THE COURT: Sustained in that form. I think it was a range; was it not?

MR. PRITZKER: I don't believe so, your

Honor.

MR. ZELLE: Well, it says something on her form. She testified a little bit differently how goofed up the form was, so.

THE COURT: All right. In any event, I'll allow the question.

A Wasn't aware of it and it wouldn't have made any difference to me, to my opinion.

(By Mr. Pritzker)

Q Were you aware that defense counsel, who was defending this claim, gave a settlement value of $6.6 million and a verdict value of 9.6 million?

MR. ZELLE: Objection.

THE COURT: Sustained in that form.

(By Mr. Pritzker)

Q Did you take that into --

THE WITNESS: I'm sorry?

THE COURT: It's sustained in terms of that question.

(By Mr. Pritzker)

Q Did you take into account in rendering your opinion that defense counsel valued this case with a settlement value of 6.6 million and a verdict value of 9.6 million?

A Didn't take any --

MR. ZELLE: Objection.

THE COURT: Well, again, sustained. If you're referring to what Deschenes did, I don't know that it's fair to say that that's how he valued it for settlement. So you can describe what Deschenes did based on his testimony, but I don't think what you've said is a fair characterization of Mr. Deschenes' testimony.

(By Mr. Pritkzer)

Q Were you aware of the fact, Mr. Todd, that in Massachusetts verdicts carry an interest of one percent per month from the date of the verdict?

A I am aware of that.

Q And did you take that into account in opining that 2.75 was a reasonable starting offer from AIG one month before the trial and over two years from the beginning of the suit?

A Well, generally, the fact of interest and how much interest would be awarded if a case went to trial at any particular point is the white elephant in the room. Defendants say we're not considering it, we're here for settlement. Interest is what you get if you take the risk of trial, so defendants don't consider it.

Plaintiffs argue that interest should be considered, because if we do go to trial we get all that interest, so what you're offering me in settlement is so much less than I could get in court and so forth.

But it isn't a factor, the number. You don't say I'm going to settle at X and plus Y, the interest. It's the white elephant in the room. It has an effect, but it's not something that's quantified in the context of a settlement discussion or negotiation.

Q Would you agree with me, Mr. Todd, that valuing pain and suffering and loss of consortium claims are big unknowns?

A Big unknowns. Very risky.

Q And would you also agree with me that in a case where liability is clear, the negotiation should be over the value of pain and suffering and the loss of consortium and not over the value of the special economic damages?

A No, I don't agree with that. I think the social -- a responsible plaintiff's attorney and a competent defense adjustor are going to have as the primary concern in settling a case what is it going to cost for this woman in this case to live out the rest of her life with the medical attention she needs, with the household attention she needs, with the equipment she

needs, what's it going to take to let her live out the rest of her life that way. And then we discuss structures in order to finance the life-care plans and so forth.

So I think the initial concern of a responsible plaintiff's counsel and a competent defendant's adjustor is what's it going to take to allow this woman to live as comfortable a life as possible and as healthy a life as possible. Then on top of that, you talk about the rest of it.

Q Did you opine in this case that it was reasonable for AIG to believe that to avoid the risk and the stress of trial, plaintiffs would accept less than the amount they expected or hoped that the jury would award?

A I think that's true in any settlement. A settlement is an insurance policy against a bad result at trial.

Q Let me ask you --

A And I would hope -- and to answer further that question, when you've got a plaintiff who is in a position that they need care, the expense of which exceeds their ability to pay personally, going to trial at the risk of a jury coming in at less than is going to be necessary is very risky, in my judgment.

Q Mr. Todd, I assume that you're charging for your expert

services today?

A You assume right.

Q Are you doing so on an hourly basis?

A Yes.

Q And how much time approximately have you put into this case?

A I don't know the answer to that. I would say 30 hours maybe. It's got to be just a wild estimate, I think.

Q And what is the rate that you charge?

A I'm embarrassed to tell you.

Q Well, you won't embarrass me, sir.

A It's considerably less than you do. Five hundred and twenty-five dollars an hour.

Q And that's the same for preparation and for testimony?

A Yes.

MR. PRITZKER: I have no other questions.

THE COURT: Any redirect?

MR. ZELLE: I've got a couple of questions, your Honor.

REDIRECT EXAMINATION BY MR. ZELLE:

Q You mentioned, Mr. Todd, that there were any number of distinguishing factors in the Oliveira case comparing it with the Rhodes case. Will you please explain what those factors are?

A Well, you had a plaintiff -- excuse me. You had a defendant who was driving drunk, he was underage to be drinking liquor. You have a plaintiff who was parked by the side of the road when he came around the corner speeding, driving drunk, and crashed into her, knocked the car 90 feet, flipped over in the air and landed and burst in flames.

This defendant driver stood there while this car was burning and the plaintiff was being burned and did nothing to assist her; others had to pull her out of the car.

Among her damages she was tetraplegic, she had sensory deficits in both arms, right down to her hands. She had cognitive defects, brain damage, in other words, as a consequence of this accident. She was burned over her arms and chest and back, third-degree burns. She had to be institutionalized because her moods and her affect and her inability to assist in any way was such that her daughter and her niece could not take care of her. And the daughter required -- saw to it that she was institutionalized, spending the rest of her life in an institution.

Her special damages were vastly -- her life-care plan numbers were multiples of what Mrs. Rhodes'

life-care plan was. There was a range of from three to five million dollars. And it was tried in the County of Providence in Rhode Island, which is a notoriously generous county to plaintiffs.

Q The Oliveira claim, are you aware that that also included a lost wage claim?

A Oh, yes. She had -- she earned about -- she was a clerk at a municipal office and she earned about $15,500 a year and that resulted in, I think, about $350,000 of lost wages.

Q The fact that after the accident in the Oliveira case, the plaintiff's son died shortly thereafter, is that a factor that you would feel distinguishes that case from the present case?

A I was aware of that, but I don't know how you -- it certainly did affect it, but he died approximately a year later, yes.

Q What about the relationship between the plaintiff, Mrs. Oliveira and her daughter, does that have any distinguishing factors from the present case?

MR. PRITZKER: Objection, your Honor.

A Well, her daughter had her institutionalized.

THE COURT: Overruled.

MR. PRITZKER: There was no loss of

consortium claim, your Honor.

MR. ZELLE: That wasn't the question.

THE COURT: Okay. It's not irrelevant to the question, so. Okay. You may proceed.

THE WITNESS: Shall I answer it or not answer it, Judge?

THE COURT: I thought you did. I thought you said that she was institutionalized or she had to place her in an institution and that was the difference.

THE WITNESS: And that caused an estrangement. They never spoke again.

(By Mr. Zelle)

Q Can you explain a little bit further your testimony that, regardless of the fact of the effect of joint and several and third-party claims might have on how money works itself out after a verdict, how does it play into settlement that there is a third-party defendant that may or may not have a direct obligation to the plaintiff?

A Another source of money. In this source of money, a million dollars, the insurance company had set up a million dollar reserve, in other words, reserved the entire million dollars, and had expected that they would pay a sum greater than 800,000 to settle it.

Q I think I've got one more question. Just let me find it in my notes.

Here's my question. Can you just explain in your experience in settling cases why plaintiffs are willing to forgo interest to get cases resolved, to settle cases?

MR. PRITZKER: Objection.

THE COURT: Overruled.

A Interest is generally regarded as the reward for having gone to trial, assuming the risk to go to trial. In a settlement, you're urging on the plaintiff that, look, you're forgoing the risk of going to trial, so we're talking just about an amount it will take to settle a case. You should regard -- and I generally tell people -- regard interest as how it would affect the verdict. In other words, if you have a 25 percent interest rate and the plaintiff -- I generally say to the defendant, look, if you can settle the case for 300,000 or 400,000, that's the same as $600,000 verdict reduced to 400,000. I don't know whether I'm articulating that clearly, but it's a factor that I argue to the defendant, look it, this is the same, if you

reduce it by the 25 percent interest. It's as if they got a verdict of much less than you're paying them to settle this case, so it's reasonable for you to take that into consideration.

Q Mr. Pritzker asked you about foregoing the risks and distress -- I don't know if he said emotional distress of trial. In your experience, is that a factor that you try to impart upon plaintiffs in encouraging settlements, that is, the distress or the emotional distress or difficult emotional feelings of going through trial?

A Absolutely. I feel that it's incumbent on lawyers -- I agree with Mr. Pritzker that we have a duty to be zealous. On the other hand, we have a duty to keep in mind the best interest of the client and not to risk for glory sake or, gee, I may hit a homerun, the possibility that you could leave your clients, if you don't settle this case and go to trial, you could leave them in a position where they just can't afford to continue to live in any decent style.

Q You testified in response from questions from

Mr. Varga about some cases that just can't settle, and I'd like you to provide this court with your opinion as to whether this case, given the information you have about the demands and the offers, was one that falls into that category.

MR. PRITZKER: Objection, your Honor.

THE COURT: Sustained.

MR. PRITZKER: This is beyond cross-examination.

THE COURT: Sustained.

MR. ZELLE: It's within Mr. Varga's cross.

THE COURT: It's not because it's beyond the scope, it's because he's already given his opinion with regard to it; and beyond that, I think what he's already said would be speculation.

MR. ZELLE: All right. I think that's all I have, your Honor.

THE COURT: Okay. Mr. Varga, anything else you have?

MR. VARGA: Nothing further, Judge.

THE COURT: Mr. Pritzker, anything else

you have?

MR. PRITZKER: No, your Honor.

THE COURT: All right. I've got a few questions, Mr. Todd.

What do you understand in your opinion is the minimum offer that would be reasonable -- strike that.

What in your opinion was the minimum reasonable offer to be made by the close of mediation?

THE WITNESS: Well, I think under the circumstances of this mediation, where the three and a half million dollar offer did not receive a response, that's a reasonable offer of settlement, when you couple it with what they would receive on top of that from the tree company.

THE COURT: Would an offer below $3.5 million have been reasonable?

THE WITNESS: Would an offer below --

THE COURT: 3.5 million.

THE WITNESS: Taking into consideration the amount of money that was available from the other defendant?

THE COURT: Yes.

THE WITNESS: Yes. I think anything below $3 million, 3.5, $3 million, is probably outside the reasonable range if it were the final offer. I think an initial offer stands in a different status.

THE COURT: All right. I'm referring to the offer to be made before one leaves mediation.

THE WITNESS: I think within the context of this mediation, the 3.5 offer was reasonable.

THE COURT: Okay. My question is, is that the lowest -- would an offer -- strike that.

In your opinion, would an offer of less than $3.5 million have been reasonable at the close of mediation?

THE WITNESS: I think 3 million would have been reasonable.

THE COURT: Would an offer below 3 million have been reasonable?

THE WITNESS: As a final offer, I don't think so.

THE COURT: Okay. Now, when do you understand the defendants knew that the tree service had settled for $550,000?

THE WITNESS: I don't know when they found that out. I think it was in the course -- well, actually, I don't know whether it was after the mediation. I don't know that.

THE COURT: Okay. Once that fact was known, that there would not be $1 million available for settlement but instead $550,000, do you understand there to be any further obligation on the part of the insurer to change their previous settlement offer?

THE WITNESS: The previous being the 3.5 million?

THE COURT: Right.

THE WITNESS: No, not in the context of the settlement discussions as they stood at that point in time, and I think 3.5 plus 550 falls within the range of what I consider the low range but the range of what I consider to be a reasonable settlement range.

THE COURT: All right. Let me give you a hypothetical.

If the offer had not been 3.5 million but had been what you considered to be the lowest minimum reasonable offer of 3 million, would the settlement with the tree service at less than was anticipated obligate the insurer to increase their offer to a higher amount to offset the difference between their expectation and the reality?

MR. ZELLE: Let me note an objection for the record.

THE COURT: It's noted.

THE WITNESS: I think, yes, in order to bring it within the range. If it fell short of the range, I think they should have increased it to bring it up to the range of a reasonable settlement.

THE COURT: Okay. Any further questions?

MR. ZELLE: May I have one follow-up on your question, your Honor.

EXAMINATION BY MR. ZELLE:

Q Mr. Todd, you understand that the mediation was weeks before trial began. Do you have an opinion following Judge Gants' hypothetical at

what point in time an additional offer should have been made?
A Well, at any time that settlement could be reach. And I think the 6 million went up to six and a half million, and I thought those all were in the high end and beyond the high end of the reasonable range.
Q Let me ask it this way, then. Again, assuming the facts presented by Judge Gants' hypothetical, if AIG increased its offer at the time of trial, would that be within the reasonable amount of time to make an offer to account for the fact that the full amount of the tree service's policy was not paid?
A Yes. We had the mediation ending on hugely disparate poles, then there's a very short period of time to get ready and prepare for the trial and so forth, and then an offer of 6 million before the beginning of the trial I think was a timely one and reasonable, very reasonable offer of settlement; and that, of course, during the trial as they saw how it was going, was increased.
MR. ZELLE: I hesitate to ask this question,

your Honor, because in my view you kind of opened the door to ask him the question: What is the reasonable range?
That was never a part of our disclosure, but inasmuch as you framed your questions into what would be the bottom dollar of the reasonable range, you opened it -- I will ask the question and play out the objection.
THE COURT: I didn't ask what the reasonable range was. I asked him what is the low end of the reasonable range.
MR. ZELLE: Right. Let me follow that up then.
(By Mr. Zelle)
Q Mr. Todd. At the time of mediation, what in your opinion was the low end of the reasonable range?
A Four million dollars. And I include in that, as Mr. Pritzker was going through the specials, that the medicals are all liens, the medical insurance company pays those, and you typically compromise the medical bills with the insurance company; and then the cost of the life-care plan is typically covered by a structure, and in this case the structure would cost about $600,000.

MR. ZELLE: That's all I have.
THE COURT: Okay. Any further questions?
MR. PRITZKER: No, your Honor.
THE COURT: Okay. Thank you, you may step down.
MR. PRITZKER: Your Honor, our rebuttal is less than five minutes.
THE COURT: What would be the basis for rebuttal?
MR. PRITZKER: The testimony of Ms. Kelly.
THE COURT: Of which Ms. Kelly? I assume Tracey Kelly.
MR. PRITZKER: I'm sorry. Tracey Kelly, not Janet Kelley.
THE COURT: And what is it about her that you can -- give me a proffer as to what you contend would be the rebuttal.
MS. PINKHAM: Your Honor, the plaintiffs would proffer that in May of 2004, the plaintiffs made an offer to settle the discovery dispute over the mental health records and that plaintiffs' counsel corresponded with counsel from GAF an offered to make Mrs. Rhodes' mental therapy records that related to her ADHD and bipolar condition available in exchange for an

agreement that she could then put on evidence of those conditions at trial, which up to that point in time the plaintiffs had continually represented that they were not going to present expert testimony or rely on her pre-existing conditions at the time of trial. There was no response to that offer, and the motion to compel was ultimately filed and decided by Judge Chernoff.
In addition, the plaintiffs would provide evidence that Mr. Nitti, while he communicated an offer on the first day of trial, the next offer that was communicated by Mr. Nitti was on September 13 and that the offer that was communicated on the last day of trial was not communicated until the jury had already begun deliberating.
THE COURT: As opposed to what she had said, which was at the close of all the evidence?
MS. PINKHAM: Well, I believe her testimony was unclear unto that point, and there's been some confusion as to when exactly the last offer was communicated.
THE COURT: Okay. It's my understanding that it was at the close of all the evidence.
MS. PINKHAM: After the closing, while the jury was deliberating, your Honor.

THE COURT: Okay.

MS. PINKHAM: And if the court would accept that offer of proof, then we would not need to call Mr. Pritzker.

THE COURT: Well, let me hear from Mr. Varga.

MR. VARGA: Your Honor, I don't have a comment specifically on that issue. I would defer to, obviously, AIG. I do want to say that if there is going to be a rebuttal case, perhaps I would suggest we close out our cases first, and I do have two housekeeping matters to accomplish there before plaintiffs put on any kind of rebuttal, but I'd allow Mr. Zelle to address --

MR. ZELLE: I think it's a point well taken. Let's discuss rebuttal after we close.

THE COURT: Well, we can, but consider the hour, but go ahead.

MR. VARGA: Your Honor, in terms of Zurich's case, there is -- first of all, I thought this was all taken care of on the first day of trial, but we had obviously put forth a book of exhibits which your Honor has been referring to and which the witnesses have been referring to. We'd just like to formally move those into evidence. Those are all unobjected-to exhibits,

so we'd like to move those in officially for the record.

THE COURT: Okay. They're in.

MR. VARGA: Thank you.

(Exhibit 101-130, marked; See Exhibit List.)

MR. VARGA: Thank you. And, your Honor, there is an additional exhibit which we'd like to add to that book, which is selected deposition testimony of Marcia Rhodes given in this case. It is the equivalent of two pages of deposition testimony. It's about 48 lines, and it is designations that I think are important on the question of damages, your Honor. And it is pursuant to Rule 32A(2), I believe. And to the extent it is testimony of a party used for any purpose.

THE COURT: All right. Any objection to that?

MS. PINKHAM: Yes, your Honor. As you know, Mrs. Rhodes was available and she was here, and if Zurich felt the need to cross-examine her with deposition testimony, they should have done that when she was here.

THE COURT: Well, that is overruled. If you

were in federal court, you'd be correct, but the state rule, which is not frankly one that I agree with but I'm still bound by, is that admissions by an opposing party may be offered at any time without calling. Indeed, statements made by a witness who has testified do not even need to be presented to that witness to confront that witness, so I do think it comes in . So I will admit it as the next exhibit for Zurich, which is 100 and something.

MR. VARGA: Actually, your Honor, if I may, to make things simple, I'd like to put this in the book as Exhibit 101. There was a space left for 101. No document was introduced under that number, so I think that would make it simple.

THE COURT: All right. We'll make it 101.

MS. PINKHAM: Your Honor, now that I've actually had the chance to look at this. Now the introduction of this testimony is going to require an opportunity on the part of the plaintiffs to counter it, because there's additional testimony that Mrs. Rhodes gave during her deposition that actually should come in under the doctrine of completeness. So I would ask that we be allowed the opportunity to submit another few pages of her deposition testimony.

THE COURT: All right. Well, we'll see what you propose and we'll address it when that's done. but 101 comes in.

(Exhibit 101, marked; Selected Deposition Transcript Testimony of Marcia Rhodes.)

THE COURT: All right. What else?

MR. VARGA: Your Honor, that's all that I have. With that, Zurich will rest. Thank you.

THE COURT: All right. Mr. Zelle?

MR. ZELLE: I'm waiting for the court reporter, your Honor.

Similarly, we'd like to move for the admission of all of the exhibits that have been agreed to -- oh, we've done that.

And also similarly, following up on Ms. Pinkham's point that deposition testimony should be issued, deposition testimony that has been designated by plaintiffs of Tracey Kelly we had offered at the beginning of the session this morning to add eight lines, given her representation that for completion purposes it's reasonable. I think they've had time to look at those eight lines. Do you have any objection?

MS. PINKHAM: I have no objection.

MR. ZELLE: And we're going to offer page 110, lines 8 through 17.

THE COURT: Which will be essentially part of --

MR. ZELLE: That will be Exhibit 230, I believe.

THE COURT: Well --

MR. ZELLE: Or we can make it 93B.

THE COURT: Yes. I think that's what we'll do.

MR. ZELLE: All right.

THE COURT: Right. 93A -- no, 93B.

MR. ZELLE: We would, I assure you, never mark an exhibit as 93A.

THE COURT: Right. Okay. We already have. Okay. 93B.

(Exhibit 93B, marked; Designated Deposition Testimony of Tracey Kelly.)

THE COURT: All right. Anything else?

MR. ZELLE: No. At that point -- I don't have a clean copy. I'll give her this one.

MR. PRITZER: Why don't we get a clean copy.

THE COURT: All right. Well, we're going to have to. Okay. So at the appropriate time you can do that. Let's move on to be discussing the time for closings. You've rested. I assume each of you renew your motions for directed verdict; is that correct?

MR. ZELLE: Yes, your Honor.

MR. VARGA: Yes, your Honor.

THE COURT: And I assume Ms. Pinkham renews her motion.

MS. PINKHAM: Yes, your Honor.

THE COURT: And Ms. Pinkham's motion for directed verdict is denied; the others are reserved.

All right. We need to discuss closings. Have you conferred as to the timing of closings?

MR. ZELLE: Yes, I've spoken with Mr. Pritzker that I'm not available Monday, Tuesday, Wednesday. Thursday or Friday is available, so it's up to them.

MR. VARGA: Actually, your Honor, I had --

MR. ZELLE: Sorry.

MR. VARGA: That's okay. I had not discussed with counsel, but our preference -- Zurich's preference was to submit trial briefs first and then come back at

the court's pleasure and argue -- or offer the closings at that point and address any questions that the court might have regarding the briefing, which I think is a more efficient way to address the court's concerns.

MR. PRITZKER: And we agree with Mr. Varga.

THE COURT: I think that probably is the better way in the context that I don't think I'm going to learn anything necessarily at closing with regard to the case, but this allows us to get into legal issues that may arise in a more sensible way.

When will these briefs be submitted?

MR. VARGA: Your Honor, I would like to have until the 26th of March to present ours. That would obviously apply to everyone, which I believe is a Monday.

THE COURT: I'm not so sure you're going to get that. You'll get till the 23rd. I'm actually inclined to hear the arguments on the 23rd.

MR. PRITZKER: We can certainly be ready, your Honor, with the briefs on the 21st.

THE COURT: Well, why don't we aim for that. The reason is that I'm -- I've cleared that last week for writing, and if we do it the 26th, then I lose a day of writing time, whether it be on this or other

cases and I'm disinclined to do that.

So why don't we say that briefs will be due by the close of business on the 21st, to be delivered to Mr. Dailey or to Ms. Walsh, and Friday morning at nine we'll plan to do closings. All right? At that point if there's anything within the rule of completeness you wish to add, Ms. Pinkham, I'll permit you to do reopen the evidence for that purpose only.

By the way, I didn't hear from defense counsel with regard to the argument for rebuttal. We deferred it.

MR. ZELLE: Yes. We certainly oppose the motion to present a rebuttal case. There is nothing that plaintiffs did not have a capacity to prepare for trial. They chose not to call Mr. Pritzker. They certainly had a reason to expect that there might be testimony from Ms. Kelly that they would wish to rebut. It simply was waived by virtue of their refusal to -- or decision not to present Mr. Pritzker as part of their case in chief.

THE COURT: All right. Mr. Varga?

MR. VARGA: Your Honor, I would join in that objection. I think that they had every opportunity to consider what evidence they needed to put in in this

case, and I believe that the pre-trial order reflects what Mr. Zelle was just saying with respect to the ability to anticipate what you need to put in. And there certainly was nothing in the AIG case or in the Zurich case that was new or surprising by any stretch of the imagination. I think they had the opportunity to present the witnesses that they wanted to. They certainly had enough witnesses in the case and neglected to do so. I don't think a rebuttal case is appropriate in that circumstance.

THE COURT: All right. Here's what I'm going to do. With respect to the timing of the offers during the course of trial, Ms. Kelly was not a percipient witness to that. In any event, those offers were made by Mr. Nitti, his deposition transcript has already been admitted in the case, and therefore, he is the percipient witness to offering direct testimony as to that. Her testimony essentially is hearsay, and therefore I don't think whatever she may have said as to her understanding as to when Nitti made those offers would be sufficient with regard to a rebuttal.

As to the first point with regard to the offer made by counsel, if there is a letter that was transmitted -- I assume there's no dispute as to the

authenticity of that offer with regard to resolution of the psychological records part -- I will admit that into evidence as the Exhibit 96, I guess, but I don't intend to have testimony above and beyond the fact that the letter was transmitted, and I believe she acknowledged that there was some letter which had been transmitted, so I'll take the letter, but that's it.

All right. So the rebuttal has been permitted with respect to the admission of Exhibit 96.

(Exhibit No. 96, marked; Letter dated May 25, 2004 from Mr. Pritzker to Mr. Deschenes.)

THE COURT: Nothing beyond that. The evidence is now closed. And on the 21st you'll submit whatever trial briefs you wish to submit --

THE CLERK: In this courtroom, Judge?

THE COURT: To you or to Ms. Walsh.

Nine a.m. closings. In terms of your planning, you should not plan for anything with regard to the defense. Each of you will have no more than an hour, at least as to narrative. There may be some questioning, but basically ballpark, a bit less than an hour. With regard to that, to address not only evidentiary issues but also whatever legal issues you

think may arise, if you wish to go beyond your briefs as to that; and as to the plaintiffs, I'll give them an hour and 45 minutes because they had to address both Zurich and AIG. I don't think it requires double because there's some duplication with regard to presentation. You're not required to use all that time.

MR. PRITZKER: Your Honor, I do not intend to preempt Ms. Pinkham's closing, but given the fact that the plaintiffs did not call me, or at least call me for a very limited purpose, may I participate in the dialogue, if there is any, as it relates to the law and perhaps any other issues?

THE COURT: You may participate in matters of law. You may participate in matters of fact, except to the extent of the reasonableness of the attorneys' fees, which is the sole subject on which you've testified. So as to that, Ms. Pinkham is the only person from your side who can address that.

THE CLERK: Judge, can we have counsel go over the exhibits before they leave?

THE COURT: Yes, we should. Actually, let's do this rather than take the time now. The case is not going to come to me, in any event, for a decision until

the -- why don't you go over the exhibits. What I'd like you to bring with you or have submitted is a comprehensive index of exhibits identifying not only their number and a brief vanilla description of what the exhibit is, and you can go over these books to make sure that they're updated appropriately. All right? So that will serve the dual purpose of making sure that I have all the exhibits and resolve any disputes that may occur, and will also serve the purpose of permitting Mr. Dailey quite quickly to obtain your agreement that the exhibits are all there. Okay?

Anything else?

MR. PRITZKER: No. Thank you, your Honor.

MR. ZELLE: Thank you, your Honor.

THE COURT: All right. See you back on the 23rd.

(Hearing ended at 1:22 p.m.)

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 _141_, is a complete, true and accurate transcription of the above-referenced case.

Paula Pietrella

Faye LeRoux

Court Reporters

Pages: 202

COMMONWEALTH OF MASSACHUSETTS

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

MARCIA RHODES, HAROLD RHODES AND 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 17

BEFORE: GANTS, J.
BOSTON, MASSACHUSETTS
MARCH 30, 2007

Paula Pietrella
Faye LeRoux

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I N D E X

E X H I B I T S

NO. DESCRIPTION PAGE

None

FOR I.D.

None

PROCEEDINGS

(In court at 9:19 a.m.)

THE COURT: Why don't you call the case.

THE CLERK Your Honor, before the court we have the final arguments for a jury-waived trial in the case of Rhodes, et al. versus AIG Domestic Claims, Inc., et al., Docket No. SUCV2005-1360.

Would counsel identify themselves for the record.

MR. PRITZKER: Your Honor, Fred Pritzker from Brown Rudnick for the plaintiffs.

MS. PINKHAM: Margaret Pinkham for the Rhodes family.

MR. BROWN: Daniel Brown for the plaintiffs.

MR. VARGA: Gregory Varga, your Honor, on behalf of Zurich American.

MS. SACKET: Elizabeth Sackett on behalf of Zurich American.

MR. COHEN: Mark Cohen, AIGDC and National Union.

MR. MASELEK: Robert Maselek on behalf of AIGDC and National Union.

MR. McDONOUGH: Brian McDonough on behalf of AIGDC and National Union.

MR. ZELLE: Tony Zelle, AIG and National Union.

THE COURT: All right. Before we start with the closings, I think we need to address this motion to amend the complaint.

Mr. Pritzker, I'm a little bit confused. Let us assume for the purposes of this question that you have failed to prove that either Zurich or AIG failed -- well, I hate to use the word "fail" twice.

Let us assume for purposes of this question that the evidence will show that Zurich and AIG each made a prompt and fair settlement offer during the course of this case. Do you contend that, even with that finding -- if this motion for leave to amend were allowed, you could still prevail?

MR. PRITZKER: Yes, your Honor. Not probably on the punitive damages but certainly on the compensatory damages.

THE COURT: And if, indeed, a fair -- a prompt and fair settlement offer was made, how would you be able to show that you were damaged?

MR. PRITZKER: That would be very difficult to do, your Honor, although it is possible that because of the -- I shouldn't even say "possible." There is a

scenario that even if a prompt and fair settlement offer were made, that because the standards were not adopted, for instance, the standards for adopting standards, the requirement that standards be adopted, that the implementation or the communication of the fair offer, when it was made, still may have been made in a way which affected the Rhodes family.

THE COURT: I don't know that I understand that. I mean, somebody says $6 million. Do you think that $6 million offer is different because the process that led to it was more chaotic than it should have been within the insurance company?

MR. PRITKZER: I honestly cannot think of an example right now where the breach of other parts of 176D might have caused damage, but I'm thinking of things like the requirement that the deposition be taken before a communication were made even though -- I'm sorry, before a mediation were had and an offer were made, even if the offer were then timely, that that could create a damage. But I have to confess, your Honor, having heard the question for the first time, that I'm having difficulty in answering your question to the affirmative. I cannot think of damage.

THE COURT: All right. And if you can't

think of any, then why should I allow a motion for leave to amend allegations which in practice will have no consequence on the outcome of this case, especially since they were brought after the trial was over?

MR. PRITZKER: Well, they certainly would have consequence in the event that if a violation is found. In other words, if it is not -- the offers were found not to be either fair or timely for the issue of whether or not the conduct was willful and knowing, the violations, the additional violations, do have probative value for that.

THE COURT: Okay. Let's use the example we're using, since this is the one you raised. What does that mean? I understand, I mean in terms of where I am, I understand that if I were to find that the purpose of requiring the deposition was not truly to solicit information from her because they recognize that nothing new would be learned but to drag out the process or to harass or with the view of wearing the Rhodeses down, that that would bear on whether or not that was willful and knowing, but I don't see how it would otherwise bear on that.

MR. PRITZKER: If, in fact, the violations of the statute were not, one, effecting a prompt

settlement fairly but rather were three or four violations, it seems that that would be probative on the issue of whether or not double or triple damages should be awarded.

I grant the court that a lot of that is evidentiary as opposed to new causes of action; it is in evidence, so I'm not sure we need the amendment except to conform to the evidence. I don't think we need Counts IV and V for that purpose, but I do think that it is appropriate where the evidence is in as to what the conduct of the defendants was, that the complaint be allowed to cite that evidence as additional grounds for the punitive damage component of the case.

THE COURT: All right. Mr. Varga or Mr. --

MR. PRITZKER: But before I end, I have actually preempted Mr. Brown who was going to argue this motion, and I would like at least him to be able to respond at some point.

THE COURT: All right. Mr. Brown, I hope Mr. Pritzker has not unduly interfered with your argument.

MR. BROWN: Even if he had, I couldn't say.

THE COURT: Hopefully he's listened to you enough to know what he should have said.

So tell me, is there anything that he should have said which he didn't?

MR. BROWN: Not at this point.

THE COURT: So you think he'll make partner then?

All right. Mr. Varga -- I'm sorry, Ms. Sackett.

MS. SACKETT: Your Honor, I think it's telling that Mr. Pritzker admitted that he doesn't believe there's any way that any of these violations would give different grounds for recovery in this action, at least for compensable. But looking at the standards for allowing a motion to amend at this late game, there clearly are significant problems with this motion. It's unjustifiably untimely. It causes substantial prejudice to Zurich. The fact that plaintiffs were aware of this factual evidence back in June 2006, when Mr. McIntosh's deposition was taken, and the timing of it certainly suggests that there are ulterior motives to the filing of this motion. There's no evidence that Zurich in any way consented to these theories throughout the trial and, quite frankly, these new theories are futile.

Chapter 93A sets a standard. And in the

demand letter, you have to be reasonably clear and articulate what the basis is for your Chapter 93A claim. Consistently, from the time they filed this letter, through the complaint, through discovery, when their expert opinion was limited to this area, through the pretrial statement, through Mr. Pritzker's own opening statement, the only theory of liability against Zurich has been 39(f), failure to effectuate a prompt and reasonable settlement when liability is reasonably clear.

Now, in terms of prejudice to Zurich, it is significant. Zurich decided how to handle this case from discovery through trial based on this one theory. Zurich made tactical, significant tactical decision in particular with respect to this trial as to what witnesses it would or wouldn't call, what topics would or wouldn't be covered with witnesses, and what opinions would or would not be expressed by our expert. To Monday-morning quarterback and decide to come up with these new theories at this late date would be substantially prejudice.

And finally, there are two theories. One is 3(9)(d), and is not even applicable in this circumstance. It concerns a refusal to

make an offer, and Zurich certainly made an offer of its $2 million.

The other one would be -- I'm sorry, your Honor -- 3(9)(g), which compels insureds to institute litigation, and clearly plaintiffs are not insureds in the matter and don't have standing to even raise a claim under that.

I'll leave my colleague to probably address some of the other parts.

THE COURT: Okay. Since I've guessed wrong each time as to which of these, okay.

MR. MASELEK: We echo many of the same arguments, but I would just like to focus on a few things and one is the timing of the motion itself which wasn't filed until after we had drafted and filed our post-trial brief. It wasn't filed before trial, during trial, immediately after trial, so we've had no chance to address the substance of these new allegations.

Again, the facts underlying them, the communications between Mr. Satriano and Mr. Bartell were well known at depositions. So they've known about it for a long time and it's

just far too late to make an amendment like that. And then primarily also, our whole entire strategy wouldn't have been different, but we certainly would have presented evidence through expert testimony, and other testimony as well, to rebut these allegations.

And so the evidence as it came in, I don't think a good argument could be made that we implicitly agreed to try these new theories. As your Honor indicated, they are arguably relevant to the timing and issues such as that, the tender and things like that that were issues at trial, and so as the evidence came in, it had arguable relevance to the Section F violations. So I don't believe Rule 15 should apply at all.

THE COURT: Okay. Mr. Brown, I'll give you the last word.

MR. BROWN: It's just, yes, we knew about some of the evidence, but there was no evidence presented at trial that countered it, such as the fact that AIG didn't have any standards. Two witnesses testified to that, but we assumed that maybe they would come forward and actually say that they did have standards,

but they didn't do that. The fact of the matter is that Zurich and AIG both knew about their violations, they both knew about the statute, and it goes directly to their culpability and the egregiousness of their actions in the case.

THE COURT: All right. The motion for leave to amend is denied. I don't frankly expect it to have any particular significance since Mr. Pritzker I think conceded, as I think he must, that if I were to find that there was a prompt and fair offer of settlement, it would still not be liability based on these new grounds.

The reasons for the denial are manyfold; I will count them up at the end. It is true that for 93A there must be a 93A letter, and these allegations were not specifically incorporated in a 93A letter. More substantively, I do think the evidence is such that there were no material surprises at trial. The issues that were raised in this motion for leave to amend were, I think, adequately warned of during the course of the depositions. So I don't think there was anything terribly new at

trial which would justify leave to amend at the conclusion of trial. I do think there would be some degree of prejudice to the defendants who, if these were to be substantive claims, independent sources of liability would have arguably added to the testimony of certain of the witnesses or brought in additional witnesses.

And finally, I guess where I began, I'm not convinced -- I'm sorry. Ms. Sackett is correct, at least with regard to the claim of at least one of the allegations, one must be an insured to bring it. And as to the other allegations here, I don't think that they would be a cause of any injury if indeed there had been a prompt and fair settlement offer.

Now, that does not mean, as I think I alluded to earlier, that I will not consider the evidence addressed. I think we all understand that. But I'm going to consider it in the context of whether any of that meant that the offer was not made promptly and was unduly delayed. The example of Mrs. Rhodes' deposition is a good one. I understood that to be raised

with the view that that was not a just or reasonable basis for delay. I will consider it in that light, but I don't plan to consider it as an independent ground for liability.

As to the absence of AIG written standards, that, too, will be considered in terms of whether or not AIG made a fair and reasonable offer. But if I find that they did, the fact that they came to it not by following written guidelines but because of internal decisions which were based on history and practice as opposed to written rules, will not change the result.

So the bottom line is, all the evidence will come in and will be considered. It will be considered in the context of whether or not there was a timely and fair offer of settlement in this case after liability became reasonably clear.

So with that let's move to closings. Who is to be --

MS. SACKETT: Your Honor, I'm sorry. We did file a motion to strike along with an opposition.

THE COURT: With regard to the trial brief?

MS. SACKETT: With regard, your Honor, to the fact that in plaintiffs' trial brief, they're now asserting a million dollars' worth of lost interest rather than the seven to eight hundred.

THE COURT: And I'm aware of that. It doesn't really matter whether it is to be stricken or not from the trial brief. It matters whether or not I am to consider there to be evidence. So you can incorporate that into -- I'm mean, I've noted your arguments. You may certainly incorporate them, you or Mr. Varga -- see, I am trainable.

MR. VARGA: Thank you, your Honor. I'm pleased to hear that.

THE COURT: At least as to that. As to whether it's appropriate realm of damages, but the trial brief has no particular consequence, so for me to strike it would also have no -- I may ignore it, I may not be persuaded by it, but that could be said about many of the pages that have been written. So I don't plan to go one by

one and see whether any of them should be stricken as unpersuasive or beyond the scope of the evidence.

So with that, remind me of the timetable that we had set with regard to time limits.

MR. VARGA: Your Honor, you had given the defendants each one hour, and plaintiffs one hour and forty-five minutes.

THE COURT: Okay.

MR. VARGA: I do have for hopefully just two minutes one final housekeeping matter to raise and it relates to evidence which plaintiffs submitted together with their trial brief.

As Exhibit 97, Ms. Pinkham introduced some deposition testimony, some additional excerpts from Marcia Rhodes' deposition pursuant to the doctrine of completeness to complete the line of questioning. And I understood and expected that she would actually put in the entire line of questioning, and she didn't.

So what I'd like to do, just again in the doctrine of completeness, is give the court

the rest of page 74 of the deposition that was actually redacted, which is a two-question cross-examination by yours truly, which demonstrates the fact that the change in Mrs. Rhodes' testimony from when we examined her to when plaintiffs examined her was due to the fact that she had a conversation with them in the hallway during the course of the deposition before the testimony changed. That's all this shows.

THE COURT: And the change is with regard to the willingness to accept an offer? Is that what --

MR. VARGA: No, it's with regard to whether or not Mrs. Rhodes knew that her family had actually been paid by the insurance companies and whether she felt that there was any reason to pursue this lawsuit, whether there was a reason to continue with this lawsuit. That's the only reason for offering it.

THE COURT: Okay. Any objection to that?

MS. PINKHAM: No, your Honor.

THE COURT: Okay. That may do.

MR. VARGA: I'd suggest we add that to Zurich Exhibit 101.

THE COURT: I think that makes good sense as opposed to adding one.

All right. Mr. Varga, assuming it is to be you who's to make the closing, I will hear you.

MR. VARGA: Thank you, your Honor.

As the court is aware, your Honor, plaintiffs seek over $40 million against Zurich American Insurance Company. Forty million in a case in which they never would have accepted the amount of money that we had to offer, the $2 million. Forty million dollars in a case where Zurich, the primary insurer, ten months before the trial, the first trial date that was set in this case, told the excess insurer, We're going to go get authority to tender our limits to you, the ball's going to be in your court. Forty million dollars in a case in which eight months before trial the primary carrier went to the excess carrier formally and said, You've got our money, it's in your pocket, let's get the case moving forward. Forty million dollars in a case

that didn't settle not because of anything Zurich did but because in the opinion of AIG'S expert, Owen Todd, there are some cases that don't settle. And in his opinion this one didn't because AIG and the plaintiffs simply could not bridge the substantial gap that separated their respective valuations of what the plaintiffs' damages were. That's AIG's own expert.

We've have sixteen days of testimony, hundreds of pages of exhibits in this case not because Zurich failed to tender or failed to make an offer but because in the view of plaintiffs' expert and in the view of plaintiffs themselves, this was a no-brainer. You don't need any medical records. Those are a red herring. You don't need to look at any documents about damages. This was a rear-end collision. You were told by the plaintiffs' lawyer she suffered terrible injuries, she was paralyzed. You don't need to see any of that stuff.

Forty million dollars, your Honor, because the plaintiffs went to trial in a case

and recovered $12 million in compensatory damages in a case in which they claim they would have settled for 8 million, which is 50 percent less than they actually recovered. For all of that, they want $40 million from Zurich American Insurance Company.

The reality is, your Honor, the plaintiffs are not entitled in this case even to $25 in nominal damages. They did not meet their burden of proof with respect to any of the elements of Chapter 176D and Chapter 93A. They did not prove that Zurich American Insurance Company failed to take steps to effectuate settlement when liability became reasonably clear. They did not prove that there was any causal link between Zurich's alleged delay in effectuating settlement and any of the damages that they have struggled to prove in this case. There's no causal connection. And they definitely have not shown that any of the actions undertaken by Kathleen Fuell, whom you met and saw for three days on the stand, or David McIntosh, were committed with any ill will, any improper motive, intentional disregard

for the plaintiffs' rights or interests, or any other culpable state of mind. They have not proven anything close to willful or knowledge conduct on the part of Zurich. It is a fiction.

Again, your Honor, as Judge Todd said on the stand, some cases don't settle and some cases do. In this case we had a very aggressive plaintiffs firm. By their own description to "Lawyers Weekly," they aggressively pursued this case. We had an excess insurer that attempted to settle the case, but there was a gap of $2 million that could not be bridged, not because of anything that Zurich did or didn't do but because sometimes cases don't settle. This case went to trial because they had vastly different view as to what the case was worth.

Your Honor, the obligation of Zurich under Chapter 176D -- and the words of the statute was to effectuate settlement, that they were to make a prompt, fair and equitable settlement when liability was reasonably clear. What that does not mean is that they had to settle the case because clearly some cases don't settle. Sometimes an insurance company can't

settle a case with a plaintiff. What the statute requires is that you take prompt and appropriate steps to attempt to effectuate a settlement.

So how was Zurich to effectuate a settlement in this case where plaintiffs have admitted over and over that $2 million was not going to get it done? What was Zurich supposed to do? Well, Karl Maser made it pretty clear to you when he testified the custom and practice in the industry -- and to use the words of Mr. Satriano -- is for the primary carrier to reach up to the excess carrier and to say, Our limits are going to be exposed here, you're going to need to get involved, you're going to need take this thing, take this ball and run with it.

November 19, 2003, ten months before trial, that's exactly what Kathleen Fuell did. Precisely what she did. We know that her communication with AIG on a conference call and with all the other participants was effective to put the excess carrier on notice that its limits -- or that some of its money would be necessary to resolve the case. We know that because Mr.

Satriano acknowledged that Zurich did in fact reach up. And he also told you that he sprang into action and rolled up his sleeves and started taking a whole number of steps that would enable him to position the case for settlement. He requested a whole number of documents from various parties. He got his own defense firm involved. He scheduled a meeting without -- I shouldn't say he scheduled it, but the evidence is that a meeting was scheduled in March of 2004 without Zurich participating. He took all of these steps after November 19, 2003. Any question as to whether AIG knew that Zurich had handed or was going to hand its money over and that AIG would be taking over the case is eliminated by the evidence in this case. If Zurich had actually turned over the money on November 19, 2003, Mr. Satriano would have done the exact same things because he told Mr. Goldman that on cross-examination.

The questions really in this case with respect to Zurich, your Honor, are the same two that I outlined when I did my opening all the way back in February of what seems forever ago.

Should Zurich have taken these steps that it took on November 19th sooner? Did liability become reasonably clear and damages become reasonably clear in an amount in excess of $2 million at some point before Kathleen Fuell and her company had an opportunity to review, evaluate, and verify the damages documentation that they received for the first time in September? That's question one.

Question two is the one I like and I had spoken so much about, causation. And that's the one I want to talk about first just like I did in the opening. But I will say, your Honor, if you answer either of those questions in the negative; that is, did liability and damages become reasonably clear in an amount of two million or more before November 19th, or whether an earlier tender by Zurich would have resulted in a settlement between plaintiffs and AIG, if you answer either of those in the negative, there is no way that damages of any kind or relief of any kind can be awarded against Zurich in this case.

Frankly, your Honor, I don't think

there's any mystery that the greater analysis in this case is on the question of, When did liability become reasonably clear? I'll tell you that I don't think you need to even reach that question in this case because the evidence is completely absent on the question of causation. And I want to turn to that for a few moments.

The court has acknowledged already that Hershenow, the Supreme Judicial Court's most recent pronouncement on the doctrine of causation in 93A, makes causation an essential element. And in your Honor's summary judgment ruling back in November, you acknowledged that the question here is whether an earlier tender by Zurich more likely than not would have resulted in settlement of the case by National Union and AIG. I'm quoting from the court's memo, page 4. That's the test.

Why is that appropriate? Because plaintiffs disagree. But let's talk about why it's appropriate.

Well, we know that under the Lazarus decision, which we discussed during the summary judgment hearing, Zurich had no obligation to pay the plaintiffs without a relief. To effectuate settlement,

said the Lazarus court, is to exchange a payment for a release. That's what an insurer is obligated to do. Zurich couldn't do that. We know that because the plaintiffs stipulated to it in the pretrial memo, and there's been no evidence to suggest that 2 million ever would have gotten it done here.

So the question is, How could Zurich have put money in the plaintiffs' hands? How could Zurich have stopped this litigation which they claimed was so frustrating and difficult by itself? Was there any way to do that? The answer is obvious. There was no way that Zurich could do that unilaterally without the excess carrier's involvement. There is no question about that and plaintiffs never argued anything to the contrary.

Plaintiffs have never articulated a different causation formula in this case because they can't. There isn't one that makes any sense. What they tried to do in their trial brief was say that, Well, the Hopkins case says we don't have to accept -- we don't have to prove we would have accepted a settlement that you never offered.

I addressed this, I thought, in the summary judgment argument, your Honor, but I'll say it again.

Hopkins is completely inapposite, and it's inapposite because that case involved one insurance company that had the primary and the excess layer. It involved a case which ultimately did settle before it went to trial. It settled for a fraction of the total limits that Liberty Mutual held in that case.

There is no question that Liberty Mutual, unlike Zurich in this case, had the ability to effectuate settlement within its policy limits. We know that because it did so. We know that because it did so for a fraction of what the limits were. Zurich, on the other hand, never had that ability. It never had that power. The only thing it could do was get the excess carrier involved and move toward settlement, toward a global effort to settle the case. There was no way, unlike in the Hopkins case, that Zurich could have paid its money to the plaintiffs and stopped the litigation unless the excess insurer got involved and got a settlement with the plaintiffs. Hopkins plays no role and should play no role in the court's analysis whatsoever. It is easily distinguishable.

This court got the test right in the summary judgment papers, in the summary judgment ruling. And the plaintiffs, interestingly, said in their trial

brief that they don't need to prove that they would have accepted a different offer. But that's precisely what they tried to do, they struggled to do, with their witnesses on the stand in this case. And I'll talk about that a little bit more in a moment or two when I talk about the evidence.

The test as applied here, the causation test that we've discussed, required the plaintiffs to prove that it is more likely than not that if Zurich had taken steps before November 19th to effectuate settlement, to get the excess carrier involved in moving toward a global resolution, that it is more likely than not that the case would have settled; that the litigation would have stopped; that plaintiffs would have received money sooner; that they would not have experienced these alleged frustration of litigation or the other alleged damages that they've claimed and seemed to have changed in the trial brief.

So what is the evidence? We have to look obviously at what the plaintiffs would have accepted and we have to look at what AIG and National Union were willing to offer. We have to compare those two things. That's what logic tells us to do.

Plaintiffs say in their trial brief -- before

I get there, I think that Judge Todd did say it best when he said the gap was too wide to bridge. And the gap was $2 million, your Honor. They never got closer than that. And they never got closer after all the evidence was in at trial and after all the discovery was taken. And they never got closer, not because of the timing of Zurich's efforts to settle the case but because they had different views on what the damages were worth. The demand by the plaintiffs, 16.5, goes up to 19.5. AIG's offers are lower, obviously. They never got to the point closer than $2 million apart.

Now, what supports my statement? Well, let's talk about the plaintiffs first. And I'm not a one-trick pony, your Honor, I will tell you that right now, but I do have a good trick up my sleeve and it's one you've seen before and it's no mystery. It's the interrogatory answer. And it's actually the only evidence in this case, the only evidence in this case of what the plaintiffs were willing to take at any point before the mediation took place.

Interrogatory No. 9, which Harold Rhodes answered not once, not twice, four times. Marcia Rhodes answered once and twice. So six times collectively they provided the following answer to the

following interrogatory:

Please state what offers of settlement you would have accepted from January 2002, until the resolution of the underlying matter. If the amount you would have accepted changed at any time, please indicate for what periods of time each amount is applicable.

And the answer:

I believe the family was willing to accept 8 million to resolve the underlying matter up through the mediation, August 11, 2004. Stating what the family would have agreed to between the time of the mediation and the jury announcing its verdict will be speculative. After the jury verdict I was willing to accept the full amount of the jury verdict, plus all accrued interest, to resolve the underlying matter.

Now, those words are important, and they chose them carefully with the assistance of their counsel, and they signed them under oath, and they signed them not once, not twice, six times. And in the, I think it's nineteen months, since these interrogatory answers were signed and served, not one of the plaintiffs ever sought to amend, correct, or supplement that answer, or any other answer, in these

interrogatories. They did, however, on two occasions supplement their answers to Zurich's interrogatories, so we know they knew how to do it. The reason they didn't supplement is because this is the truth and this is accurate and this is complete and this is what their testimony is. This is what we know about what Mr. and Mrs. Rhodes were willing to take. That's what they've told you; that's what they've told us.

Those are Exhibits 122 through 125 in Zurich's book, your Honor, and that is the only evidence in this case of what plaintiffs were willing to take before the mediation. And we know that after the mediation, that number didn't change. It certainly didn't go down. We know that for a fact, as well, from the testimony.

So what did the Rhodeses say at trial? Well, let's talk about Mr. Rhodes first. He was asked a number of questions about that by Mr. Cohen, not by his own counsel starting off but by Mr. Cohen. And he testified at trial, as he did in his deposition, that at the mediation he wouldn't have taken 6 million and he wouldn't have taken 7 million. That is abundantly clear. He also testified that he stands by Interrogatory Answer No. 9 all four times that he

signed it.

When he was asked, Was there ever a time when you would have taken 6 million ever? his answer was very clear: I don't know. I don't know.

It's not evidence, Judge. And the only thing it allows you to do or calls upon you to do in this case is to speculate and guess about what Mr. Rhodes might or might not have done. But his answer was: I don't know.

You cannot draw an inference from that statement that Mr. Rhodes ever would have considered less than 8 million, especially given the interrogatory answer that was provided. He did say, however, that he would have considered and relied upon the advice of his counsel, Mr. Pritzker, and his brother, a judge, also his lawyer. I would have considered the advice of my lawyers. But as your Honor is well aware, the plaintiffs claim the attorney-client privilege as to all those conversations, and so you never heard any evidence about what discussions they had concerning how much they'd accept. All you know is that they made demands of 16.5 and 19.5 and that they said that they wouldn't take 6 or 7 at the mediation and that they would not accept less than 8 prior to the mediation.

That's what we know.

What did Mrs. Rhodes say? Well, this is where it got interesting, your Honor. Mrs. Rhodes affirmed her interrogatory answer. She's said, That's true and it was true when I said it; and when I said it, I knew that the amount that we were willing to accept was an important fact. So despite that plaintiffs argue in their trial brief that they don't need to prove they would have accepted an earlier offer, that's exactly what they tried to do with Mrs. Rhodes. And I would like, if the court would indulge me, just to read that piece of the testimony because I think it's very telling in this case.

Ms. Pinkham on cross-examination tried mightily to lead Mrs. Rhodes to answer that was favorable on that point. The first question: Mrs. Rhodes, would you have agreed to accept an amount less than 8 million in 2002 or 2003?

Answer: I don't know. Because there was no offer forthcoming, so how would I know how I would have reacted.

She tried it again. Question: In any event, would you have relied on the advice of your attorney as well as your husband in responding to any settlement

offer that was communicated to you?

Answer: If they both agreed with each other, yes.

Question: And so if your husband and your attorney both agreed that some number less than 6 million was an appropriate settlement -- strike that. If some less than 8 million was an appropriate settlement in either 2002 or 2003, would you have gone along with that recommendation? And over the objections of Mr. Cohen and myself, she said, again, I don't know.

So Ms. Pinkham tried one more time. And she said: If your attorney and your husband said it was a good idea in order to make the case go away, would you have listened to them? And again, over the objections of counsel, she finally got an answer that perhaps she was pleased with, which was: If they both thought it was a good idea and that was a fair settlement, I probably would have gone along with them if they both agreed.

That's as good as it got for the plaintiffs. But the court made a very important observation immediately after that. The court pointed out that, I don't see quite how this goes anywhere because we're

never going to hear or learn what it was that Mr. Pritzker and Mr. Rhodes ever discussed regarding settlement offers or demands. Mr. Pritzker said, No, your Honor, you're not going to hear any of that.

So that testimony leads to a very definite dead end. There is no evidence from Mrs. Rhodes, no evidence from Mr. Rhodes, that either of them would have considered accepting anything less than $8 million. "I don't know," your Honor, is not evidence. You cannot draw an inference from that. It's nothing. What we do know is that at the time of the mediation there was an offer or demand of 19.5 million still out there.

Now, let's talk about AIG for a moment. The testimony that matters with respect to AIG on this issue is testimony of people who were actually in a position of authority to authorize settlement. And there's only one person you heard from on that score, and that was Tracey Kelly. Mr. Satriano had no authority, he told you, because he had joined the company just a few months beforehand.

So what did Ms. Kelly say? After Mrs. Rhodes was deposed and before the mediation, AIG reached a value on this case. And the value they chose was $4.75

million, 1.75 of which they viewed as what their maximum exposure would be at that point in time.

The case went to mediation, it didn't settle. I don't need to talk about that. But what I do need to talk about is what happened after the mediation. Rebecca Rhodes was deposed. They completed a little cleanup with Marcia Rhodes' deposition. And before the evidence started in the trial, the value was still 4.75 million. But because Professional Tree had settled out, obviously that meant that AIG recognized its contribution would be somewhat more. But the value was the same; it didn't change. Plaintiffs, $8 million; AIG, $4.75 million.

Offers and demands were exchanged during the course of trial, your Honor, but we learned from Ms. Kelly that the authorization for $6 million, the highest authority, the highest amount that AIG put on this case in terms of value, was not given until just before trial ended. And on moments before closing arguments in the underlying action, that offer of 6 million was extended to plaintiffs and it was rejected immediately without them even knowing about it. The highest amount that AIG put on this case, right or wrong, and it's not for me to say or for my client to

say whether it was right or wrong, but the highest amount that they put on this case was $6 million. The plaintiffs, we know, were nowhere near that. They were still well north of $6 million.

Plaintiffs have suggested in their trial brief, interestingly, that you can infer from the fact that AIG's offers during trial rose and that they ultimately, in June of 2005, agreed to pay almost $9 million, that you can infer from that, that if we had tendered sooner, if Zurich had made its policy limits available sooner, that's evidence that AIG and plaintiffs would have somehow reached a number that they could agree to and they could live with. What happened during trial and after trial, completely irrelevant on this question. Because the reason that -- and this is from Tracey Kelly. The reason that AIG's offer and settlement value on this case went from 4.75 before trial to 6 million at the very end of trial was because the evidence went in far better for plaintiffs than AIG's people expected.

Mr. Nitti was sitting in the courtroom, he was reporting on a daily basis, and the value rose because they realized that the evidence was going in very well for plaintiffs, that Marcia Rhodes and Harold

Rhodes and Rebecca Rhodes testified and were received by the jury very well. And that is what made the difference. To suggest that there was some point in time when a verdict was not imminent and when the pressure and risk to AIG was at a far lower point, that there was some point earlier when they would have put more than 6 million on the case is ludicrous. There's absolutely no basis to draw that kind of inference. Logic tells you that the point in time when they're going to put the most on the case is after they realize, oh, oh, the evidence went in much worse than we thought. And that's precisely what happened in this case.

Again, right or wrong, Judge, that's the number, and there was no evidence whatsoever in this case from which you could infer that there was a time when they would have raised that number higher if Zurich had put its money out earlier than it did, if we had taken some earlier steps to effectuate settlement. There's no way to draw that inference.

And so what you're left with at the end of the day here, Judge, is a gap of $2 million. And there's been no proof at all in this case that that gap would have been bridged. And there's nothing the

plaintiffs have said in their briefs and there's nothing in the transcripts and there's nothing in any document and there's nothing that Ms. Pinkham can say in her closing today that will lead you to the conclusion that it is more likely than not that an earlier effort to get AIG involved on the part of Zurich would have caused plaintiffs and AIG to reach a settlement of this case and would have stopped this litigation in its tracks. There's no evidence of that. And because there is no evidence of that, Judge, they have not met their burden of proving that the alleged delay on Zurich's part in making its policy limits available caused them any injury. We could not have effectuated settlement without a settlement by the excess insurer and the plaintiff. And that didn't happen because, as Mr. Todd said, some cases don't settle.

Because there's no causation, Judge, there's no actual damages. There are no nominal damages allowed. And there certainly are no punitive damages allowed under that set of circumstances. And it's on that basis alone that the court can enter a judgment in favor of Zurich on this complaint.

But lest you think I'm finished, I need to

talk about the issues of liability and damages. And it's interesting now, your Honor, at the close of evidence that plaintiffs have this sea change in their theory and now want to focus on this, quote, negligent investigation, despite that their own expert says that Crawford did a great job, was acting on behalf of Zurich. That's what their expert says. Now we've got a change in the theory. They want to convert this case into something different.

Well, the question really in this case, your Honor, is, Did liability and damages in the amount of 2 million or more become reasonably clear at some point before Zurich took steps in November of 2003 to get the excess insurer involved? The test is -- and we briefed this for you, your Honor -- the test is, Can we say that no insurer would have made the decision to tender the limits in November 2003? Can we say that no reasonable insurer would have made the decision in that time frame? And the answer is clearly, No, we cannot say that.

Now, the plaintiffs have changed their tune, not only before trial but during trial and now after trial, in terms of when liability and damages allegedly became reasonably clear. Their expert, Mr. Kiriakos

says, Well, the latest was April 2002. At that point you knew you had to put your money out there. And then he says, Well, maybe it was September 2002. That's realy when it was, it was September. And now in the trial brief, plaintiffs have a whole bunch of different dates out there and they get closer -- they're moving in the right direction. They're getting toward January and they're going a little further into 2003, but they're not quite there yet. They're not quite at the truth. And the truth is that liability and damages did not become reasonably clear in an amount of 2 million or more until after Zurich had the opportunity to review, evaluate and verify the damage materials and documentation that it needed to properly make decisions on this case.

The plaintiffs' position really reflects an ignorance of industry custom and practice in terms of what a primary insurer's obligations are and what a primary insurer needs to do to evaluate a case. As nice a gentleman as Mr. Kiriakos is, he's dead wrong when he says that medical records are a red herring in a case like this. That is a preposterous statement, which he made several times.

He says, I, as a claims professional, can

evaluate cases in the abstract. I believe those are his exact words, your Honor. And that, again, is hard to believe that he got on the stand to say that, and it's hard to believe, because no reasonable insurance company would make a decision on a case of this type without documentation. And you heard that from Mr. Maser, who is a 44-year veteran in the insurance industry who has not bounced around from company to company but worked at two at which he was the senior most claim executive making decisions on claims nationally without any settlement or limitation on his settlement authority.

He testified that no matter what the policy limit is, the primary carrier has an obligation to do a thorough and fair investigation and thorough and fair evaluation of the damages. And it can't do it based on words made by a gentleman like Mr. Pritzker, who's a plaintiff's counsel, and it can't do it based on other secondhand information, because that's irresponsible and it's not consistent with good claim handling practices.

And they need to have documentation of what the injuries are, what the condition is, what the prognosis is, what the future holds in a case involving

an allegation of paralysis. That is a fundamental principle and it's consistent with logic. One has to be concerned in a situation, in any claim, with the possibility of inaccuracies in terms of what plaintiffs' attorneys represent about damages. And also you heard Mr. Maser talk about the concern for fraud. Now, that's not to suggest there was a concern of fraud in this case, but that is the reason why companies have to dig deeper and get the facts and get the documentation.

Ms. Fuell explained to you the types of records that a primary carrier needs to see. And I won't remind you of what all those were, but there's a pretty significant list. And again, the reason they need to see that is because it is independent, verifiable documentation from neutral sources that says what happened, how much did it cost, what does the future hold. And those things are critical in a case like this.

Your Honor knows full well, based on the evidence, that Zurich had none of that information, despite its efforts to get it, before November of 2003 -- I'm sorry, before September 2003. What you also know from the record is that after requesting this

information and relying upon Crawford to provide it, Crawford again is retained as a third-party administrator by GAF. GAF bought the services of claim handling from Crawford, not from Zurich. They bought an unbundled insurance program. So the claim handling services were performed by Crawford & Company.

Mr. McIntosh, as oversight person, had the role of overseeing the claim. He did that. He requested information and backup and documentation from Crawford as was reasonable and customary in the insurance industry and consistent with the wishes of the insured, GAF, that Crawford manage the claim and run the claim. Mr. McIntosh attempted to get verifiable documentation and he did it in repeated letters and e-mails and phone calls. And what we learned from the reports that he was receiving in 2002, the June report and the September report and the December report, was that Crawford had secondhand information that came from Mr. Pritzker. Crawford had some statements in there and comments about the potential case value, but Crawford's own witnesses told us, including Mr. Chaney and Ms. Mills, that they had nothing to base their comments on, not a single record, nothing else. Zurich asked for it; Crawford didn't

have it.

During 2003 there were additional reports that came in, reports in May and June and July. And Mr. McIntosh, from January all the way through August, was making requests, some of them fairly sharp letters, saying we really need this stuff. You're making recommendations of a $2 million reserve, you haven't backed it up, we need you to do so, please. He did that repeatedly. And Crawford continued to say in their reports that they were working with defense to get that material, that defense is going to forward that material and going to obtain it from plaintiffs. Bottom line, Zurich didn't have it. And if you didn't have it, you can't consider it and you can't make decisions based on it.

What Zurich understood from the Crawford reports was what any of us would understand by reading them that the information they had through July 2003, was secondhand information, not medical records. They were saying we're going and getting those, we don't have them yet. Zurich attempted during this time period in good faith and in the exercise of honest business judgment and consistent with industry custom and practice to get those materials, but it couldn't

get them because Crawford didn't have them.

This is not a matter of finger-pointing as the plaintiffs suggest, your Honor. Their expert says Crawford did everything they were supposed to do in this case. This is a matter of the records not being available to see. This is a matter of Zurich not having them. And as I said, if you don't have them, you can't review them and make decisions.

Even the medical records that were produced unbeknownst to Zurich in April were only on a part of the case, only on a part of the claim. There were no documents in there at all, your Honor, regarding future injuries, future damages, future economic losses. None of that was in there. That came in the demand package which Zurich received in September.

Damages became reasonably clear, your Honor, in an amount of $2 million or more in November 2003 as Karl Maser told you. He explained that Zurich needed appropriately and consistent with industry custom and practice some time to verify the damages that were claimed. So that's precisely what Kathleen Fuell did. She took that demand package and she reviewed it carefully and she reviewed the "Day in the Life" video. She looked at the damages documentation and made a

conclusion in her mind preliminarily that this is likely a case that will exceed our policy limits.

So what did she do? She took immediate steps to verify it further. She sought the input of defense counsel on the merits of the case and on the damages. She went to jury verdict research to try to look into things to get a better understanding of what a case like this might be worth. She looked at a defense life-care plan that was retained at the right time, says Mr. Kiriakos, after the plaintiff's life-care plan came in. She looked at all that information and she verified and made a determination in her mind that it was time now that liability was reasonably clear in terms of the damages. It was time to move this case toward a settlement posture. And that's precisely what she did.

It's worth pointing out, your Honor, and I'm not going to get into detail on this, because we did in the brief, but GAF's liability, the liability of the principal insured here, of the named insured, was clearly an open question. It was hotly litigated and hotly contested in discovery. And we've laid out for you in the brief, your Honor, the places where you see evidence suggesting that GAF was not in control of Mr.

Zalewski for purposes of a respondeat superior theory, which is the only theory plaintiffs had asserted against GAF. There was nothing in the reports from Crawford that suggested that there was, in fact, control exerted. Those reports only talked about the contractual liability of GAF, not vicarious liability.

Plaintiffs says, Well, Zalewski's liability was reasonably clear right away. You knew it was a rear-end collision. He had 800-foot line of sight. A guy with white gloves who was six-foot-four with a blaze orange vest was standing up in front of the car and the brake lights were on. He had 700 feet. Well, Mr. Zalewski's liability and the liability of his employer were more apparent, without question, based on the facts.

However, what was known about insurance policies that they might have had? It's not a matter of going and focusing on a way to shift your liability as an insurance company. It's doing your duty to your policyholder to make sure that you are not overexposing them. And it is customary for Zurich as a primary insurer and in fact required that they go out and look for other policies of insurance. And they did that, not in a manner that distracted them from what they

were doing in terms of investigation and evaluation of damages, they did it on a separate track by their coverage counsel. It did not impact what Zurich was doing. Mr. Maser told you that. It's very clear that that did not hold anything up. It was customary to do it and it was necessary to do it.

Your Honor, Mr. Kiriakos has offered you a number of opinions in this case. And I think if your Honor, on this question of when liability became reasonably clear, is looking at the expert testimony and is trying to decide whom do I believe here, I want to address that just for a moment briefly. And I want to address it in terms of qualifications.

Mr. Kiriakos said that, Hey, once you knew this was a rear-end collision, you knew that GAF was on the hook. That was established from day one. Again, that's a no-brainer. Once you knew that there was paralysis, or at least once the plaintiffs' lawyer told you that there was paralysis, you knew this case was worth $2 million, you should have put it up right away, April 2002.

Medical records, red herring. Don't need them. I don't need those to evaluate a case like this, Mr. Pritzker. That's what he said.

Whether DLS's policy was -- whether DLS had a policy, that doesn't matter. You don't need to look into that to know that you're liable.

Those are his opinions. They deserve no weight whatsoever, your Honor.

Mr. Kiriakos worked in a number of lower-level positions in a whole bunch of insurance companies in his career. The longest time he was with a company was four years. He got fired from one of them because of unsatisfactory performance. His longest employment was with a company that he founded, which basically took recorded statements from witnesses, Adjustors Outstanding, a TPA that had no authority whatsoever.

What was Mr. Kiriakos's settlement authority? What positions did he hold at any of the companies that he worked for over the years? His maximum settlement authority over his 27-year career was a half million dollars for a short period of time in 1990. His highest settlement authority, his highest authority to make decisions on claims involving paralysis or other thing like that since 1990 was $150,000. He has had no settlement authority of any kind in fourteen of the last fifteen years. And this is a gentleman who knows industry custom and practice and is in a position to

evaluate what Zurich did or did not do? Was in a position to value the case? I think the answer to that is no. I think his opinions are not worth any weight, your Honor.

I won't bore the court with a recitation of Mr. Maser's impressive resume, but I will tell you that this is a gentleman, who I said before, had unlimited authority to make decisions on cases at two major insurance companies. He worked his way up the Fireman's Fund over twenty-one years. He had responsibility for the entire country when it came to claims of all lines of business. This is a person who is an authority on settlement or on claim handling practices, on custom and practice in the industry. This is a person, if you are looking for standards, if you're looking to understand what companies should do, that's the gentleman you should listen to.

Briefly, your Honor, we've heard lots of evidence on this issue of "the Tender." It's the capital T and it's sort of emblazoned all over the documents. As I said, when it became apparent to Zurich that liability was reasonably clear in excess of 2 million, Zurich did what industry custom and practice required. It reached up to the excess carrier.

I talked about this before. We know that that stuff was effective to put AIG on notice, because it got them rolling. It got Mr. Satriano rolling up his sleeves and digging into the file and working hard to gather information and make sure that he can put himself and his company in a position to make decisions on how to approach this case and how to deal with the mediation. The fact that Zurich did not tender officially until January 2004, when Ms. Fuell contacted Mr. Satriano and said, You have our money, didn't affect anything. It didn't slow Mr. Satriano's reaction to the case. It didn't impede his investigation. He did everything that he needed to do when he learned from Zurich in November that Kathleen Fuell intended to tender the policy limits to AIG.

There is no industry practice or standard or custom that a tender of policy limits has to be in writing. No one has produced that. Because it doesn't exist and it never has. This happens all the time, as Mr. Maser told you. Companies work informally. So to suggest, as plaintiffs do, that Zurich, by not sending a formal letter until March 29, 2004, somehow delayed the ultimate resolution of the case is preposterous. There is no evidence that its delay or that its failure

to send that letter sooner caused any slowdown in the process of this case. AIG was moving forward on its task of gathering the information and preparing the case for resolution. There was a March 5, 2004 meeting that took place without Zurich and before the formal letter went out on March 29th. That is the best evidence that the time period between January and March, when Zurich put that formal letter out there, did not cause any delay.

And lastly, this defense cost dispute that has figured so prominently in this trial is, to use Mr. Kiriakos's words, really a red herring, if this is actually true. The dispute arose on March 29, 2004, your Honor, when Zurich sent its letter saying this is what our policy says. Because we've tendered to you, we don't have the obligation to defend anymore. That's when it arose, because AIG's response was, Wait a minute, our policy doesn't require us to defend, we have no defense obligation. That was the dispute. And how many days did it last? Four. Four days. And how was it resolved? Zurich stepped up. Its policy said you don't have an obligation to defend after you tender. But it did. Why? Because it wanted to look out for the interest of its policyholder and to keep

the case moving along and not let it get bogged down in a dispute over who was going to defend or fund the defense going forward. That, your Honor, is good faith, and that is what Zurich did.

I want to turn to damages, your Honor, as the third thing as plaintiffs need to prove in this case. We know that they have to prove actual loss, not something speculative, not a guess, but actual loss. And it's not just plaintiffs as a group. It's each plaintiff: Rebecca Rhodes, Marcia Rhodes, and Harold Rhodes. Yes, they're a team; yes, they're a family, but each has an obligation separately to prove damages in this case. None of them have.

We've talked about emotional distress and we've talked about in some of the pretrial memos and some of the summary judgment papers, we've talked about this concept of the frustration of litigation, which comes out of the Clegg case from 1996. What Hershenow says and what the Haddad case, Haddad v. Gonzalez case say is that, yes, you can recover emotional distress in a Chapter 93A if it is severe. Haddad v. Gonzalez goes on to say you have to prove the elements of intentional infliction of emotional distress. And there is also -- the name of the case is escaping me, which is

unfortunate, but it is in our brief. There's another case from the Bankruptcy Court which says we have found no case in Massachusetts saying that you can recover emotional distress in the absence of either physical manifestations of harm or intentional infliction of emotional distress.

The plaintiffs in this case have made absolutely no effort to prove the elements of intentional infliction, your Honor. There is no proof in this case that Kathleen Fuell or David McIntosh of Zurich acted with any ill motive or with the intent to cause the plaintiffs emotional distress. There is nothing that you could infer from any statement they uttered or any document they authored that could lead to that conclusion that could lead to that conclusion.

Extreme and outrageous conduct. Well, that's another element of intentional infliction of emotional distress, as the court is well aware. The allegation against Zurich is that you tendered your policy limits but you waited too long, and we had to go through a lawsuit, hundreds of thousands of which are pending in courtrooms around this country today. Is it extreme and outrageous conduct for us to seek medical records, seek information supporting damages? Is it extreme or

outrageous for us to insist on documentation of damages so that a reasonable, rational judgment can be made in a case like this.

Was the distress severe? Well, your Honor, what they've called it is the frustrations of litigation. We had to go through signing interrogatory answers. We had to go through depositions and we had to testify at trial and we had to feel uncomfortable driving to trial and had negative experiences because we were worried about finances. Your Honor, I worry about finances every minute of every day, unfortunately. I think many of us do. These are concerns that all of us feel. And I'm not minimizing any feelings that the Rhodeses may have experienced, but I will say that they do not rise to the level of severe emotional distress that the cases anticipate and call for. And there's a reason why they call for it, because the SJC has been abundantly cautious in opening the door to emotional distressed plaintiffs just a little bit to make sure that only legitimate cases get through.

Now, the plaintiffs rely on the Clegg decision, your Honor, which is really the genesis of this, quote, frustration of litigation concept, this

amorphous concept that comes out of that case. And they say, hey, we don't have to prove intentional infliction or anything else. All we have to show is that we're frustrated, that we had some anxiety.

I would challenge the plaintiffs to point out to you any language in the Clegg case, or any case that has followed it, that says that it was the SJC's intent to lower the bar for recovery of emotional distress simply because a plaintiff chooses the vehicle of Chapter 93A through which to pursue those damages as opposed to a common law tort. There is nothing in Clegg to support that concept, and there is nothing in any case that has followed it to support that concept. There is, however, case law, as we've put in our brief, that shows that the elements of intentional infliction are essential.

Mr. Rhodes testified that his distress stemmed from the fact that we weren't hearing from anyone, the insurers weren't getting to us. If you look at the newspaper article that was published in which Mr. Pritzker is quoted and Ms. Pinkham is quoted, you'll see that they weren't eager to hear from anyone early on, your Honor. They pursued what they called an aggressive strategy.

Counsel from day one was preparing this case to go to trial. Mr. Pritzker said I'm not afraid to antagonize insurance companies. Far from cooperating with them, I'm not afraid to antagonize them. And look at what I did. I filed so early that I got $2 million plus and interest for these folks. An aggressive litigation strategy, coupled with ignoring a request from an adjustor for documentation and information regarding damages for a full year. Does that reflect a group of people who are eagerly awaiting a resolution of a lawsuit? Or does it reflect aggressive pursuit of a trial date? I think that it is the latter, your Honor, clearly. And again, it is a question of, What emotional distress was really suffered here?

And as we pointed out in our brief, the other deficiency in the proof lies in the fact that plaintiffs have no ability to separate any alleged frustration of litigation that they experienced from any of the emotional distress that they were experiencing because of the very unfortunate and fundamental change in their lives which was caused by Mrs. Rhodes' terrible accident. Mr. Rhodes' life changed in dramatic ways, obviously, because his role changed on numerous levels, including becoming a mother

to Rebecca at times because it was difficult with Mrs. Rhodes having to really work toward recuperating and recovering. He had to deal with hundreds of medical appointments. He had many other sources of stress during that whole time period that were the cause of emotional stress, and they haven't shown you that the act of signing interrogatory answers added a level of distress which is distinct from that. And it's that deficiency that, in addition to the inability to prove the elements of intentional infliction, compels a conclusion that there were no damages for emotional distress here.

We've addressed the economic damages, your Honor, in our brief, and I would point out very briefly that the plaintiffs have waived their statutory costs that they incurred because they filed -- they entered into a settlement agreement, they bought out of an appeal, they filed a satisfaction of judgments; and the judgments that they said were satisfied were judgments that included interest and costs of action. They voluntarily filed a satisfaction of judgments, which is in the exhibits in this case. They waived statutory costs. They don't get them here against either of the defendants.

They also waived prejudgment interest, if there is in fact any evidence of them having -- of any of that being unpaid.

Post-judgment interest, your Honor, that's an interesting one, because plaintiffs never actually come out and say Zurich caused any post-judgment interest. And there's a good reason for that. Because in December of 2004, Zurich paid its full policy limit, plus post-judgment interest on the entire judgment, from the date of the judgments up through December 23, 2004. And under its policy, that extinguished any obligation it had to pay post-judgment interest.

Now, plaintiffs and AIG were still unable to settle their differences until June of 2005. That's not Zurich's problem. It wasn't Zurich's fault. Any accrued post-judgment interest that plaintiffs may be able to recover in this case certainly does not come from Zurich and it cannot possibly be held jointly or severely liable.

Your Honor, I don't feel I need to spend a lot of time on the issue of multiple damages, but I will say, as I said earlier, that these are reserved for cases in which an insurance company's conduct is egregious in which there is evidence of intentional

efforts and refusals to settle and ill will toward t plaintiffs and consciousness of wrongdoing and dishonest purpose. This is the language that comes out of the case law:

It is not -- they're not allowed for bad judgment or for negligence. And so even if it were possible to conclude that Zurich delayed its tender or did not offer its policy limits to AIG early enough, that there was some point in time when they should have made a decision without the documentation of the injuries. And even if you could find that there's a causal link between that and any of the damages that there plaintiffs have struggled to prove here, you cannot get to the conclusion based on the evidence in this case that Mr. McIntosh or Kathleen Fuell intentionally refused to settle or tried to wear the Rhodes family down. That's not what the evidence showed. The evidence showed a good-faith exercise of honest business judgment. And when it became reasonably clear to Zurich that the damages exceeded $2 million, it took immediate action toward settling this case. There's no basis for multiple damages.

The second to last point I want to make, your Honor, very briefly, and we've briefed the issue of the

constitutionality of punitive damages. I want to address plaintiffs' argument just very briefly. And they don't really take a stab at the elements of BMW v. Gore or Campbell. There's some scant reference to the elements, the guideposts. But there's really no effort to try to justify or explain why those guideposts compel the conclusion that the punitive damages award of either 24 million or 36 million against an actual damages award, which in their very best case, if they're very lucky, could maybe get to 500,000 or a million dollars, that they could show that that's not excessive, there's no way to get to that point.

What they say instead is that BMW and Campbell don't apply to cases that involve statutory punitive damages. They only apply to common law punitive damages. And they don't apply to cases decided by judges. They apply only to cases decided by juries. And they cite to some case law from Louisiana and Colorado and Oklahoma and Maryland for that proposition. And I will submit to the court that none of those cases support that proposition. The Maryland case they cite, this Lowry's Reports case, actually says the Gore guideposts may apply to punitive damage awards under federal statute, at page 461. That's what

that case says. That was a copyright infringement case where they were discussing whether the Gore concepts apply to compensatory damage award, not punitive damage awards. And the court said we're not going to mess with Congress's decision on compensatory damages.

They cite you to Gilbert v. Security Finance. That case involved a statutory cap of punitive damages at $500,000, and the court said there, We're not going to apply BMW because it's presumptively valid. If you have a cap, the defendant is on notice as to the potential severity of the penalty that will be imposed for unlawful conduct; therefore, we don't see that there's a due process issue here. And there are other cases, your Honor, that they cite which also involves statutory caps on damages, not something that's involved in this case.

What we have is a situation here where, under the Gore guideposts, clearly any punitive damages award is going to so far outpace and eclipse any compensatory award as to be ridiculous.

Twenty-four million dollars is what they seek against my client, your Honor, or thirty-six million dollars. The ratio would be so far beyond the realm of constitution as to be laughable. There is no way to

get there logically. It would be an unconstitutional deprivation of Zurich's due process rights under the Fourteenth Amendment of the Constitution to enter an award of multiple damages as the court has said it would be required to do with a finding of knowing or willful conduct here. I don't see any way that plaintiffs can say that those standards, that Zurich is not entitled to the constitutional protections discussed in Gore and Campbell and most recently in the Philip Morris case out of California.

Your Honor, I want to close my closing by pointing out that it's a very interesting place that Zurich finds itself in at the end of this trial. We know that the case didn't settle here, the underlying case didn't settle because, again, as Mr. Todd says -- I feel like I hired him actually, I'm using his name too many times. But as Mr. Todd says, there are some cases that settle and there are some cases that don't, and this case involved a gap between the plaintiff and the excess carrier that was too great to bridge. And before, it was just the plaintiffs pointing the finger at us, but now it's also AIG. And the finger is being pointed subtlety, but the finger is pointed to Zurich saying, You didn't do enough here. So what plaintiffs

say is, You did too much investigation. You went too far. You took too long. You shouldn't have looked so far into damages. You didn't need all those damages information. It was a red herring. You shouldn't have looked into whether there was other primary insurance. Your obligation was to settle the case. You shouldn't have even considered that. You waited too long to tender. You didn't need to focus on liability so much. You should have done it earlier.

And on the other hand, we have AIG pointing in the middle at Zurich saying, You guys didn't take enough discovery here. You didn't do enough investigation. You didn't make enough inquiry as to whether there was other primary insurance. You tendered when the case wasn't ready for us. It wasn't ripe for us to make a decision on this.

Interestingly, both sides point at Zurich. And it's very ironic when you consider the fact, your Honor, that it was Zurich that tried to move the case to settlement in November 2003 by telling AIG and everyone else on that conference call that they were going to tender limits. And it's ironic when you consider that Zurich tendered those limits eight months before trial started. And it's ironic when you

consider that Zurich didn't bicker over defending DLS and Penske and Zalewski when there was a question about it. They stepped up and they did it under a reservation of rights, and they continued to defend to keep that case moving along. And it's ironic when you think that the dispute over the funding of the defense obligation that arose and lasted for four days was resolved by Zurich stepping up and acting in good faith. And it's ironic when you consider that when the trial was over in the underlying case, it was Zurich that stepped and said, Here's our policy limits, here's your post-judgment interest, we want to get that money in your hands. It's very ironic that everyone points to Zurich, your Honor.

Zurich had $2 million. It made the $2 million available eight months before trial. The case didn't settle not because of the timing of Zurich's tender, it didn't settle because neither side could get -- the two sides could not get to the middle. They couldn't reach a resolution. And that sometimes happens. The reality in this case, your Honor, is that there was no violation of Chapter 176D by Zurich. There was no unfair or deceptive act or practice by Zurich in handling this case. There was the exercise

of honest business judgment and an attempt to effectuate settlement at the point in time when liability became reasonably clear. Plaintiffs have not met their burden of proof. They are not entitled to relief against Zurich American Insurance Company.

I want to thank you, your Honor, for all the time that you invested in the case. Personally, I am sorry that it went longer than it did, but thank you for your consideration.

THE COURT: All right. We'll take a break of five minutes and then we'll hear from AIG.

(A recess was taken.)

THE COURT OFFICER: This Honorable Court is back in session, please be seated.

THE COURT: Okay. Mr. Zelle.

MR. ZELLE: Thank you, your Honor.

MS. PINKHAM: Your Honor, is it your intent to take a break at 1 o'clock and then have some come back at 2, since the plaintiffs are entitled to one hour and forty-five minutes?

THE COURT: We're not going to cheat you out of your time.

MS. PINKHAM: Okay. I just wanted to confirm that would be the game plan.

THE COURT: I think we'll have to see. I think realistically you'll get half of yours in and then we'll come back at two and finish yours.

But, yes, you'll get yours in. Whether it's before or after lunch, we'll see what the timing is. Realistically we may give you an intermission, we'll call it an intermission, but the others don't need an intermission.

Mr. Zelle, you may proceed.

MR. ZELLE: Thank you, your Honor.

I am going to focus my argument on the legal decisions this court must make. I'm mindful of the fact that the court has taken, at least in my last count, eighty-seven pages of notes --

THE COURT: I'm on a hundred and two right now.

MR. ZELLE: -- concerning facts, and to the extent that they are pertinent to the legal arguments I'll present, I'll certainly refer to them.

I'm going to touch on a couple of topics. First of all, that there's no legal duty for an excess --insurance company to investigate a claim prior to tender. I'll touch on a point that, as a matter of law, the conduct of AIG after tender in investigating

the claim was reasonable. I'll note that any delay in investigating the claim was reasonable delay because it merited information that assisted AIG to comply with its obligation to effectuate settlement.

I will briefly address the fact that a formal, written tender, the tender requested, the request by AIG that the tender be in writing, was reasonable. If not, standard industry practice -- there's a dispute as whether it's standard or not, but there's no dispute that it was reasonable.

And I will make the points emphatically that AIG's conduct here fully complied with 176D for two reasons. Number one, prior to the time that AIG made an offer, liability was not reasonably clear; and secondly, all of the offers that AIG made were reasonable. And I'll briefly note before I come around to arguing that in detail, this court does not have to make a determination, at least with respect to AIG, as to when liability became reasonably clear. This court does not have to fix a date so long as it finds that AIG made a reasonable offer when AIG felt that liability was reasonably clear. It is that standard -- whether it is reasonably clear to the insurer, and that's an objective reasonable insurer -- that governs

here.

With respect to the duty prior in this case to March of 2003, when Zurich tendered its policy, the law is clear throughout the United States -- there's a plethora of case law that we've cited in our brief, there are treatises that we've cited in our brief, there are treatises that plaintiffs cited in their brief -- that support the proposition that there is no duty on the part of an excess insurance company to investigate a claim pre-tender. Moreover, in addition to the legal authority and the treatises, there is custom and practice which has been established by the testimony in this case that the excess carrier, in its custom and practice, waits for the primary carrier to reach up. And it is also custom and practice, as established by the testimony in this case and by the guiding principles that have been discussed in this case and that are reflected in legal authority, that excess carriers are entitled to rely on primary carriers to investigate and to evaluate liability, damages and coverage issues.

AIG complied with the industry standard. Moreover, despite the fact that there may not have been -- at least legal authority doesn't support the

proposition that there was any obligation to do so -- AIG did -- which is standard custom and practice in the industry -- that upon notice from the broker of the Rhodes' claim against GAF, they identified themselves, they identified the TPA, they identified the defense counsel, which would be the sources of information, and they advised Crawford, and by copy of the letter to Mr. Deschenes advised him that they wanted to be provided with all material information that would be developed relating to the liability of their policyholder, or any other insured party under that policy; to damages, that is, the injuries suffered by the plaintiffs; and to coverage.

Plaintiffs' argument that AIG should have prompted Zurich to do something more or to do things more quickly is legally unfounded. There's no authority, not even authority that they cite in the treatises -- and they do pull text out of treatises, but if you read the treatise in its entirety, it will make it clear that it is only where the excess carrier expresses an intent to take over a case that it has any obligation to prompt the primary carrier to cooperate or to do more. And that was not the case here.

The legal authority cited by plaintiffs on

this point, not surprisingly, is a lawsuit by an excess carrier against a primary carrier in which the excess carrier is accusing the primary carrier of abandoning its obligations. And in that case, the court did note, Well, the excess carrier could have prompted the primary carrier to do more. That's not the law and it certainly isn't the facts here. The letters that Ms. Kelly sent to Crawford, the follow-up telephone calls, demonstrate that there was sufficient prompting, if the court even wants to go that route.

I also note on that point that the guiding principles, as if espousing authority across the country, reflects the fact that the excess carrier is not in the standard practice, custom and practice, going to be prompting primary carriers to do their job. They rely on the primary carrier and they rely on defense counsel typically retained by primary carrier. But in this case, a nuance that has caused some issues, at least factual issues, it was GAF that retained counsel.

The obligation that plaintiffs seek to impose on an excess carrier to do something, to investigate prior to tender is not only contrary to industry practice, it ignores the economic realities on which

those practices are based. Our brief cites to authority which explicitly recognizes the economic realities. And I think this court should observe that to impose upon an excess carrier any obligation connected with the defense of the policyholder, whether it's investigation, evaluation or negotiation prior to tender, would harm the public and would harm this Commonwealth inasmuch as excess insurance would not be as affordable as it is today. The economic realities are starkly ignored by the plaintiffs in their argument.

Now, with respect to post-tender claim handling, what is required is that -- and this is not an element of this claim -- but what is required by 176D, Section 3(9)(d) is that insurers reasonably investigate claims. And as you heard through testimony from the experts and through a perusal, I presume, of the guiding principles as cited in certain authority, industry practice is to thoroughly evaluate claims -- excuse me, thoroughly investigate claims before evaluating them. And that benefits the policyholder. And that benefits, in a claim like this, a third-party claimant. The obligation, or at least the industry practice to thoroughly investigate claims, is one that

is designed to expedite effectuation of claims. It is designed to insure that meaningful settlement negotiations take place and that a meaningful assessment of settlement value can be achieved.

The evidence presented in this case is not contested by plaintiffs with respect to whether the investigation undertaken by AIG after tender was thorough. The suggestion is that it was unnecessary or unreasonable. And plaintiffs rely on bootstrap logic to support that proposition because they argue the valuation established or the value of the claim established by Ms. Kelly, and by Mr. Nitti for that matter, was not explicitly based upon anything that was said during the deposition of Mrs. Rhodes or Rebecca Rhodes, that it did not refer explicitly to the report or the IME. The report hadn't even been prepared. That the doctor who performed the IME wasn't presented as a witness at trial. But that bootstrap logic falls apart if it's viewed in context of the insurance company's duty to investigate and its custom and practice to investigate thoroughly. And it's also flawed inasmuch as it isn't consistent with the underlying purpose of a thorough investigation which is to enable insurance companies to meaningful evaluate

claims and to provide plaintiffs whether they are the policyholder or a third-party plaintiff with a fair, justifiable assessment of the settlement offer that it makes.

The evidence here is unrefuted that taking a plaintiff's deposition in a personal injury case is reasonable. And it is virtually undisputed -- there was some hedging by Mr. Kiriakos -- that it was absolutely necessary in a case like this to enable an insurance company to meaningfully evaluate the claim. Similarly, an IME is something that no reasonable insurance company -- and I'll cite the Hartford case which sets a standard -- would any reasonable insurance company evaluate this claim without an IME. You heard no evidence that it would; and therefore, under the Hartford standard, it isn't bad faith for AIG to have pursued an IME here.

With respect to the medical records of the pre-existing condition of Mrs. Rhodes, where there is a claim that the accident caused by GAF and the driver, Mr. Zalewski, exacerbated an existing injury or an existing condition, it is preposterous to suggest that it is unreasonable to seek that information as part of the evaluation of the claim.

Now, when the baton was passed to AIG, AIG did what was reasonable. And AIG can't be faulted for what was done pre-tender because AIG didn't control the defense and AIG had no duty to even participate in the defense. The fact that it took some time after the tender is not evidence that it was unreasonable to do it. There is an issue presented to this court for determination as to whether it was done expeditiously or whether there was unfair or deceptive delay. There was delay. No argument can be made that there wasn't delay. But was that delay due to unfair or deceptive conduct on the part of AIG? It wasn't.

The evidence is clear there was a delay for one reason and one reason only: AIG's efforts to exercise its contractual right to associate in counsel was impeded. And you heard testimony, you asked the question, your Honor: Is that a breach of contract? And the answer is, Yes, it was. It was inappropriate. It was a breach of its obligation under the insurance policy for GAF to oppose or interfere with the efforts by AIG to associate in counsel. AIG could not unilaterally take over control of the defense, or the negotiation for that matter.

There's testimony that there was an effort by

AIG to involve Mr. Conroy in the defense and to have Mr. Conroy directly contact Mr. Pritzker. Who knows what would have happened if that transpired. Maybe that would have aggravated the plaintiffs. Maybe it would have set a better course for further negotiations. But it didn't happen and it didn't happen for one reason: GAF said no. That can't be put on the shoulders of AIG. AIG is not responsible for that.

AIG is also not responsible for the fact that Mr. Deschenes, who was directed by GAF, did not, after November or after March, undertake any further discovery. He didn't take the depositions that AIG wanted taken. He didn't obtain the IME that AIG believed was necessary and a reasonable effort. And he didn't further pursue the medical records. But it was on Mr. Deschenes' watch, it was GAF that was in control, that prevented any further investigation between the time there was a tender and the time control was relinquished to Mr. Campbell, or to AIG, in June 2004. And I don't think any legitimate argument can be made that the time between June 2004 and the time that AIG made its first settlement offer at mediation in August was an unreasonable delay. In

fact, it was essentially sanctioned by plaintiffs' own counsel who agreed let's get the IME and then take the deposition, let's wait until the trial court rules on the motion to compel the medical records before we take the deposition.

The evidence that has been presented in a form of letters by Mr. Bartell have no relevance. They are immaterial. This court has observed or ruled that they could be offered for notice. And they certainly did put AIG on notice that plaintiffs wanted to settle. But we were on notice of that as of November. It purports to put AIG on notice of unfair claims practices, but it doesn't really set forth unfair claims practices. What Mr. Bartell does is he tries to impose a duty on AIG not to acknowledge coverage, to confirm what AIG conceded in February of 2002, that it did provide coverage. Ms. Kelley, in responding to the notice and advising Crawford and counsel retained by GAF that it is the excess carrier and it wants information, established beyond reasonable contest that AIG would provide coverage. And noteworthy in the letter from Mr. Bartell saying it's been two years, you haven't affirmed coverage, where did Mr. Bartell or GAF ever ask National Union to confirm coverage? It is a

complete red herring, your Honor, it's immaterial, and most significantly it didn't in any way interfere with AIG's efforts to evaluate the materials that had already been provided to it. All it interfered with was AIG's effort to associate in counsel, and as I previously noted, it was through no fault of AIG that a counsel wasn't associated in; it was entirely GAF's fault.

Now, the key issues here, your Honor, are whether AIG complied with 176D. And as this court may have observed, those cases which discuss an insurer's duty to effectuate settlement are not a model of clarity and precision. Nevertheless, your Honor, distilled to its essence, the statute requires two things when liability is reasonably clear -- when liability is reasonably clear, and I'll discuss that it wasn't prior to the offer in a moment. But when liability is reasonably clear, an insurer must, one, put a reasonable value on the claim and a value that reflects that insurance company's exposure. Obviously, the latter derives from the former. You can't determine

AIG's exposure unless you know what the value or a reasonable value of the claim was.

Secondly, the insurance company under 176D Section 3(9) Subsection (f), requires when liability is reasonably clear, that an insurance company extends an offer which demonstrates an intent to resolve the claim for that reasonable value. There is no authority for the proposition that an insurer must at any time make its best offer. What it must do is effectuate settlement. And an insurer must make a reasonable offer, but that is not necessarily an offer that reflects the reasonable settlement value.

What a reasonable offer must reflect, or put another way, for an offer to be reasonable, it must reflect that this insurance company intends to settle the case in the reasonable range. And we've heard testimony from two witnesses, Mr. Cormack and Mr. Todd, about signaling a negotiation. And there is a plethora of authority that talks about negotiation being taken into consideration by the Legislature when it drafted this section of

176D.

And the case law makes it clear that the reasonableness of an offer must be judged in relation to (a) the value of the case, that is, what a reasonable insurance company would put on the case; and the amount of the demands. In this case, I'm not going to belabor the issue. The demands were extraordinarily high. The offers were clearly gauged to reach the reasonable settlement range. And that is a range that I'll talk about in a moment. It doesn't even matter which range you accept. Even plaintiffs, if you accept that range and you look at the offers by AIG, they would be construed by an experienced negotiator to signal a willingness to settle in any range this court may find was reasonable. But I will argue what the evidence I believe establishes is the reasonable range.

Before I do that, I want to touch on the fact that there is no evidence which could reasonably be found to support the conclusion that liability was reasonably clear before AIG made its first settlement offer. The relevant

inquiry is whether AIG believed that GAF's liability with respect to damages in this case was clear enough to meaningfully evaluate the case. And I'm not going to recite the authority or argue the cases, but I will note that the Bolden case, the O'Leary-Alison case and the Tyler case all support the proposition that reasonably clear -- the reasonably clear in whose mind? -- is the insurance company's mind, or a reasonable insurance company's mind.

No reasonable insurance claim professional would say that a complete and meaningful evaluation of this claim could have been accomplished, or any catastrophic personal injury claim, could be accomplished without depositions of the plaintiffs, an IME, medical records, and an analysis of other sources of insurance or funds that would contribute to the settlement. Nor would any reasonable claim professional attempt to determine the exposure to his company without thoroughly evaluating the other available insurance. And I have mentioned this before, no reasonable insurance claims professional would attempt to evaluate or place

a value on his company's exposure without understanding, or evaluating at least, the third-party contribution that may come from, in this case, McMillan's Tree Service.

AIG looked into all of those issues. AIG evaluated all of those issues. AIG came up with a number. And although AIG never obtained all of the information it would have liked to have had, it nevertheless put a reasonable value on the case and made reasonable offers.

So let me talk about the offers, and, really, this is the last point I'm going to address. All of the offers were reasonable because they were ones that signaled that AIG put a reasonable settlement value on this case. It doesn't have to be our best offer and it doesn't have to be one that will settle the case or that is even within the reasonable range. It had to be one that signals that the insurance company will settle within the reasonable range. That's the reasoning behind the legal authority that the plaintiffs' demand may be taken into consideration.

Again the Bobick case, Forcucci, the

Almy case, which was I believe Judge Fabricant, and the Panzarella case, another Superior Court case, all reflect the recognition by courts that the Legislature must have considered negotiation when it drafted 176D 3(9)(f).

The court -- Forcucci was the first one, other courts have cited Forcucci for the proposition that reasonableness is to be considered in light of the situation as a whole. And I submit that that should be looked at through the lens of, What offers are going to move the plaintiff into a range where the case can get settled? That's the situation as a whole, through the lens of effectuating settlement.

Again, as Owen Todd explained, negotiation is intended to signal where you want to end up. And Owen Todd explained that the offers made by AIG, its first offer of $2.75 million, its last offer at mediation three and a half million dollars, did signal to someone who can read the signals where AIG wanted to end up. And this takes us to a point that Mr. Varga noted where this case should have ended up, at

least in the perception of AIG, and I will explain why that perception was reasonable, was less than where plaintiffs were willing to accept. And I'm not suggesting that they were unreasonable, I am suggesting that it doesn't matter what they think is reasonable. What matters is what an objective reasonable number is.

An objective analysis certainly supported Mr. Todd's testimony that 4 to $6 million was a reasonable range. And but for the very first offer made by AIG at mediation, which obviously was an opening offer intended to signal to plaintiffs we're never going to pay you anything close to 19 million or 16 million, but it also signaled that AIG is willing to settle in the 4 to $6 million dollar range.

And why is that reasonable? Well, Mr. Todd explained that, in his opinion, it's reasonable because that is where cases settle. And he has as a mediator effectuated the settlement of paraplegia cases and other comparable cases that involved severe bodily injuries and relatively similar special damages.

His experience is hundreds and hundreds of mediations, nearly 100 arbitrations. His experience includes sitting on the court in Norfolk County, a county which, based on his experience, he opined was a conservative county. And he testified that 4 to $6 million was reasonable settlement range. I submit, your Honor, there are few people who bring more experience or credibility, or more integrity to the seat of an expert witness on the subject of evaluating claims and valuating claims than Mr. Todd. I submit that his testimony that 4 to $6 million was a reasonable value is unimpeachable.

I submit that Mr. Kiriakos' testimony, and I try not to even mention the name, is simply lacking in credibility. Of course, on cross-examination he gave up some very helpful testimony, and inasmuch as that's contrary to the interest of plaintiffs, it has some credibility. But his testimony that that settlement value at a particular time, or at any particular time, was 8 to $10 million, was based on a feeling. It should not withstand scrutiny; it should not be given any credibility. The

reasonable settlement range is 4 to $6 million The efforts by AIG to reach a settlement in that range are clearly demonstrated by its settlement offers.

I don't have anything further, your Honor. I note that in plaintiffs' trial brief they don't even mention post-trial negotiations. There was scant evidence presented on that. I submit it isn't an issue. It is addressed in our brief. We make argument based on the testimony admitted that the appeal was reasonable, that the settlement offers were reasonable, but I don't think any further explication of the law or the facts bearing on post-trial offers is necessary.

If there's no questions from the court, that's all I have.

THE COURT: Well, I do have a few questions, which I'll --

MR. ZELLE: I'm sorry. This on the liability issues. I apologize to Mark as well as the court.

With respect to causation and damages, Mr. Cohen will, as he did in the summary

judgment hearing, address those points.

THE COURT: Then I will save whatever I have, if it's still there at the end. So, Mr. Cohen.

MR. COHEN: Thank you, your Honor.

Thank you, good morning. Your Honor, as Mr. Zelle just noted, I'm here to talk about the causation and damages issues, and the first issue that I'd like to address is causation.

Mr. Varga spoke rather eloquently about the law. As you know, we discussed this in detail at the summary judgment motion, and my understanding of your opinion as expressed then is the plaintiffs would have to prove at trial that they would have accepted a reasonable offer if it was made. And that makes perfect sense because the damages that they've identified, for example, that they had to incur additional costs at trial, would only have been incurred if -- would not have been incurred if -- excuse me, would have been incurred in any event if they hadn't accepted an offer.

Similarly the emotional distress or stress or frustrations of litigation, or

whatever it is they're claiming, of going through a trial would have happened in any event if they had turned down a reasonable offer.

Mr. Varga talked about the Hopkins case. And as you mentioned in the summary judgment hearing, that case is distinguishable, because in that case we know what would have happened if a reasonable offer was made. A reasonable offer was made quite a bit later after the court found that an offer should have been made, and it was in fact accepted by the plaintiffs.

The only other case that the plaintiffs have cited in connection with this causation argument is the Bobick case, and in that case neither causation nor damages was at issue at all because the court found that there was no 93A violation in the first place. So any statements that were made by the court regarding causation in that case are purely dicta.

Both the Hopkins case and the Bobick case were decided before the SJC decision in Hershenow, which I would submit, your Honor, has clarified exactly what a plaintiff in a 93A case

has to show. And we discussed this in tremendous detail at the summary judgment hearing. It is discussed in our brief. Mr. Varga mentioned in his arguments, so I'm not going to get into it in detail. But basically what a plaintiff has to show is that they suffered a loss, that they are worse off in some respect by some violation that a 93A defendant committed than they would have been if the violation hadn't been committed.

So where's the loss? Here, the plaintiffs assert that we failed to make a reasonable offer of settlement after liability was clear. We've discussed in a lot of detail, and Mr. Zelle has discussed, that liability wasn't reasonably clear before the mediation of this case. Mrs. Rhodes clearly hadn't reached an end result. Discovery needed to be done. I'm not going to repeat that, you have our brief, and I'm going to stay away from the factual arguments as much as I can, but in the event that the court were to find that we didn't make a reasonable offer at a time when liability was reasonably clear, you'll then have to

decide, in order to determine whether the plaintiffs would have accepted such a reasonable offer, what a reasonable offer would have been.

Well, what evidence do you have to go on to answer that question? Very little, your Honor. And it only comes from one person and that's Mr. Kiriakos. Mr. Kiriakos testified that based on his vast experience in handling paraplegia cases, namely two cases that he's had in the course of his 27-year-odd career in the insurance industry, that the reasonable value of the case was various things. And it's changed over time.

First, he said in the answers to interrogatories, which he said on the stand, I wrote that myself. So those were his words, and they were signed under oath by the plaintiffs as their expert testimony. He said a reasonable offer would have been 6 to $8 million.

Later, at trial, despite nothing whatsoever in the interrogatory answers suggesting, implying or indicating in any way that the 6 to $8 million was different at the time of the mediation or at trial -- in fact,

the interrogatory answers basically refer to the entire time period, as I went through with Mr. Kiriakos on the first day that I cross-examined him. In any event, then he comes into trial and goes, Well, no, I only meant that's what it was worth in the summer of 2003.

Well, so then I cross-examined him further and I referred him to the Crawford reports, that he talked about Crawford did a bang-up, terrific job and everything they did was right, and by the way I just happen to work for Crawford now. Well, in any event I asked him about the Crawford reports. There was one in September 2003, there was one in October 2003, there was one in November 2003. They all said a reasonable valuation of the case -- they didn't say whether it was the worth of the case or whatever. They said a reasonable valuation of the case would be 5 to $7 million. I said, Mr. Kiriakos, if 5 to $7 million is a reasonable range for this case, wouldn't you have to agree that $5 million dollars is a reasonable range? And he said yes. He said it was reasonable in September, 2003; it was reasonable in October

2003. But by November 2003, one month later, maybe it wasn't so reasonable. I would have picked something a little bit higher, he said.

Well, the issue in this case isn't what Mr. Kiriakos would or wouldn't have picked. The issue is what a reasonable offer was. And maybe Mr. Kiriakos would have picked a higher number than somebody else. We know that Specialty National, the insurer for the tree service, chose 4 to $5 million --

MS. PINKHAM: Objection, your Honor. There's no evidence you specifically excluded any evidence hearsay from a motion filed in district court. Move to strike.

MR. COHEN: Your Honor, Mr. Cormack testified specifically to that without objection at trial.

MS. PINKHAM: And again, your Honor, there's no substantive evidence, and your Honor specifically excluded it during the testimony of the fact witnesses.

THE COURT: I will note the objection. If it's not part of the evidence, I will not consider it, but I don't want to resolve the

dispute right now.

MR. COHEN: Thank you, your Honor.

In any event, assuming that a reasonable offer of $5 million in October 2003, as Mr. Kiriakos himself conceded, the only difference between October 2003 and the time of the mediation eight or nine months later was that some more interest had run. So let's say the interest on $5 million would have been another eight or nine percent, which takes you to maybe $5.4 million, or let's say even $5.5 million. That's the only evidence that you have from which you can determine what a reasonable offer would be.

Now, would the Rhodeses have taken that $5.5 million offer? The evidence is resoundingly clear that they never would have. Harold Rhodes said that in the interrogatory answers he signed on his behalf, on Rebecca's behalf, and Marcia Rhodes said that in her interrogatory answers as well. So we know the answer to this question. If a reasonable offer had been made by AIG and if you find the offers should have been made earlier or that they

weren't reasonable when they were made and you choose to adopt Mr. Kiriakos' testimony based on his vast two-case experience in paraplegic cases, then you have to assume that a reasonable offer of $5.5 million or so made at the end of 2003 or early 2004, that would never have been accepted by the plaintiffs. So therefore there's no causation.

Now, the plaintiffs in their own brief acknowledge that a $6.6 million offer would have been reasonable on March of 2004. Would the plaintiffs have accepted that offer? We know the answer to that as well. They would not. Mr. Rhodes testified at trial before the mediation and he said in his interrogatory answers before the mediation he would not have accepted anything less than $8 million to settle the case. He would not have accepted what his expert, what his attorneys in their briefs say would have been a reasonable offer. Therefore, there can be no causation for failing to make a reasonable offer.

Now, what is that important? Because 93A is designed to effectuate settlements. It's

not designed to require an insurance company to make a useless offer that will never be accepted, that the plaintiffs say specifically they will not accept. What is the point of making an insurer go through the motions of making an offer that the plaintiffs say I wouldn't have accepted anyhow? What is the point of trying to award 36 or $40 million of damages because an insurance company didn't make on offer that the plaintiff testifies under oath I would never have accepted? Clearly, there shouldn't be any basis for any loss, for any 93A violation, for any actual damages, for any multiple damages in that situation.

Now, let me get on to some of the other damages issues.

First off, the plaintiffs say that they sustained emotional distress related to the frustrations and stress of trial. And we heard Stephen Rhodes come in and testify about facial expressions and tone of voice. And the plaintiffs themselves all came in and they testified that they were upset, that they were dismayed, they couldn't believe things were

going on, that they were stressed. That is not the stuff of emotional distress damages in Massachusetts as our courts have made crystal clear. Not only in 93A cases, but in every case, a plaintiff has to show more then mere upset, distress, anger, grief, humiliation. That's what the SJC says. There is no one single Massachusetts case that has ever awarded emotional distress damages, either in a 93A cause of action or in any other case for that matter, unless the plaintiff has proven one of two things: intentional tort, number one; or number two, that there is some physical harm caused by the emotional distress.

Now, the Rhodeses have all either stipulated or testified that they had no physical harm. Perhaps that's because they didn't want us to get their medical and psychological records. I don't know. That would be only speculation on my part. But in any event, they stipulated to that. They have not alleged, pled, or proven that there was any intentional infliction of emotional distress.

Now, Mr. Varga already talked about the

Haddad case, and the plaintiffs don't say that there was intentional infliction of emotional distress, we've proven that. They don't say that. What they say instead is that Haddad does not require intentional infliction of emotional distress. But if you read the decision, you can only reach one conclusion, the whole heading in the section is entitled, "Emotional distress damages in a 93A case."

But let's look at it a little bit more logically, your Honor.

Now, what the plaintiffs say is that if you're alleging intentional infliction of emotional distress, a common law cause of action for that, and you're also alleging violation of 93A, in those instances you have to prove that the distress was intentionally inflicted on you and all of the elements that go along with that, that it's outrageous and would not be tolerable in any community, that the emotional distress is severe, et cetera. But according to the plaintiffs, if you're only seeking recovery for, to use their term, a garden-variety 93A violation, then you don't have to prove

intentional infliction of emotional distress.

Now, how could the possibly make any sense?

Basically what the plaintiffs are saying is the more egregious the behavior on the part of defendant, the higher the burden of proof is. So if a defendant acts in an extremely egregious fashion to intentionally inflict emotional distress on a plaintiff, then the plaintiff has to prove intentional infliction of emotional distress. But if there's just a mere 93A violation, you can recover emotional distress without showing this intentional, willful, outrageous conduct or severe emotional distress. I would submit, your Honor, that that is completely nonsensical.

This case, in my opinion, proves exactly why emotional distress shouldn't be allowed and isn't allowed in cases where there's not an intentional tort and there is not any physical harm that the plaintiff is alleging. In this case, there's no way that you as a finder of fact, or any judge, or any jury, if this had been a jury case, could possibly put a

number on the testimony that the plaintiffs gave about their emotional distress. I don't doubt that they had some frustration over having to litigate a case, as does any plaintiff in any case. I'm sure nobody likes to have their deposition taken and have an IME or whatever, but that's kind of the facts of life of bringing a suit and litigating against somebody.

But how can you put a value on tone of voice, facial expressions, I felt bad, I felt nervous, I felt a little bad? That's just not something that anybody can value, nor is it something that there's any concrete way to determine the extent to which it's true or isn't true.

We know that the Rhodeses were obviously going through a great deal of emotional distress as a result of Mrs. Rhodes' accident and injuries and the upset of her life. How can you as the fact finder possibly sort out to what extent the distress was caused by that as opposed to having your deposition taken, et cetera?

Again, the cases make clear that when

there is an award of emotional distress, the emotional distress has to be reasonable. And is it reasonable for somebody who has a net worth of $900,000 and has just settled with a company for $550,000 to be extremely worried and distraught about their financial situation? I would say probably not.

The other problem with emotional distress is you have three separate plaintiffs here. They each have to prove their case. They each have to prove that AIG failed to make them a reasonable offer of settlement. None of them -- the plaintiffs have introduced not one scintilla of evidence of what a reasonable offer would have been for each of their individual cases.

But getting back to the emotional distress component. Rebecca Rhodes testified she didn't even know she was a plaintiff until a year after the case was resolved and she had been paid, or her parents had been paid on her behalf. How can somebody who doesn't know they're a litigant suffer and be compensated for emotional distress related to having to litigate

a case?

Plaintiffs say, Well, maybe she didn't know she was a litigant, but she knew that she was going to have to testify as a witness at the trial and she was concerned about her parents. Well, if that's the test for awarding emotional distress damages, where is the end of it? Can Mr. Rhodes, Judge Rhodes, come in and say, Gee, I was really distressed about having to talk to Harold all the time about how the trial was going and they weren't settling and now I'm entitled to come in and recover for my emotional distress.

Cousins, grandparents, nieces and nephews, can they also come in? Can any other witnesses at the trial come in and say, You owe me money under Chapter 93A because I had to testify in this case that you should have settled? Well, that just doesn't belie, your Honor, and there's no authority to support it whatsoever.

As far as the out-of-pocket costs go, first off, they settled this case. They resolved the case and as part of the settlement

AIG agreed to forgo the appeal. And what the plaintiffs did as part of the settlement is they agreed to forgo a portion of the amount they would have collected if they had won the appeal. So there was consideration on both sides, and as part of that consideration the plaintiffs had waived and relinquished any right to complain about any costs that they incurred in connection with the trial.

In addition to that, they filed a motion for costs in the underlying case, which hadn't been acted upon at the time of the settlement, and that's something that they gave up as part of their settlement, that we won't seek those costs, but yet they are seeking the exact same costs as damages in this case.

The costs also, your Honor, include a very large component of overhead. There is copying costs at 20 cents a page. There is Westlaw costs, which includes the costs where the Westlaw computers are stationed. There's faxes at $1.25 a page. And we've gone through, and our trial brief contains quite a bit of case law saying that whether it's reasonable to

charge your clients for that or not, it's not reasonable to recover that as an element of damages at trial against somebody else.

Now, the other reason that the plaintiffs can't recover any economic damages is because, by not settling the case, they recovered many millions of dollars more than the amount that they say or their expert says would have been reasonable to settle it. And again, that gets us back to the Hershenow case. Hershenow again said that a plaintiff has to show that a 93A violation caused a loss, caused the plaintiff to be worse off in some respect than the plaintiff was before. And the Rhodeses, fortunately for them, are not worse off by taking this case to trial, rejecting the offers that were made, and having obtained a judgment of nearly $12 million in the underlying case. Basically they're saying you did something bad to us by not offering us 5 million or 6 million or $8 million before trial, and I was so damaged that I had to go to trial and recover $12 million. Well, where is the loss that they sustained as a result of that?

This is not a case where a reasonable offer wasn't made and then later they accepted an offer before trial and they can say, Well, you know, we lost the interest and the use of that money. Here they've netted 4 million or 6 million or more by taking this case to trial.

Another reason why the plaintiffs can't recover any damages in this case is because none of the elements of costs that they've identified were addressed in their Chapter 93A demand letters. In fact, their forgone judgment theory, and many of the costs as well, can't be recovered because those damages, if they were damages, occurred after the 93A letters were sent. The first one, I believe, was in December of 2004. The case didn't settle until June of 2004.

Furthermore, as indicated in the Bolden case, there is at least an issue that hasn't been resolved by Massachusetts cases as to whether there is a, quote, unquote, judgment, that can be satisfied when the case settles after a trial. Here we know there was a settlement that the Rhodeses agreed to accept

$8.9 million or so from AIGDC, and the judgment that they obtained, including this 1 million dollars that they say they lost, was never collected on.

Not only the Bolden case, but other Massachusetts cases, I think in may be Bobick or possibly one of the other SJC cases, has indicated that judgment has a particular meaning under Chapter 93A law and it does not mean a settlement. A case that ends with a settlement does not end with a judgment, and a settlement can't be multiplied.

Now, I'd like to briefly address the constitutional issue, your Honor. Hopefully you won't get that far, but I know I only have about five minutes. Mr. Varga already said the cases that the plaintiffs have cited don't in fact provide any support for their position. One theory that they've talked about is that the Supreme Court cases on due process shouldn't apply when there is a statutory cap on punitive damages.

Well, aside from the fact that some of these cases do talk about the Gore and BMW

factors and other cases in which there has been a statutory cap, and I cite to you Austin v. Norfolk Southern -- I only have the Westlaw cite, 2005, U.S. Appeal, LEXIS cite 27298, Third Circuit; Tony Gollo Motors v. Chapa 2006 Texas LEXIS 1301. These cases have said that you do consider the factors when there is a statutory cap, but in any event, there is no statutory cap in our case. Chapter 93A contains no cap on punitive damages. If you have a billion-dollar verdict, theoretically you could double or treble that.

The only constraint on punitive damages after a judgment under Chapter 93A under this 1989 amendment is the amount of the judgment in the underlying case. We talked about this a great deal at the summary judgment motions, so I won't get into it in the great detail in the four minutes that I have left, but your Honor, the whole point of these Supreme Court cases is that, in order to award punitive damages in a civil case, the punishment, the punitive damages, has to fit the crime. In other words, the violation, whatever it is, the civil

violation that the defendant committed.

Here, under Chapter 93A's theme, there is no relationship whatsoever between the damages, the actual damages, the real world damages that AIG is alleged to have caused, and the judgment in the underlying case. Therefore, any award of punitive damages in this case would have to violate Chapter 93A. Even if you give the plaintiff all the damages that they are seeking, they would still be wildly disproportionate to any reprehensibility of any conduct and the ratio that punitive damages would bear to compensatory damages.

Again, I don't think there is any case law that would support the view that because this case is being decided by a judge and not a jury that the Supreme Court cases shouldn't apply. We're not claiming that the statute violates procedural due process, we're claiming a violation of substantive due process, your Honor.

Again, the last point they make is that punitive damages awarded to a statute shouldn't be subject to the due process analysis. We've cited a

number of cases to the contrary. The cases that they cited aren't on point. The Colorado case dealing with the Consumer Protection Statute deals with a statute in which there is potential trebling of actual damages. But here in our case we have potential trebling of a judgment that has no relationship whatsoever with actual damages. And I think Mr. Varga already mentioned that the other case dealing with copyright infringement, the court was concerned with what compensatory damages are, in that copyright infringement has statutory damages due to the difficulties in proving damages as a result of copyright infringement.

Anyhow, your Honor, I'd like to wrap up now. I would just like to say on behalf of myself and Mr. Zelle, thank you for taking so much care to read our submissions and listen to us talk. And if you have any questions, either Mr. Zelle or I would be pleased to answer them.

THE COURT: I think what I will do is I may have some questions, but I'm going to save it for the conclusion of all the arguments so as not to interfere with it.

MR. COHEN: Thank you.

THE COURT: Okay. Ms. Pinkham, why don't you plan to use an hour and five minutes and then we'll take a break and you'll conclude at the end of the lunch break. All right?

MS. PINKHAM: Thank you very much, your Honor.

MS. PINKHAM: There has been a lot of finger-pointing in this case and there's plenty of blame to go around. Both defendants have talked about it. Crawford didn't provide any backup, defense didn't give me the medicals, he didn't do jury verdict research, the insured wouldn't let us associate in counsel, they wouldn't cooperate with discovery, plaintiffs asked for too much money. There's a lot of that in this case, Judge, and I ask that you put that aside and focus through the smoke because this case must start and finish with Marcia, Harold and Rebecca Rhodes.

We all know what brought us here. On January 9, 2002, Marcia Rhodes turned left onto Route 109, stopped at the direction of Sergeant Boultonhouse, looked into her rearview mirror and saw a white truck bearing down on her. All

she had time to do was turn her wheels before an 80,000-pound truck slammed into her stopped car. So we begin with the most horrible chapter in the lives of Marcia, Harold and Rebecca Rhodes.

Your Honor, if you could only look at one exhibit in this case out of the 150 that we put in, I would ask that you look Exhibit 80A-1. It is Marcia Rhodes' victim impact statement. And I ask that you think about how this case would have turned out differently if, in November of 2002, when both Zurich and AIG were on notice of this claim, if either of them had bothered to follow up on the criminal proceedings against the driver, Carlo Zalewski. There's absolutely no evidence that they paid attention to that.

But Marcia Rhodes did. She was there in the Wrentham District Court in November of 2002 and she read he victim impact statement to the judge. I think you can draw a reasonable inference on how any representative of an insurance company would have reacted to Mrs. Rhodes, how it would have assessed her presentation and her eloquence if they had

bothered.

I'm sure you're going to have time to look at more than one document, Judge, so I want to highlight some of the key documents in this case, because, as I said, there's lots of smoke so you need to focus on the documents and the evidence.

Let's start with Zurich. The first document you need to look at, I would suggest, is Zurich's contract with Crawford, Exhibit 62.

Now, as much as Zurich wants to say that Crawford was GAF's agent, it's clear based on Exhibit 2 that Crawford was retained to do Zurich's bidding. Paragraph 3 of Exhibit 2, the first thing that Crawford is authorized to do is accept and acknowledge proof of loss.

Paragraph 4 contains an express limitation on Crawford's authority to act on behalf of Zurich. It doesn't say that Crawford is not authorized to accept notice of a claim. That's not the only express limitation of Crawford's authority in Exhibit 62. Clearly, Crawford was Zurich's agent for all purposes in this case, including accepting notice of a

claim.

The next document that I would ask the court to focus on is one that was a subject of a discovery dispute that you may or may not recall. Exhibit 64 is Zurich's Liability Best Practices guidelines. Zurich did not want to produce this document in this case, and it only did so after you ordered it to. The first page of Exhibit 64, at ZA-1236, talks about timely recognition and resolution of coverage issues. All applicable coverage issues are recognized immediately upon receipt of information evidencing potential coverage issues. They must be resolved proactively in a timely manner. Investigation of facts relevant to coverage issues initiated no more than two business days after receipt of information. That's the first thing in their guidelines.

Next is Customer Service, on page 1238. The insured and claimant are to be contacted within one business day. The case manager must be the one to make contact with those parties. Contact by third parties, such independent adjustors, does not qualify as contact. If

there is representation of the claimant by counsel, initial contact with the attorney should be made. This is what Zurich was supposed to be doing.

The next page, 1239, Investigation. The case manager is responsible for conducting an investigation into all aspects of the claim. The case manager should develop and pursue a focused and proactive strategy to obtain all necessary evidence information and should not abandon the investigation to counsel or the discovery process. An evaluation is to be completed and documented within no more than 30 days of receipt of said information.

And Zurich guidelines also address Reserving. Estimated realistic case exposure is proactively recognized as soon as possible but no more than 30 days from our receipt of information evidencing that exposure. Reserves are to be routinely reevaluated. The reserve is posted within the case manager's authority.

Now, all the witnesses who talked about Exhibit 64 said that, Yeah, Zurich's policies, that's industry standard. Well, it would have

been nice if it followed them in the Rhodes' case.

The next document that I ask that you look at, not surprisingly, is Zurich' insurance policy. That was marked as Exhibit 61. Now, we went through this at trial, but clearly in order for Zurich to establish coverage, which is the first thing it's supposed to do under its guidelines, it has to look at its policy and see who's an insured.

Now, we know from looking at the policy that in order to determine if the Massachusetts endorsement on hired autos that is found at BMCA-0103 of Exhibit 61, you have to find out if a vehicle is leased for a term of more than six months or longer.

There's other provisions in the policy that we also talked about during trial, particularly the other insurance provision at page BMCA-0075. That's a very important provision because it says for any covered auto you own, this coverage form provides primary insurance.

There's another provision right after

that that says regardless -- of subpart A -- This coverage forms liability as primary for any liability assumed under an insured contract. And that's a defined term as well.

So it's important to have looked at Zurich's policy in order to figure out what other documents Zurich needed to look at. Clearly, the other document that Zurich needed to look at was Penske's lease. That is part of the several tabs. In Exhibit 10, it's particularly Tab 12. It's entitled "Rollins Leasing Equipment," and there's evidence that Penske acquired Rollins.

If you look at Exhibit 12 -- excuse me, Tab 12 of Exhibit 10, and if you go to the last page, Schedule A, Bates No. BMCA-0045, you'll see the term in months is 54. So there, that answers the question.

The Penske tractor that was involved in the accident -- and it even actually, the exhibit, Schedule A, even includes the vehicle identification numbers. That makes it easy to cross-reference it with the police report. The Penske tractor that was involved in the accident

was leased for a term of more than six months; therefore, it was specified as a covered auto you own under Zurich's policy. Therefore, Zurich provided primary policy. Therefore, there wasn't really a need to go looking around for other primary policies because Zurich, if it had done its own analysis, would have understood that the Zurich policy provided the primary coverage.

What other document could Zurich have looked at that's also marked as an exhibit in this case? The DLS contract. That's Tab 10 to Exhibit 10. The DLS contract -- it's not very complicated -- and in fact, GAF's risk manager, Robert Manning, faxed an outline of what to look at to Mr. Chaney on January 10, 2002. That fax is Exhibit 1 in this case, your Honor. Mr. Manning suggested that Chaney look at paragraph 7. And in paragraph 7 DLS was required to get a policy, a general liability policy, and provide proof of that to GAF

Now, if Zurich really did want to find out if there were any other primary policies, all it had to do was ask GAF, because under the

GAF contract with DLS, GAF was supposed to have the proof, and if they didn't have the proof, well, then Crawford and therefore Zurich could have figured out much earlier in this case that it wasn't really worth the time to go chasing after a primary policy that didn't exist.

Now, the next set of documents that are obviously important in this case is 66. There's 66A through quite a number. You don't need to look at all of them, your Honor. 66A, though, is obviously important, as that document put both AIG and Zurich on notice that Zalewski was clearly at fault in this accident.

66D is the September 2002 transmittal letter from Crawford in which Crawford says, Hey, we think this case is going to be worth 5 to $10 million. Accordingly, both Zurich and AIG were on notice this was going to be a high-value case in September of 2002.

But Zurich doesn't want to rely on those Crawford transmittal letters. It says, You know, we can't rely on that. We don't know how he got that number. There's no documentation. Chaney didn't have any medicals.

Oh, really? He said he asked Mr. Pritzker for it in January and we still didn't have any medicals, so we had no basis upon which to determine whether there was any support for this 5 to 10 million valuation.

Well, your Honor, it's strains credulity to think that if -- if -- Mr. Chaney asked for medical records in a January 25, 2002 conversation and that the plaintiffs did not provide them as promised, although Mr. Pritzker did provide the police report to Mr. Chaney as promised, if Mr. Chaney wanted those medical records, if Zurich needed those medical records, then why not send a letter? Why not call them again? That never happened. No one from Zurich called Mr. Pritzker despite the fact that Zurich's own guidelines say you must have contact with the plaintiffs' counsel. That didn't happen here.

And it's not enough to say that Crawford screwed it up and didn't have any documentation. They also want to distance themselves from the defense counsel. Again, let's point the finger at Nixon Peabody.

Somehow Nixon Peabody must be at fault for the fact that we didn't have the documentation that we needed, despite the fact that our guidelines put the burden squarely on the case manager to go out and do investigation and gather documents. Oh, it must have been Nixon Peabody's fault. And besides, why could we rely on anything that they said? We certainly couldn't rely on anything that Mr. Pritzker said. And it was clear that Crawford & Company was only getting hearsay information from plaintiffs' counsel.

Well, your Honor, again, Mr. Chaney testified he only had one conversation with Mr. Pritzker, January 25, 2002. So how could it be that all of the other information that Crawford was transmitting in its letters came from Mr. Pritzker? Well, there were other counsel involved: Nixon Peabody; Corrigan, Johnson & Tutor. I think it's reasonable to infer that the defense counsel were talking with plaintiffs' counsel, and information was being exchanged among those individuals. And if Zurich can't rely on defense counsel, especially

defense counsel that it retained, including Corrigan, Johnson & Tutor, and Morrison, Mahoney & Miller, then I think there's a big problem in this case.

Zurich says it needed proof that Mrs. Rhodes was paralyzed. Well, then why didn't they ask for it, Judge? If they wanted to see the UMass medical records, they were sitting on the 17th floor at Brown Rudnick in April of 2002, waiting for someone to ask for them. No one asked for those medical records until 2003. So it's kind of hard to give Zurich any credit for doing a reasonable investigation when David MacIntosh did nothing from January of 2002 to August of 2003. Yet, he's complaining that he doesn't have the documents, Judge. Well, your Honor, I would submit it's not reasonable to complain that you don't have the documentation to do an evaluation when you don't even follow your own guidelines that places the responsibility on you to go get it.

It wasn't until December of 2003 that Zurich created its own analysis of the case. Crawford had done one in September of 2002, but

Zurich didn't have any faith in it. So it did its in December of 2003. And guess what? Zurich's valuation was twice as high as Crawford's.

Who did that valuation? Kathleen Fuell. We know it wasn't David MacIntosh because the man did precious little, apart from writing two letters, two letters to try to get the documents that he was supposed to be in charge of.

Kathleen Fuell looks like a star employee compared to David MacIntosh, who again had responsibility in this case from January of 2002 to August of 2003. But Ms. Fuell herself didn't comply with Zurich's guidelines. She comes in on the claim in September of 2003. She has the plaintiffs' demand package. The plaintiffs have pulled together all the exhibits and all the documentation and all the records that Zurich says it needs, and they tied it all up and presented it on a silver platter. And Ms. Fuell says, Yeah, that package had everything I need to value the case.

Well, what did she do with it?

Nothing. Did she increase reserves in September of 2003? No. What was her authority? $500,000. Did she post $500,000 on the file in September of 2003? No. Did she ask for permission to tender the policy limits? No. She didn't do that until GAF's broker set up a conference call to get all the parties together because GAF wanted to know how come nothing's happening in this case. We need to put a settlement offer on the table.

So it wasn't until November 19, 2003, that it occurred to Ms. Fuell that, Gee, maybe I ought to ask for $2 million and put it up on this case. Did she do it in November? No. Did she fill out her form in December? Yes. Finally, December 19 she forwards the form. Does she follow-up on it? Not until GAF's broker again says, Hey, what are we doing? What are we doing about this sensitive claim? She waits until January.

So now finally January 2003, Zurich says, Yes, let's post a $2 million reserve on this claim. And how long did that take to happen when Ms. Fuell came on board? September.

September '03 -- and I may have misspoke actually. I think I might have said January.

THE COURT: It's '04.

MS. PINKHAM: Thank you.

So September 2003 to January 2004, five months, that doesn't comply with Zurich's guidelines. So she posts $2 million on a claim. Does she make an offer to the plaintiffs? No. What does she do? She sits on it. When was the first time a $2 million offer was extended to the plaintiffs? March 31, 2004.

Why was the offer presented on March 31, 2004? Well, because there was a pretrial on April 1, 2004. That's the only reason the first offer was ever made in this case. Zurich finally tenders to AIG. AIG immediately rejects it and says, Hey, under our policy there has to be a payment. And that's Exhibit 36, your Honor.

Our policy says we don't have to do anything until there's been a payment on the claim. Did Zurich write out a $2 million check and pay it to AIG? No. Did it write out a $2 million check and pay it to the plaintiffs? No.

Did it have the ability to do so under its own insurance policy? Absolutely.

Zurich's policy said that it could stop defending the case upon tendering or paying the maximum limits provided under this coverage without the need for a judgment or a settlement of the lawsuit or a release by the claimants. And that's on page BMCA 0080, at Exhibit 62 -- excuse me, 61.

AIG didn't really want to write that $2 million check. We know AIG didn't want to write that $2 million check because --

THE COURT: You mean Zurich.

MS. PINKHAM: Yes, sorry, I appreciate that, your Honor.

We know that Zurich didn't want to write the $2 million check because it didn't write it in September of 2004 when a judgment entered in favor of the plaintiff. So there, there's a judgment, you can go ahead and pay them. Didn't do that. Didn't pay the plaintiffs in September, October or November.

When did Zurich finally write that $2 million check? December 2004. Why? Because it

had been served with a 93A demand letter. That's the only reason Zurich made payment in this case.

Now, your Honor, the plaintiffs have never taken the position that Zurich wasn't entitled to documentation. And we don't take the position that they didn't have to act until they got documentation. What the plaintiffs have said all along is that Zurich was required to act to get the documentation that it needed to analyze the claim.

And therein lies the intentional violation, especially in light of Exhibit 66L, which is the November 2003 transmittal letter in which John Chaney says, Hey, the plaintiffs are setting you up for a 93A violation by making an early demand and asking for a good faith offer. Oh, and by the way, the demand's not unreasonable given there's 3 million specials.

Exhibit 66L is the smoking gun against Zurich. It clearly establishes it's an intentional and knowing violation, as if there wasn't already enough evidence by the fact that its two case managers completely ignored

Zurich's guidelines.

Now, let's focus on AIG. Again, where do we start? Well, we start with the policy language. That policy is Exhibit 69. Again, if you look at the policy, it doesn't take very long to figure out that Zalewski was covered.

Now, AIG also wants to rely on, Well, we had to look to see if there were any other primary policies and we needed a reasonable amount of time to investigate that. Judge, all of the attorneys in this case knew, some as early by December of 2002, that there was no other coverage available to DLS.

Tim Corrigan knew that in December of 2002 because he spoke with DLS's counsel. And that's what counsel told him, We don't have it. Chaney puts it in Exhibit 66L: There has been a broker error . They were supposed to get a primary policy but they didn't, so DLS doesn't have any other coverage. Why are you guys still talking about this? You should be focused on settling the case.

In March of 2003, Morris, Mahoney & Miller, also insurance defense counsel, in

addition to Corrigan, Johnson & Tutor, says in responses to document requests, that Zalewski doesn't have any other insurance available other than Zurich.

So clearly by March of 2003, if defense counsel knew there were no other primary policies available, then that knowledge is imputed to AIG. Why? Because AIG has asserted the attorney-client privileged communications with both Johnson, Corrigan & Tutor and Morris Mahoney & Miller. Exhibit 84, which is their privilege log, is replete with communications from those two firms that were not produced in discovery because AIG asserted the privilege.

The next, again, set of documents that it makes sense to examine are the same ones for Zurich, 66A, which AIG clearly had, because it was faxed to it in February, and that formed the basis of its initial entry. And the excess claims notes establishes Zalewski's liability. 66D, that's the 5 to $10 million evaluation in September of 2002. And again, 66L, the wake-up call from John Chaney.

Now, the other document that's

obviously very important in this case is Exhibit 31. That's Mr. Satriano's handwritten notes of the March 5, 2004, meeting with GAF. And those notes contain the reference to the 6.6 settlement range and the 9.6 verdict that was described by Attorney Deschenes during that meeting. Obviously, that's an important document, as is Mr. Satriano's testimony that he didn't disagree with those numbers, and that in fact, they were talking anywhere from eight on in this case, and that maybe the case was eight to ten, or ten to twelve, but not sixteen.

The next exhibit is Exhibit 32. That is Mr. Bartell's letter to AIG that was prompted by the fact that AIG refused to commit to go into mediation and refused to commit $3 million towards a settlement offer during the March meeting.

Now, your Honor, if Exhibit 66L is the smoking gun in the case, then Exhibit 32 is a smoking cannon that was aimed at AIG by its own insured. There can be no question that after it received Exhibit 32, that AIG was clearly on notice of what was required under Massachusetts

law.

Finally, the last document that I would direct your attention to is Exhibit 45, which is Warren Nitti's narrative claim memo. The other important piece of evidence in connection with Exhibit 45 is the stipulation that the information that he relied on in creating Exhibit 45 was contained in the plaintiffs' demand letter that was sent in August of 2003.

So now let's focus on AIG's excuses as to why it took so long to make an offer.

The first excuse is, GAF was fighting with us. It wouldn't let us associate in counsel, so that really slowed us down. Well, your Honor, Greg Deschenes took the stand and testified that the only issue that GAF had with associating in counsel in December of 2003, was the fact that GAF didn't want any coverage issues hanging out there and they wanted coverage confirmed. And he also testified that that coverage concern that GAF had did not impede at all Bill Conroy's ability to get up to speed in the Rhodes case. In fact, he testified that between November of 2003 and March of 2004,

anything that the Campbell firm asked for we gave them.

Mr. Deschenes also testified that at the March meeting with GAF, Bill Conroy said, We want a physiatrist to examine Mrs. Rhodes, and we said fine. We -- I mean GAF -- had no problem or issue with that discovery being done. That position was also confirmed by the evidence. Exhibit 40 is Attorney Bartell's letter to AIG in May saying, Listen, we never objected to you doing discovery. The only objection we have is this new position that now you can't go to mediation until discovery is done. And that was the position that AIG took in May.

You will recall Mr. Deschenes testified that during the March 5th meeting, Mr. Satriano said, Hey, if you can get Mr. Pritzker to go to mediation without a price of admission, we'll do it. And so that's what Mr. Deschenes did. He contacted Mr. Pritzker. Mr. Pritzker got back to him in April and said, Okay, we'll do it and you guys can even pick the mediator.

So the plaintiff was ready to go to

mediation in April first offer 2004. AIG wasn't. AIG said in May, No, we're not doing mediation until we finish all this discovery. And I would suggest that if you look in the record, you will not find any support for AIG's position in Attorney Zelle's statement that the whole timing of mediation and the IME and the depositions was all agreed to by the plaintiffs.

Tracey Kelly admitted, well, she didn't know what was happening because all the discussions were going on amongst counsel. So there's no evidence that the plaintiffs bought into this, Yeah, well we'll do an IME and mediation later and let's wait and see. No evidence of that whatsoever.

What about their next excuse: We can't put a value on this case without doing these depositions and an IME. That is unreasonable. All the other professionals had been able to put a value on the case without that discovery. Crawford had done its value. Zurich had done a value. Mr. Deschenes had done his value. But AIG couldn't put a value on the case without taking two depositions and doing an IME? That's

ridiculous.

And again, your Honor, the plaintiffs never took the position that AIG was not entitled to take these two depositions or do an IME. And if they had acted sooner and asked to do them in November, December, January, February, March, April, May, June, they would have gotten the same response that they got in July: Sure, let's schedule them.

But AIG didn't do that. It waited until after its motion to continue the trial date was denied before even attempting to schedule any of these things.

Now, AIG takes the position that liability really wasn't clear until mediation, so therefore we didn't have to make on offer until mediation. Again, that's an unreasonable position to take, if not a ridiculous position to take, given that Warren Nitti relied on information that was provided in August of 2003 and October of 2003, when the life-care planner finished her report, which was marked as Exhibit 11 in this case. That was the basis for his analysis and evaluation, information that was a

year old. And now AIG takes the position that, oh, we couldn't put a value on the case until mediation? Liability wasn't reasonably clear until then? That's ridiculous. Its own agents had already done it months before.

Let's talk about mediation, Judge. What happened at the mediation? Well, we know the case didn't settle. Why not? Well, the adjustor who thought the case was worth $6 million , didn't have $6 million of authority to go to mediation.

Now, AIG now takes the position that, Hey, when we say 2.75 for our first offer, that was supposed to send a signal to the plaintiffs that we were willing to settle the case in the 4 to $6 million range. Well, that's ridiculous, because Warren Nitti didn't even have $4 million of authority at the mediation.

Why would have happened in this case if AIG had listened to its adjustor and given him $6 million of authority? Well, we already know from the Rhodes answers to interrogatories that they signed six times that they were willing to settle the case for $8 million at the mediation.

What would have happened if AIG put $6 million on the table at mediation? Tracey Kelly testified that all Warren Nitti had to do, if the parties seemed close, all he had to do was pick up the phone and call and she and Bryan Pedro would be right there to approve an increase to get the case settled. That's what she testified to.

That didn't happen at the mediation, Judge, because they undercut their own adjustor, the only person who actually had reviewed the documents in the file, the person who was the most familiar with the claim.

We are never going to know for sure what happened, because again, as Mr. Rhodes testified repeatedly, although the defendants only want you to focus on the first part of his testimony, Would you have settled for $6 million at the mediation? Would you have settled for $7 million dollars at the mediation? His response: I don't know. You people never made that offer so I don't know what I would have done.

What do we do know? We do know the Rhodes family wanted to put this case behind

them because it was a black cloud that was looming over their lives, and they did not want to go to trial. Plenty of evidence to that.

And this is exactly, exactly why the Hopkins decision came out as it did. Zurich wants to say, Well, they can't prove causation. Can't prove causation because they can't show that they would have accepted an offer. Well, Liberty Mutual tried that argument years ago and the SJC said, No, no, no, that's not right. Where you haven't made an offer, how could you possibly expect the plaintiffs to prove what they would have done with it?

And that's all the Rhodes' testimony shows your Honor. It is unfair to put the plaintiffs in a position to prove what would have happened if someone had made a reasonable offer, a reasonable offer that never came.

And the SJC held in Hopkins, No, we are not going to require a plaintiff to prove a hypothetical. But in the Clegg decision, the court did look at what happened when a primary insurer promptly -- actually, I shouldn't say promptly because that insurer was held liable

for violating the statute. But when a primary insurer finally tendered its policy limits and there was a reasonable excess carrier, which we didn't have in this case, Judge, frankly, I don't think either defendant should get the benefit of the fact that the other violated the statute. Because what does that do? That leaves the Rhodeses hanging out there with no relief. That's not what's intended by the statute.

Let's focus on the mental health records. AIG said, Yeah, we needed those mental health records That was part of the discovery what was absolutely crucial in this case, and, sure, we filed a motion to compel. And you know what? They're right. It's absolutely their right to file a motion to compel. Just as it was absolutely Judge Chernoff's right and discretion to say, No, why would I give you access to these privileged mental health records when the plaintiffs aren't calling an expert and are not making affirmative use of any mental health testimony at trial? I'm not going to do that.

It was bad faith for AIG to then go back after them and then come up with a new theory in August. In August of 2004 they weren't relying on exacerbation of Mrs. Rhodes' pre-existing conditions anymore. Exhibit 94 in this case shows that now AIG was saying, We have a right to those records, Judge. You want to know why? Because we deposed her. And you know what she said? She said she was profoundly depressed. Being paralyzed makes her have feelings of utter hopelessness and despair. So therefore we have a right to go look through her mental health records. That was the position they took in August of 2004. That was in bad faith. And that is why Judge Donovan denied it.

Now they have a new theory in this case. Well, we also needed those records because, you know, that would have been really good discovery for us to have on the loss of consortium claims. So we were entitled to get Marcia Rhodes' privileged mental health records and go digging through them to see if there was anything that maybe we could use on the claim that Rebecca Rhodes had. Or maybe we could find

some stuff in there to use on the loss of consortium claim for Harold Rhodes.

Clearly that's bad faith. You can find bad faith three different ways by their focus on the mental health records, your Honor. You can find bad faith in the fact that they moved for them again in August, under a completely separate theory. You can rely on that because they filed a notice of appeal. And one of the bases of the notice of appeal is, Well, we had the right to those mental health records and we really needed those as discovery on the loss of consortium claims. That's bad faith.

Or you could find bad faith because here we have a classic example of a defendant presenting a moving target. Oh, you don't like that argument? Let me find another one. Oh, you didn't like that argument? Let me present another one. And I would cite, your Honor, to Commercial Union v. Seven Provinces 217 F 3d 33. It's a First Circuit decision in which a reinsurer was found to have violated Chapter 93A by presenting a moving target and continually changing its defenses instead of making a

settlement offer in the case.

Let's talk about the appeal a little bit more. There is only one conclusion that can be drawn. That appeal was filed in bad faith.

Mr. Nitti, again, the only witness who was familiar with the claim, the man who attended every day of trial, testified that he wasn't the one who recommended the appeal. There is absolutely no evidence that AIG did anything to evaluate likelihood of success and the merits of an appeal. In fact, now they're saying, Well, we waited on purpose, we waited on purpose to do any analysis because we wanted to look at the trial transcript. Well, how about you ask the four guys who sat at defense counsel the whole trial? How about you ask Bill Conroy, Russ Pauleck, Lawrence Boyle or John Knight. Why don't you ask them about that they think your chances are on appeal? No. AIG wanted to wait and wait for the trial transcript.

Well, they didn't do an analysis on the likelihood of success, but we can talk about it because we all know that in order to get the judge's decision flipped -- Judge Donovan

obviously denied the motion for a new trial -- they would have to establish that she abused her discretion in not allowing access to mental health records. That's an extremely high standard. Not very likely that's going to happen.

But even if it did, then what did they have to show? Then they had to show that the fact that they didn't have access to Mrs. Rhodes' mental health records actually would have made a difference at the trial; that it was anything other than harmless error. That's exactly what it was, Judge, if anything, harmless error.

If you have time to look at lots of exhibits, look at Exhibit 71, the trial transcript. And I think you'll conclude the only conclusion is that clearly given all the evidence in that case, Mrs. Rhodes' mental health records wouldn't have made one bit of difficult in the outcome.

But let's assume they could, let's assume lightning would strike and they'd get it flipped. What do they get? The best they can

get is a new trial on damages, because liability had been stipulated to.

Okay, so the best they can do is a new trial on damages, years down the road. Chances are I'm going to get a bigger verdict because, you know what, Mrs. Rhodes will have continued to have been paralyzed and she's going to continue to have complications, as in fact she did and as was communicated to AIG post-verdict.

So the risk is, I have a new trial on damages only with more damages. Oh, and don't forget interest that's accruing. How could the decision to file that appeal have been made in good faith? It couldn't have. In fact, there is evidence that defense counsel did not advise appeal.

Your Honor, I would ask that you look at Exhibit 49, which is an e-mail from Stephen Penick to Kathleen Fuell. Mr. Penick testified in his deposition -- and that was also an exhibit in this case -- that after trial he was calling around to speak with defense counsel because Zurich wanted an update, and that he put into his e-mail exactly what he heard from

defense counsel.

The first thing he heard was there were no surprises. And the next thing he heard was, We do not anticipate an appeal. That's what defense counsel told him. And obviously, Judge, you can draw the inference from that, that defense counsel did not recommend an appeal.

You an also draw an inference from the fact that AIG has refused to assert the advice of counsel defense. Clearly, if its lawyers were telling it, You have a great shot or at least more than a fifty-fifty shot at getting a new trial, they would be relying on that in this case. But they're not. And I would suggest to you the reasonable inference of why they're not is because their lawyers were telling them, Just pay the judgment, be done with it, and let these people get on with their lives. And that didn't happen.

Plenty of evidence for you to determine that the reason AIG filed that appeal is because then that would give them more time to make more lowball offers, and the Rhodes family would be even more desperate to settle for less than what

they were legally entitled to.

You can look at the exchange of offers post-verdict. AIG's first offer was $7 million, and that included Zurich's $2 million on a case with a verdict of over $11 million. That's not good faith, Judge. And they went up a couple of more times, but finally when it became obvious to AIG that the plaintiffs were not going to settle the case for only 50 percent of the judgment value, they finally made a reasonable settlement offer June of 2005. And the case settled and the Rhodes were paid.

I think it's also very important for you to note that all but the last of the post-trial offers would have required the Rhodes family to release this claim, the 93A claim. And you can certainly rely on that in finding bad faith and an unreasonable settlement offer.

Your Honor, these insurers acted intentionally. Zurich and AIG, they didn't do anything until push came to shove. Zurich didn't make its offer until the pre-trial conference. AIG didn't act until trial was imminent. And both of its witnesses were pretty

frank about that why they didn't act, trial wasn't imminent.

How can you not find intentional violation of the statute here?

Let's focus on damages. Litigation costs. That's not very complicated. Obviously the Rhodes family incurred costs in bringing and going through with the personal injury action. Exhibits 90 and 91 show all the disbursements and includes a summary. Zurich particularly wants to be sure that you find that all of the plaintiffs incurred costs, and that's going to be very easy for you to do, Judge, on the basis of the evidence that's before you because Exhibit 91D, the last summary, which shows the disbursements to the Rhodes family, shows that the payments were made to Marcia and Harold Rhodes after the costs were deducted. So clearly they paid the costs.

What about Becca? Rebecca Rhodes wasn't a party to the contingency fee contract, your Honor. She was a minor. Her father acted on her behalf. So you can clearly find that Harold Rhodes incurred costs on behalf of his

daughter and that she incurred them as well. And if you like, you can allocate them in proportion to each of their recoveries, such that Rebecca Rhodes would be deemed to have incurred six percent of the costs; Harold Rhodes would be deemed to have incurred 16 percent of the costs; and Marcia Rhodes would be deemed to have incurred 78 percent of the costs.

More than the costs of litigation, obviously in this case, were the frustrations of litigation. The Clegg case has to mean something, your Honor. Costs and frustrations of litigation has to have a meaning. The SJC didn't say plaintiffs can recover for their costs and intentional infliction of emotional distress in these actions. No. Costs and frustrations.

Clearly there is authority for awarding emotional distress in 93A cases. We've provided it to your Honor, and actually I should direct your attention that we had provided you with a number of cases at the summary judgment hearing. And if you need additional copies we are happy to give them to you.

The First Agricultural case is the appellate decision case, in which the court says, Yes, this is a 93A, and goes out of its way to say, Listen, we're distinguishing this from intentional infliction of emotional distress and negligent infliction of emotional distress. That's not what this case is.

And the court said there is nothing to suggest the Trial Court was wrong in awarding damages for emotional distress. And what was the distress in that case? It was a woman whose house was going to be foreclosed on when the loan officer knew she had never signed the loan. So her testimony at trial was she thought she was going to lose everything and she sent a letter that said she was suffering emotional, social, and financial distress. And she obtained an award for emotional distress damages.

The Rhodes family obviously went through considerably more in this case. Your Honor, I would welcome you looking at the Haddad decision because the Haddad decision clearly says, Hey, when 93A was changed, the Legislature

clearly meant for it to provide for a broader range of recovery than it had before, because plaintiffs only used to be able to recover for property losses and economic losses, and the Legislature change the statute because it wanted to broaden the remedial scope of the statute. And the decision continually refers to emotional distress.

As it happened, the plaintiff in the Haddad case had claimed intentional infliction of emotional distress, so that's why the case talks about intentional infliction of emotional distress. But it also refers to just emotional distress as a foreseeable consequence on the statutory violation.

And your Honor, there's a number of other cases that under other states, consumer protection statutes, and particularly unfair trade settlement practices statutes, have said clearly emotional distress is recoverable. We don't need to be as concerned about requiring it to be intentional or severe or to have a physical manifestation because those requirements are for -- we want to kind of weed

out suspect claims. We don't have to worry about suspect claims in 176D actions; therefore, we're not going to require proof of intentional infliction of emotional distress or physical manifestations.

And the law is clearly the same in Massachusetts, your Honor. I've already mentioned this, Judge, but I have to point out again because we're talking about the causation here, it's going to be, I think, very straightforward for you to determine who caused what in this case. Because we know that Zurich was in charge of the claim from January of 2002 until March 31 of 2004. And your Honor, if you are looking for a shortcut way to identify what happened when, I would recommend that you look at Exhibit B to our brief. It's a timeline that references the exhibits and the dates.

So Zurich was in charge for two years, more than two years. You can find that at some point in that period Zurich should have made a reasonable settlement offer. All it could do was offer its $2 million in tender. We agree it violated the statute by not doing it promptly.

And in our brief we've given Zurich every benefit of the doubt and said, Hey, we'll give them a year, we'll give them a year to do all the things that they're supposed to do under their own guidelines and pull together all their documents and value the claim and put the $2 million up.

You can easily measure from January of 2003, to March 31, 2004, to establish what Zurich caused in terms of litigation costs, and you can also use that time frame for emotional distress.

How Zurich could make a causation argument in its brief and not even cite the Hopkins case, I don't know. But I've already addressed the Hopkins decision, Judge, and as we said, again, the SJC has already ruled that you can't force a plaintiff to prove a hypothetical.

The damages in this case are not hypothetical, though. Clearly there is evidence that the Rhodes family suffered emotional distress as the result of Zurich's delay. Marcia Rhodes testified, I felt bad just watching Harold. I wasn't even supposed to be

focused on litigation. I was supposed to take care of myself and he was going to focus on the litigation. And that's what he did. And I saw the stress he was under because of it and I felt guilty about it.

Mrs. Rhodes feels guilty that her husband is burdened by all of this stress that's caused by the fact that no one is making a settlement offer in this case. He has to go out and take out a loan to put an addition on their house. He's waking up at night worrying about money. Ample evidence that Zurich was responsible for that in 2003 and into 2004.

What about AIG? Again, let's use April 1, 2004 as the trigger point, because then at least the tender's been made and we have the pretrial conference and somebody from the Campbell firm is there. April 1, 2004 forward, you can allocate those litigation costs and that emotional stress to AIG.

And what testimony was there? Well, now it's 2004. Now Harold Rhodes is very concerned that he's already blown through $500,000 of their savings and has gone into debt and there's no settlement offer and now we have a trial date. So the concern and the worry

that he's had before has now turned into anger that he's in this situation. How can this happen when his wife was rear-ended by a truck, and no one is making a settlement offer in this case.

How about Marcia Rhodes? She thought she'd be done with litigation once Zalewski entered the plea in November 2002. He drove into me; he said he was guilty. End of story. How come no one is making an offer. Now we fast forward. We're in 2004. Gee, we're sorry, Mrs. Rhodes, all those medical records and that huge demand package with everything and pictures that were presented to these people, the "Day in the Life" video, that's not enough. We need some more from you, Mrs. Rhodes. But you know what? We're going to wait, we're going to wait until your life is so stressful that you're just weeks before a trial in this case. We're going to wait till then to do your deposition. Yeah, and we're going to wait till then to do your IME.

Again, Judge, how can you do that to a woman and claim that that's reasonable and that it's not going to cause her emotional distress?

Fine. She was a plaintiff. She had to be deposed. She didn't have to be deposed six weeks

before trial if it was so crucial to have her testimony. She did have to go to trial and her family had to go to trial because AIG didn't put a reasonable settlement offer on the table. All of them testified about what it felt for them to go through that experience. There was no reason they had to do that. Clearly you can find ample evidence of emotional distress. You want to put it back a little further? Let's focus on the appeal, then, because the family has gone through this trial and they think they're done now. They think they're done. The jury has spoken, we can get on with our lives now. And that didn't happen because now there's an appeal and there's going to be more delay. Why? Because AIG wanted to fight about a $400,000 difference in the life-care plans by August of 2004. Because AIG didn't want to put a reasonable value of Mrs. Rhodes' pain and suffering? Or the two loss of consortium claims because AIG let Tracey Kelly undercut Warren Nitti and throw up a $4.75 million value on the claim and never adjust it thereafter? Ample evidence of emotional distress, Judge.

So let's talk about punitive damages. State Farm and BMW. The reasoning behind those cases is to not let a jury be unrestrained. Can't let a jury come

back with a wild verdict. Defendants have to have notice about what they're facing. So we can't have an unrestrained jury here.

Well, there's no risk in this case, Judge. There's going to be no runaway jury in this case. We're not dealing with a common law claim tried to a jury. We're dealing with a statutory claim in which the Legislature has said punitive damages actually have to be punitive and for that reason we're not going to use lost use of money anymore. We are going to measure punitive damages by the judgment that enters in the underlying action. So, defendants, you're on notice of what the punitive damages are because it's going to be measured by the underlying judgment and it's going to be either two or up to three. So the Legislature has acted and it has specifically prescribed the punitive damages.

Accordingly, the entire rationale behind State Farm and BMW is not here. I know the defendants want to apply all the factors and the guideposts and the -- I know they want to do that, but it doesn't apply, Judge, it does not apply, and there are many other cases that have ruled the same way. The only cases that AIG has been able to cite that embrace the

reference to State Farm in punitive for statutory claims are claims dealing with certifications of class actions. Well, this isn't a class action. You have three people alleging a statutory violation. There's not millions of class members who are each claiming a right to statutory damages so that therefore the punitive damage award would be incredibly large. That's not this case. All but one of the cases they rely on are class certification cases, Judge. So obviously it's our position that those aren't good authority.

And the Texas case that AIG relies on finds that under the statute in Texas that limits the damages, there's no due process violation. And I like that, decision, Judge. I think that helps us.

Zurich and AIG knew that Marcia Harold and Rebecca Rhodes were the most vulnerable of plaintiffs. Crawford reported it, hey, that the whole family's in counseling because of this accident. They knew that. And what are the defendants arguing now? Well, Judge, we didn't really harm that that much. I mean, their lives were already so horrible, how much hard could we really cause because of this litigation? And how could you possibly figure out that the harm that was caused

by litigation is different from the harm that was caused by the injury?

And they focus on each plaintiff. Well, they say for Mrs. Rhodes: Well, Judge, she'd been seeing a therapist for years. She had these pre-existing conditions. Her life was obviously upside down because of her injuries. So, yeah, in the grand scheme of things, what's the stress of a little lawsuit? They do the same with Rebecca. Hey, Judge, Rebecca, she was in therapy, too. Okay? So that kid, she was messed up. And besides, her mother was paralyzed, so that obviously was the whole focus of any anxiety that she was feeling in 2003 and 2004. So big deal. So she had to testify at the trial. She didn't even know she was a plaintiff. Couldn't have hurt that much. And besides, her own lawyer is the one who made her cry. It wasn't our fault, it wasn't our fault that Rebecca Rhodes had to testify at trial and collapse in tears on the stand. Wasn't our fault.

And Harold, what can they say about Harold Rhodes? He was unreasonable to be concerned about the fact that he had gone through a half a million dollars of his savings? That Mr. Varga, he worries about his bills every day, too? How can any reasonable insurer

take that position? Mr. Rhodes had a lot of money in his bank account, Judge. Well, if he was so concerned about money, well, he could have used all of his retirement savings, then he wouldn't have been nervous about money, because he had plenty to live on.

AIG in its brief says, Why was he so upset about money? I mean, he knew as of August 2004, once the defendants stipulated to liability, he knew he was going to get paid. Oh, yeah, he was going to have to go through the trial, but he knew he was going to get paid. Oh, yeah, we did file that appeal and that dragged it out again, but he knew he was going to get some money, so it was unreasonable for him to be distressed in this case.

What a twisted view of reality these insurers have. And they continued throughout the trial in the closing arguments that take the position that, really, you know, the plaintiffs should have been more sensitive to the needs of the insurance company. Mr. Varga just said it in his closing argument. Plaintiffs' lawyers, they didn't really know what the insurance company needs, so it's --

Nick Satriano testified he was very concerned about Greg Deschenes because it was clear that he

didn't understand the needs of an excess carrier.

AIG's expert, Mr. Cormack said the same thing. Oh, yeah, well, you know, if plaintiffs' counsel doesn't understand the needs of the excess carrier or how it works, it's going to be really difficult to settle a case. Well, how about we focus on the statute, because the statute puts the burden on the insurers to make a reasonable settlement offer. Why does it do that? Because the statute wants to protect the plaintiffs. We're not supposed to view the world through the insurance company's eye. What reasonable insurer would not have made a fair offer in this case? How can they look at what this family went through and then say it wasn't that bad. Any reasonable insurer would look at Marcia Rhodes and say this poor woman, this blameless victim whose life was ruined when she was rear-ended by a truck, and she already had these existing issues that she was dealing with in her life, let's pay her. Let's pay her because she needs the money. How could we possibly compensate her for what she's going through? Let's pay her, let's help her. Let's comply with our obligation.

What about Rebecca Rhodes? She was 13 years old. Everybody knows how hard it is just to be 13.

Rebecca's making the transition from being a child to a grownup. And she was having a hard time of it, Judge. And they knew it. And they've argued it in their briefs, Well, she was in therapy. Yeah, all the more reason why you should be sensitive to her and comply with your obligations and make a reasonable settlement offer. Rebecca Rhodes was already having a tough time being 13 and then her mother was paralyzed and gone from her life for months in the hospital. And her father was consumed with taking care of his wife. So who was there for Rebecca?

You heard her testify, Judge: Well, my mother would be on the first floor. I'd usually stay in my room. And my Dad, if he wasn't with my Mom, would be in the basement office. We have a family that's been fractured, literally fractured by this accident, and these insurers don't feel a need to make a reasonable settlement offer? Why?

What about Harold Rhodes? Any reasonable insurer would look at this and say that poor man's a victim, too. It's just as bad for him. What he must go through now to take care of his wife, to keep the house in order, to try to pay the bills, to go to her with the doctor's appointments and try to still parent

their daughter, that must be horrible. He must miss his wife. He must miss the life he had before. Let's make a fair settlement offer in this case so these people can get on with their lives. That didn't happen, Judge.

Now, Zurich and AIG both say that they've complied with industry standard.

THE COURT: This is probably a good time for us. It's 1 o'clock, so we will take our intermission for lunch. We shall return at 2 p.m.

(The luncheon recess was taken.)

A F T E R N O O N S E S S I O N

THE COURT OFFICER: This Honorable Court is back in session, please be seated.

THE COURT: Ms. Pinkham, I hope that your ten minutes over the course of the lunch didn't suddenly get prolonged into forty.

MS PINKHAM: Hardly.

THE COURT: Okay. I realize when I left that I had to worry about that.

MS. PINKHAM: But I did find one thing I missed.

THE COURT: Okay. As long as that's within reason. You have the time to do that.

All right. Before we do that, Mr. Zelle, you're set with Judge Young?

MR. ZELLE: Yeah, I'm good.

THE COURT: You'll give him both my regards and my apologies and my thanks for his agreement to let you --

MR. ZELLE: He's not waiting. I have a partner over there.

THE COURT: Well, then knock off the "thanks" part, but you can still give him my regards.

All right. Okay, Ms. Pinkham, why don't you proceed.

MS. PINKHAM: Okay, your Honor. I want to go back and address one of the other elements of damages that the plaintiffs are seeking to recover in this case, which is the lost use of funds. And much as I had gone through and told you what I think the appropriate time line is to measure those damages as to each defendant, I want to do the same with lost use of funds.

Starting with Zurich, now, Zurich, under the Clegg case, the appropriate measure of damages is the interest on the policy limits that weren't offered within a reasonable period of time. And also in the Clegg case, the court said whether settlement is reached or not, unjust delay subjects claimants to many of the same costs and frustrations that are entitled when litigation must be instituted and until settlement is reached. So under the Clegg case, I would suggest that the measure of damages for the lost use of funds as against Zurich is its policy limits measured from the date on which a reasonable settlement offer should have been communicated, forward to December 23, 2004, which is the date on which payment was received. And

you can refer to Exhibit 91D for the specific date on which Zurich paid over its policy limits.

Now, as to AIG, I agree with Zurich that the post-judgment interest should fall on AIG's shoulders. The plaintiffs contend that they're entitled to the lost use of funds measured by the difference between what they were legally entitled to recover when the judgments entered in September of 2004, measured forward over time to when they were actually paid. And the reason that we submitted the chart that has caused so much furor is to help you in making those mathematical calculations, because obviously the interest calculation changes because there were payments made over time.

The component of the lost use of funds following the entry of judgment is two parts. The first is the total value of the judgment with the interest that had accumulated as of September 28, 2004. When you combine all the payments that the plaintiffs received after the judgment and you subtract that from the value of the judgment on September 28th, you'll see there's a $77,000 difference. The plaintiffs should have had use of those funds and they didn't because of AIG's bad faith conduct. If you look forward from the

date of judgment to September 5, 2005, when AIG made the last of its offers -- excuse me, the last of its payments, the last of the payments was made in September and the measure of those lost use of funds is $990,000.

Now, the plaintiffs contend that there's no reason why they're not entitled to recover those damages. Cases are legion in saying that plaintiffs are entitled to recover the lost use of funds to compensate them for the delay in receiving payments that should have been made. And the fact that the plaintiffs filed the satisfaction of judgment doesn't change that.

Under the Rothenberg case that we cited, your Honor, a case that specifically holds the filing a satisfaction of judgment does not preclude the collection of post-judgment interest after the date of filing, the plaintiffs are clearly entitled to recover the post-judgment interest from AIG.

If you're at all inclined to consider there being a waiver, the only waiver that the plaintiffs made was waiving their right to go after the underlying defendants to recover that,

because, again, the judgment did not enter against AIG. It entered against the underlying defendants. And I would suggest that if the defendants obtained a monetary benefit as the result of their delay and bad faith, that completely upends the purpose of the statute.

Now, before we broke I was starting to address the defendants' arguments that they've complied with the industry standards, so it's really not their fault that things didn't work out, they were complying with industry standards. Zurich apparently believes that it's industry standard to send out form reservation of rights letters to insureds to protect itself from having to evaluate their liability and when their liability becomes reasonably clear. At least that's their argument as to Zalewski.

Now, they also say, Well, it's industry standard that the excess doesn't have to do anything until there's a tender and the excess is entitled to rely on the investigation of the primary. Well, if that's the case and the excess does rely on the investigation of the primary, then it seems a matter of common sense

that if the excess carrier wants more investigation done, it should have a burden to ask.

If an excess carrier wants two more depositions and an independent medical exam, certainly industry standard would allow that to happen, and it can't the industry standard that, no discovery that the excess carrier wants can be done until there is a tender. That can't be the industry standard.

It can't be the industry standard that the primary can have a claim for 18 months before it starts to collect documents to evaluate it. We know that's not the industry standard because Zurich says its policies represent the industry standard and that's not what Zurich's policies require. It can't be the industry standard for an excess carrier to ignore a verbal tender for three months. Both Zurich and AIG engaged in willful ignorance in this case. Willful ignorance. They knew what information was necessary and they didn't go out there and get it. And now they want to say that their conduct complies with industry standards.

If that's the case, Judge, then I would submit that the entire industry can be found unreasonable. There's certainly authority for that, and I would reference the Govoni case at 51 Mass. Ap. Court 35, in which the court held that if the entire banking industry in Boston would have allowed certain checks to be cashed, then the entire industry was unreasonable; and that was no defense to the claim.

Look at what happened in this case under industry standards. We have an excess carrier who complains about a primary's investigation but hadn't done anything for months. We have an excess carrier who has the ability to direct the defense but not pay for it. We have an excess carrier who has little economic incentive to not go to trial because it's not paying for the bulk of the legal costs.

AIG said, Hey, Zurich's paying those three law firms, why don't we go to trial. Let's take a shot. Maybe we'll get a cheap jury. There is no economic incentive to make a rational decision under the way this industry works, or at least as it's been presented in

this case.

Industry standards is not always a defense, as I mentioned in the Govoni case. Entire industries can be unreasonable or unsafe, or unfair. That's why legislatures take action. That's why we have OSHA. That's why we have 176D, because the Legislature has determined that the insurance industry needed some guidelines. And apparently it wasn't happy with industry standards because it enacted the statute.

So regardless of what the industry standard is in any other state, we know what it is in Massachusetts. And an insurer who ignores that, does so at its own peril, especially in a case where you have a woman who is stopped by a police officer and rear-ended by a tractor-tanker

An insurer who doesn't want to write the big check that the plaintiffs are reasonably entitled to because fault and damages are clear, who delays as long as possible in the hope that the plaintiffs will cave before trial and take less money to avoid the ordeal of a trial, an

insurer who is foolish enough to make a family of blameless victims go in front of a jury and tell their story rather than reach a prompt and fair settlement does so at its peril.

We at plaintiffs' counsel table and many other people in the room have had the honor of representing Marcia, Harold and Rebecca Rhodes for five years. We have watched in awe of their strength and their devotion to each other as they have surmounted all the hurdles that were placed in their way.

Marcia Rhodes has said that there's no amount of money that can ever compensate her for the change in her life; and no one would argue with that. But under our legal system all we have is a system that tries to put money on a claim. That's what we have. It's a poor substitute for what they've lost, but that's all our system is set up for.

But our legal system through the jury in Norfolk County listened to Marcia, Harold and Rebecca Rhodes, and it returned a fair and a just verdict in favor of them. We're here two and a half years later and we are asking you to

do the same thing.

The defendants want to avoid punitive damages. Well, we know that statutes are presumed constitutional, and we know that the burden of proof is on the defendants to establish unconstitutionality. Punitive damages are available for a reason and there is a reason why the Legislature decided that lost use of funds alone was not a sufficient deterrent.

Your Honor, as you decide this case we ask that you think about the Rhodes family and what they went through because they were victimized twice, once by Carlo Zalewski and next by the intentional conduct of the insurers, who either forgot or didn't care what their obligations were under Chapter 176D. What happened in this case is exactly what the Legislature intended to prevent when it enacted the statute and when it increased the penalty in 1989; and we ask that you treble the fair and just verdict that the jury returned in September of 2004. There's no shame in that.

This was a case where a woman was rear-ended by a truck. Liability was clear

immediately. There was $52 million of insurance. And they had to go to trial and they had to wait through an appeal before finally there was a fair offer so they could put it behind them. Anything less then treble damages is insufficient, your Honor, because it will send the message, not only to these insurers but to others, that what happened to the Rhodes family wasn't that bad, wasn't that egregious. Your Honor, if a woman who is rear-ended by a truck and paralyzed can't get a fair settlement offer in Massachusetts, who can?

Marcia and Harold Rhodes want to be sure that what happened to them doesn't happen to anybody else. That's why they've put themselves through yet another legal ordeal. But they don't have the power to change the insurance industry. They don't have the power to send a message. You have that power and we ask you to use it to your fullest extent.

Treble damages are required to not only punish the defendants in this case but to deter this conduct in the future and to protect all other blameless victims in Massachusetts. Thank

you.

THE COURT: I do have some questions. Before I ask them let me say three things.

First, each of your closings was excellent. So I applaud you all for three very, very fine closings.

Secondly, when I do ask questions, you interpret them at your peril in terms of what you think it says as to where I am in my thinking about the case. So I know it's natural, but I do warn you that my questions may or may not reflect any particular inclination. So I encourage you not to attempt to read too much into my questions apart from the fact that I know there are various issues, some of which I will have to reach, some of which I may never reach but potentially may and therefore may still be asking about. So I mention that as I begin to ask questions.

Third and finally, especially with regard to Ms. Pinkham's last point, I, as I'm sure everybody in this courtroom does, admire the fortitude of the entire Rhodes family in terms of enduring these terrible events, both

Mrs. Rhodes in getting through the day in which everything she does is made more difficult and Mr. Rhodes in keeping the family together and helping his wife and the daughter.

So while I do admire them and to some extent can appreciate and to some extent I'm sure cannot appreciate what they're going through, it also is not going to decide this case. This case is about them only to the extent that what happened to them is something that the insurance company properly needed to investigate, evaluate and consider. So it bears on my decision to that extent, but my focus is, also as I think Ms. Pinkham properly contended, to be on what is the appropriate and legal conduct of an insurance company in examining a claim; and while that bears on the Rhodes to the extent it was their claim before them, I do understand that what I am evaluating is the extent to which an insurance company or two insurance companies did or did not engage in unfair or deceptive conduct, and that is my focus.

So whatever my decision is, it is not

-- if the Rhodeses win, it is not because I admire them; if the Rhodeses lose, it is not because I don't.

So having said that, let me now get to a number of legal questions I have.

Let me, I guess, begin with questions with respect to AIG and also to the plaintiff. Let me begin with either Mr. Zelle or Mr. Cohen. I'll ask the question and I'll leave it to you as to who should answer.

What do you -- and I also should say I received your briefs late Wednesday. I have had very little time between Wednesday near close of business until this morning, so I have reviewed them to some extent. I have not read them. I will read them. So there may be things which you have addressed in your briefs which I have not yet had a chance to read. So if I ask a question and it's there, it's not because I ignored it. It's because I haven't had a chance yet to get to it, and will get to it once I get down to writing this decision.

Liability is reasonably clear. What do you say that means in a case in which pain and

suffering, understandably, and loss of consortium, understandably, are going to be a significant, perhaps substantial share of a judgment? How do you say that phrase should be interpreted in a case with pain and suffering and loss of consortium damages?

MR. ZELLE: Well, I appreciate the question. It hasn't been answered in any appellate decision or any Superior Court decision that I've read.

THE COURT: That's why I look forward to your clarification on that.

MR. ZELLE: Well, I appreciate that. You want to write this down.

THE COURT: I will.

MR. ZELLE: When there are elements of pain and suffering, when in fact that is the largest element, you've heard testimony in this case as to how difficult that is to evaluate. And that may well explain why courts haven't ventured into that realm to try to fashion any standard. It's left with "reasonable," and the courts do identify what "reasonable" means and an objective reasonable determination. And I

submit that you've got to rely in this case on the testimony you've heard from Ms. Kelly, from Mr. Nitti, from Ms. Fuell, from claims experts, as to what variables -- and they're almost innumerable -- they will try to assess when they are going to put a number on a claim to represent pain and suffering.

And we talked, or the witnesses talked, about all sorts of things ranging from whether they're determined people, whether they're truly just hopelessly crippled mentally as well as physically by accidents.

The best that, I submit, a court can do is to derive a standard based on what is generally accepted by a professional using due diligence and due care. And in this case what you have, I submit, is that liability was never reasonably clear if you accept that all of the ranges, plaintiffs' range and defendants' ranges, were reasonable. Then it's not clear. The range is just too big.

THE COURT: That's what I'm trying to get at. Are you saying that reasonably clear means only economic damages to the extent they

are reasonably clear? Or are you saying that, no, that's too low, that some measure of damages for pain and suffering and loss of consortium are fairly required of an insurance company to offer and the standard for determining what reasonable clarity means with regard to pain and suffering and consortium is dot, dot, dot?

MR. ZELLE: A very wide range. That's the best that I can say. It's a very wide range because there are so many factors. So to go at it a bit differently, if were to ask: Does an insurer have to establish at least a value that's in the lower end of that range? the answer is yes. But that's going to be a very wide range by necessity, given not only the difficultly in assessing all of the variables but the vagaries of juries as well. And I think Mr. Cohen had a comment.

MR. COHEN: Can I just add to that, your Honor.

I think the problem in this case -- there are two issues: whether the offer was reasonable and whether the damages were reasonably clear And they're two separate

issues. And I think you're getting at when, if at all, were the damages reasonably clear.

I think the answer to that question is, in this case you had a plaintiff who really hadn't been able to begin her rehabilitation process. She testified in this case, as there is testimony of her and her family and her experts in the underlying case, we just didn't know, the insurers didn't know, the plaintiffs didn't know, their experts didn't know at the time of trial where the rehabilitation was going. Would she be able to transfer or not? Would she be able to reduce the complications or not? Would she be able to drive and be more independent? And that's why I think liability wasn't reasonably clear at the time of trial.

I wouldn't say that never, because pain and suffering is alleged, that damages can't be reasonably clear. But think about it this way, your Honor. Let's say you have a car accident and somebody is rear-ended and they injure their back and there's a primary insurer involved and the doctor says: You know, you have a bulging disk or a ruptured disk and I think we're going

to treat that conservatively for a while with exercise and diet and see how it goes.

Now, it may be that liability is reasonably clear as to some degree of damages that's going to be more than one dollar, but at that point until you determine whether the exercise and diet is going to work, whether the person's going to need surgery, whether this is going to be a permanent problem or not, you're not going to be able to ascertain what a fair settlement range is. A plaintiff is not going to take the best-case analysis theory and nor would a defendant offer the worst-case analysis.

So until you have some clarity as to damages, and in this case I don't believe you did because of the level of rehabilitation that Mrs. Rhodes had reached or hadn't reached at the time of trial, I don't believe in this case liability was reasonably clear before the mediation, or the trial for that matter.

THE COURT: Which, of course, is a different position than was taken in your closing, and that position would lead logically to the view that then there was never any

obligation to make an offer, at least until there was a judgment.

MR. COHEN: That's our position and that's explained in our brief, that we don't feel that there was an obligation to make an offer, but we made an offer because the trial came up. Offers are made all the time in cases in which both liability and fault are reasonably clear and you're faced with a trial,

THE COURT: Okay. But that reasoning, if you had never made an offer, you should still win.

MR. COHEN: In this case, correct.

THE COURT: All right.

MR. COHEN: But we did make an offer.

MR. ZELLE: Let me comment. I may not have been clear enough. In closing, I made the point that we made the offer at the mediation, and my argument is that that was reasonable. Therefore, it doesn't matter if liability were reasonably clear or not, because we made the offer. I'm not suggesting, and did not intend to suggest, that it was reasonably at that time. What I'm suggesting is you don't have to reach

the issue of whether it was reasonably clear; you can jump directly to the issue of whether the offer was reasonable to resolve this claim.

THE COURT: All right. And Mr. Pritzker or Ms. Pinkham.

MR. PRITZKER: Since I haven't stood up much, your Honor, I feel compelled.

I couldn't disagree more. First of all, the statute is clear that liability is liability. Damages were added later. Liability, at least as to Zalewski who was an insured, was clear the day of the accident, or certainly by the police report.

THE COURT: But there is case law that says when the statute says "liability" it means liability and damages.

MR. PRITZKER: I understand that.

THE COURT: So what do I do with that?

MR. PRITZKER: It is also clear from the first report on that Mrs. Rhodes was rendered a paraplegic, in a case, and the reason I started with the causal liability, in a case where there was no question that she was innocent and she was rendered a paraplegic.

THE COURT: Let's assume there is no issue of negligence.

MR. PRITZKER: So we have a baseline, which you can argue about, of the past and future costs, economic costs, which does not answer the question of whether liability is clear or not. That is only a starting point because there is a zero component in those two numbers as to pain and suffering or loss of consortium.

We know, you know from your experience, I know as a trial judge[sic], the insurers certainly know from their experience, that there is always a component of pain and suffering and always a component of loss of consortium or loss of parental enjoyment. And as to those, you can differ as to the range, but you cannot say that liability was not reasonably clear as to a range which included those components from very early on in the case.

THE COURT: Well, I'm trying to figure out what you're saying. Liability is clear in a case when there is reasonably expected to be a significant amount of pain and suffering and

damages for loss of consortium when --

MR. PRITZKER: When you can, number one, get a handle within a range of what the economic damages are, and when you have an experience level which tells you that the pain and suffering is going to be an additional range, and the loss of consortium is going to be an additional range and you added those up and you get a range of total damages. When you can do that with some certainty --

THE COURT: Some certainty means what?

MR. PRITZKER: Certainty that you're accurate within the range. Let's just say for --

THE COURT: But the nature of pain and suffering is you can never be accurate --

MR. PRITZKER: Well, you can, because you can reasonably -- remember, it's reasonable, it's not precise, it's only reasonable. And you can reasonably assess a range once you know the factors of paraplegia, the medical complications that occurred thereafter, the pain and suffering, which has a distinct life in a paraplegia case. If you've been dealing with

paraplegia cases, you know that there is pain and suffering and you know that there is a range of damages that juries decide of those, and at least now you've got a range. And that happens relatively early on, as both the Zurich standards anticipate and as the statute anticipates. It does not anticipate that in a personal injury case where pain and suffering is always a component, if causal liability is clear, that the statute doesn't apply. That's an unfair reading.

THE COURT: Let's assume it does. Let's assume that I don't accept Mr. Cohen's argument that there is no obligation to make an offer when there is pain and suffering because pain and suffering is always by its nature never reasonably clear, at least as to the amount --

MR. PRITZKER Right.

THE COURT: -- then what do you say is a reasonable offer that takes into account pain and suffering?

MR. PRITZKER: Monetarily?

THE COURT: Monetarily. That's what the offer is going to be offered. It's going to

be offered in terms of money.

MR. PRITZKER: Are you asking me for a number?

THE COURT: No, I'm asking you for a principle.

MR. PRITZKER: Okay, the principle is that that occurs after the insurer has had time to do a reasonable investigation.

THE COURT: Assume they have. I'm getting down to it, okay? They've come to mediation, let's assume they've done a reasonable investigation, reasonable evaluation.

MR. PRITKZER: Yes.

THE COURT: Let's assume they have their own measure, as they did here, of what medical expenses were, which I don't think were much in dispute. They had their own life care plan from their planner, which arguably they were going to present to the jury as their version of what they understood. And then there is that realm --

MR. PRITZKER: It's a subjective test.

THE COURT: All right. And so a reasonable offer in that circumstance is an

offer that --

MR. PRITZKER: They have to do two things, your Honor.

THE COURT: -- addresses pain and suffering and loss of consortium damages in what way?

MR. PRITZKER: They have to do two things. First of all, they first have to establish a range, and then they have to add the subjective factors that everyone has to do in our business, since it's not precise, which is, Where does this fit on that range?

I can't be more precise than that, except to say, as I think Mr. Rhodes said during his testimony, that while he couldn't say what fair range was, he knows what one isn't, and I feel that way. There was never an offer prior to trial that included one dollar for either loss of consortium or pain and suffering. We know that isn't.

What should the insurers have done? They should have figured not what Ms. Kelly did, which was 475 is the number and therefore your authority is a million dollars less than that.

She should have had a range, had a dialogue with Mr. Nitti, or whoever else, defense counsel would have been better, here is the range that we've established, where do you think we should be on this range given any number of factors, given a lot of them that they had, most of them they had.

The projections as to what her complications were going to be in the future truly is a red herring. That you can never tell. But what would, if the case were tried today, the medical experts say as to what her prognosis is? And you have to fit all of that in, not only the medical experts but the life care planners, who, by the way independently came very close as to the kind of episodic results that she could be expected to have and what they were going to cost.

THE COURT: Well, let me move to the next question, since I want to get Mr. Zelle over to Judge Young before that hearing is over, which probably is going to be futile.

This question is for Mr. Zelle. You mentioned that it was unreasonable for Mr.

Bartell to have been questioning whether or not AIG was going to accept its coverage obligation. Is there any writing that Bartell had in hand in which AIG accepted its obligation for coverage? I know at some point there was a letter which said we've always accepted it, but that came after a series of letters from Bartell. Is there anything that Bartell should have had in hand which says "There's the declaration."

MR. ZELLE: You asked two questions: Is there anything he had in hand? Is there anything he should have had in hand? And the answer to the first question is no. And the answer to the second question is no. Because the standard practice is that an insurance company gives the policyholder something to hold in hand if they're disclaiming or reserving their rights. If they're accepting coverage, they don't, they just go to work, which is the same from the primary and excess perspective. In this case, going to work is what Tracey Kelly did; she wrote to Crawford and said, We're here, we've got the excess coverage, keep us informed.

THE COURT: All right. Now, Mr. Cohen,

you argued if the offer was -- assume -- you argued essentially that if I were to find that the offer was unreasonably low, since they got much more than even they conceived would be a reasonable offer, there should be no damages.

MR. COHEN: Certainly no economic damages, your Honor.

THE COURT: Okay.

MR. COHEN: The emotional distress is a different story.

THE COURT: You also say that there would be none of those unless they had suffered some physical manifestation.

MR. COHEN: Exactly.

THE COURT: All right.

MR. COHEN: Or intentional and emotional distress.

THE COURT: Now, at the same time, if your offer had been above what they got at trial, then almost inherently one could say, How can you say that's an unreasonable offer because they got less than that at trial?

So my question is, if I accept your argument, when could a plaintiff ever win?

MR. COHEN: Plaintiff wins all the time in cases where cases settle after an offer is made. Initially, a court finds that the offer was unreasonable and they get the interest, the standard damages --

THE COURT: Okay. But that's when they ultimately do settle. When could they win if they ultimately went to trial?

MR. COHEN: That depends on when the offer was made, how much more they got than what they settled and what interest they got in the interim. The Talent [phonetic] case addressed that issue and said, you know, you should have made an offer on X date, your case settled on Y date, and we're going to decrease from your damages the interest that you got in the interim. And that was during a period of time where people were investing money at a lot more than the statutory interest rate.

But again, the fact that a plaintiff can prove damages as the SJC has said in Hershenow, doesn't entitle them to an award of damages. They have to prove that they suffered a loss, they were worse off as a result of some

violation of 93A; and they haven't done that in this case.

THE COURT: All right. Ms. Pinkham or Mr. Pritzker, any brief response?

MS. PINKHAM: Your Honor, again, I think this goes to the issue that the defendants now want to say that the Rhodes family should be thanking them for not settling and putting them through the trial because they got a really good return on their misery. I don't think the statute is intended to reward AIG for putting them through trial.

THE COURT: All right. Now that you're up, let me ask you this question with regard to the issue of the constitutionality of the punitives.

You're essentially arguing, as I gather, that 176D has established essentially a mitigated -- I'm sorry, not mitigated damages, a stipulated damages remedy, or a liquidated damages remedy.

MR. PRITZKER: Yes. I think liquidated would be better.

THE COURT: Let's assume that the

statute, instead of reading as it does, says when an insurance company fails to make a reasonable offer of settlement, the plaintiff gets $40 million.

MS. PINKHAM: Forty million?

THE COURT: It's the liquidated damages.

MS. PINKHAM: I bet there would be a lot more settlement offers.

THE COURT: I'm not asking you for the anticipated practical consequence of that.

MS. PINKAHM: That would be a very effective statute, Judge. That would certainly accomplish what the Legislature wanted to.

THE COURT: Okay. And your view is that would be constitutional?

MS. PINKHAM: Yes. You're on notice. If you're only claim is, well, we don't know and it's unfair, you know; you are on notice.

THE COURT: All right. And your view is, if you were to challenge that, how would you be challenging that? Are you saying it's a substantive due process or some other challenge to it? Are you saying it's unchallengeable?

MS. PINKHAM: How would I as the plaintiffs' attorney be challenging that?

THE COURT: No. What do you say is the appropriate standard to evaluate its constitutionality?

MS. PINKHAM: I think it --

THE COURT: Mr. Pritzker thinks he knows.

MR. PRITZKER: I do think I know.

THE COURT: This is sort of like college ball here.

MS. PINKHAM: I'll yield to him, then. We'll see if our answers match.

MR. PRITZKER: Except 40 million was probably the wrong number . So let's say that it's 500 million, and how we have a standard because the test is --

THE COURT: I chose 40 million for a reason, because it's the amount basically you're asking for.

MR. PRITZKER: And I understand that, which is why I've gone to 500 million, because if it's clearly something where the burden on the defendant is to show that there is no

realistic purpose for the -- no realistic nexus between what the Legislature did in enacting the statute and the result that's being obtained, if that's beyond a reasonable doubt, then they can challenge it.

THE COURT: So you're basically saying it's a rational basis test?

MR. PRITZKER: Yes. But no -- yes. It's a rational basis test beyond a reasonable doubt. And I believe that that's the test.

THE COURT: I think that's what -- okay, but basically a rational basis analysis.

MR. PRITZKER: Yes.

THE COURT: All right. Mr. Cohen or Mr. Zelle, I guess, for that matter, Mr. Varga.

MR. COHEN: I don't think I understood what Mr. Pritzker was talking about.

THE COURT: He basically said it would be evaluated on a rational basis test. So what he effectively is saying is that, as I understand it, is that I should analyze this 93A provision under a rational basis test as opposed to a substantive due process analysis. It may be not what he said, but that's what I take

because the practical consequence of their interpretation would be analogous to liquidated damages.

So is that right or --

MR. COHEN: I think Mr. Zelle wants to answer that question but before you do, I want to go back to your last question for a second.

Just briefly, in the Hershenow case, what happened was there was a collision damage waiver in a contract, an auto-rental contract, which apparently violated 93A, or at least was alleged to. And the court said even if that's true, you suffered no loss, no damage, as a result of that, and you don't have to just show a violation. You have to show a loss. You have to show even worse off. So those are separate elements of 93A. And even if the plaintiffs in this case have proven a violation of 93A, which we certainly don't agree with, they haven't shown any loss. Certainly no economic loss.

I'll let Mr. Zelle answer your last question.

THE COURT: Okay.

MR. ZELLE: On the substantive due

process level, what the Supreme Court discerned or determined in Gore and in State Farmers v. Campbell is that there must be some rational relationship between the compensatory award, the actual harm suffered, and the punitive award.

Where you have, as we have here, a statute that deems the judgment in the underlying award to be a basis for the multiple -- for the multiplicant to determine the punitive damage award, as applied, it can lead to unconstitutional results, because, as applied, you might have again very little compensatory damages. And I submit that here the compensatory damages are never going to be within the single digit multiplier of the potential double or treble of the underlying judgment. And that's the constitutional flaw in the statute.

THE COURT: And you're saying it should still be a substantive due process analysis.

MR. ZELLE: Absolutely.

THE COURT: Not a rational basis analysis.

MR. ZELLE: That's right.

MR. VARGA: I would offer just my agreement with that, your Honor. On the hypothetical that the court posed, I think that it would still be subject to constitutional review under Campbell and Gore for the reason that a $40 million penalty, if fixed by statute, in a case in which you have, as we do here, very scant evidence of damages, would be reviewed on the basis of -- certainly you would have to consider the reprehensibility of the conduct, the disparity, and that ratio would be astronomical in favor of excessiveness, and the notion that the punitive damages do not compare even closely with what the civil penalties are under statute, for example, under 176D.

So whether you talk about, in my view, a statutory $40 million mandatory penalty or something like we have here, which is the treble could be very little or it could be quite a bit, as it would be in this case, you have to evaluate it, I think, under Gore and Campbell regardless.

So, I think that is -- I hope that

assists the court to some degree.

THE COURT: All right.

MR. PRITZKER: If I can just put in one more thought, your Honor.

Under the defendants' view of how this should go, the Legislature virtually could almost never in this kind of a case impose penalties that would be meaningful to deter and punish, and that cannot possibly be what was intended.

MR. COHEN: Well, the Legislature could easily say we're going to allow insurance companies to be held liable for punitive damages under the standards enunciated by the Supreme Court, that, you know, there has to be a fair ratio between the reprehensibility of the conduct and the compensatory and punitive damages. That would be a perfectly appropriate course for the Legislature to take. But they can't say we're just going to multiply the judgment when it has no relationship whatsoever to what any real damages are.

MR. PRITZKER: Of course, it does have a relationship.

THE COURT: All right. I will take the matter under advisement, as you expected. What you do need to do, though, is to go over with the clerk the exhibits to make sure that you are on all four about the entirety of them. I believe -- well, it's not so easy to figure out what the numbers are because we -- I've got 1 through 96.

MS. PINKHAM: And we just submitted 97.

THE COURT: True. Well, it's a little bit harder because we agreed to not do it consecutively and to have the hundreds, I believe, be --

MR. VARGA: The hundreds are Zurich exhibits.

THE COURT: The hundreds are Zurich and the two hundreds are AIG. So this is hopefully the index? All right. If you could just confirm that those are indeed -- go through my books.

By the way, I should say I did -- I'm not sure if I told you. I did read Mr. Nitti. I think it's the only person that I haven't told you I've read. I have read his deposition. So

you are welcome to go through my books and make sure that my books conform to the totality of the exhibits that are done, and that should be put on the record before you leave.

All right. So thank you so much.

MR. PRITZKER: Do you wish us to call you again so we can put that on the record?

THE COURT: Only if there is an issue. I trust there would not be.

(The court left the bench.)

THE CLERK: Counsel, are the exhibits all in order?

MS. SACKETT: Yes.

MR. MASALEK: Yes.

MR. BROWN: Yes. The plaintiffs agree.

(Hearing ended at 2:55 p.m.)

C E R T I F I C A T E

We, Paula Pietrella and Faye LeRoux, Court Reporters, do hereby certify that the foregoing transcript, Pages 1 through 202, is a complete, true and accurate transcription of the above-referenced case.

Paula Pietrella

Faye LeRoux